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# PREFACE.

The Law of Distress Amendment Act, 1895, and the Market Gardeners' Compensation Act, 1895, have been fully dealt with in their proper places, and the Land Transfer Act, 1897, so far as applicable to the subject of the book, has been shortly noticed. The important question, however, which has recently arisen, as to what is the effect of the Land Transfer Act on the vesting of the freehold reversion of an intestate during the period between death and grant of administration, had escaped the notice of the Editor until the sheet for dealing with it had been printed off, and is therefore treated amongst the Addenda at p. lxxv.

Amongst the more important cases which have been determined since Lady Day, 1893, up to which date the last edition was brought, may be mentioned *Imray* v. *Oakshette* (p. 353), relating to the right of a sub-lessee to relief against forfeiture; *Penton* v. *Barnett* (p. 344), as to waiver of repairing covenants; the *Roundwood Colliery case* (p. 444), as to distress on lands not demised; *Chancellor* v. *Webster* and *Potter* v. *Bradley* (p. 445), as to illegality of distress for rent after judgment for it; *White* v. *Southend Hotel Co.* (p. 717), as to effect of covenants in lease of "tied house;" *Aldin* v. *Clark* (p. 186), as to the obligation of a lessor not to derogate from his own grant; *Hudson* v. *Cripps* (p. 728), in which the landlord of a residential flat was restrained from letting part of it off as a club, although he had entered into no express covenant not to use the flats generally for other than residential purposes; *Ecclesiastical Commissioners* v. *Wodehouse* (p. 29), in which the effect of the ecclesiastical law on the working of mines under a glebe was fully considered by Mr. Justice Romer; *Morley* v. *Carter* (p. 826), in which the High Court, adopting a dictum of Lord Watson in the Scotch case of *Black* v. *Clay*, cut the knot of a difficulty inevitably arising from the *Portarlington case*, by deciding that the two months within which a tenant must claim compensation under the Agricultural Holdings Act run from the date of the termination of his agricultural onstand, and not from the date of his tenancy proper; *Holmes*

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*and Formby, In re* (p. 829), to the effect that a landlord whose counterclaim overtops the tenant's claim cannot recover the balance under the Act, but must sue for it; and *Farquharson* v. *Morgan* (p. 830), to the effect that the High Court is absolutely bound to prohibit a County Court from enforcing the award of a referee under the Act of compensation for improvements comprehended within it and compensation for improvements not so comprehended.

The Forms have been carefully looked through. In view of the application of the doctrine of *Spicer* v. *Martin* (p. 707) in *Hudson* v. *Cripps* (p. 728), a clause (first inserted by the Editor many years ago) expressing seemingly implied obligations of the landlord of a block of houses has been revised and added to, while *Fletcher* v. *Nokes* and *Penton* v. *Barnett* (p. 351) have necessitated a change in one of the forms of notice given in former editions under Sect. 14 of the Conveyancing Act. There is now given a form approved by the Court of Appeal in *Penton* v. *Barnett*, for which the Editor is indebted to his friend Mr. J. D. Crawford.

Extracts from Statutes have been newly printed in a distinctive type where the exact words are quoted, and occasion has been taken carefully to check the accuracy of all such quotations, "short titles" of the Statutes, as well as the regnal years and chapters, being also given. The Table of Statutes is not only similarly arranged, but contains only the principal statutes cited. Perhaps a like new departure might have been taken with advantage in the Table of Cases, by selection for printing in it only some twentieth of the cases actually cited, but the Editor, after consultation with the publishers, did not feel justified in taking so bold a step without greater knowledge than he at present possesses of the views of his readers.

In connection with Mr. H. D. Greene's bill, first introduced in 1896, and re-introduced in the present Session, to turn the landlord's right to distrain upon a stranger's goods from an absolute into a qualified one, attention may be directed to the newly-inserted comments of the late Lord Blackburn in *Lyons* v. *Elliott* (p. 469) on the "harsh and unjust law" of William and Mary's reign by which the sale of goods distrained for rent was first authorized.

J. M. LELY.

GOLDSMITH BUILDING, TEMPLE,
*April 18th*, 1898.

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[*These Lists may not be quite exhaustive.*]

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# LIST AND EXPLANATION OF THE ABBREVIATIONS.

A. C. (preceded by [1891], [1892], or [1893] as the year may be)..... } Law Reports, Appeal Cases.
A. & E. .....Adolphus & Ellis.
Ambl.....Ambler.
Andr.....Andrews.
Anstr. .....Anstruther.
Atk. .....Atkyns.
Bac. Abr. .....Bacon's Abridgment.
Ball & B. .....Ball & Beatty (Irish).
Barnard. .....Barnardiston.
Barnes .....Barnes's Notes.
B. & A. .....Barnewall & Alderson.
B. & Ad.....Barnewall & Adolphus.
B. & C. .....Barnewall & Cresswell.
B. & S. .....Best & Smith.
Beav. .....Beavan.
Bing. .....Bingham (Old Series).
Bing., N. C. ...Bingham, New Cases.
Blac. Com.....Blackstone's Commentaries.
Blac. H.....Henry Blackstone.
Black. W. .....Sir W. Blackstone.
Bli. .....Bligh's House of Lords Cases.
Bli. N. S. .....Bligh's New Series.
B. & P. .....Bosanquet & Puller.
B. & P., N. R....Do.—New Reports.
Bradby .....Bradby on Distresses (2nd ed.).
Bridg.....Bridgman.
B. & B. .....Broderip & Bingham.
Bro. Abr. .....Brooke's Abridgment.
Bro. C. C. .....Brown's Chancery Cases.
Bro. P. C. .....Brown's Cases in Parliament.
Bullen .....Bullen on Distress.
Bull. N. P.....Bullen's Nisi Prius.
Bulst. .....Bulstrode.
Bunb. .....Bunbury.
Burr. .....Burrow.
Camp.....Campbell.
C. B. ..... } Common Bench Reports (by Manning, Granger & Scott).
C. B., N. S. } Common Bench Reports, New Series (by Scott).
C. & E. ..... } Cababé and Ellis's Nisi Prius Reports.
C. & J. .....Crompton & Jervis.
C. & K. .....Carrington & Kirwan.
Car. & M. .....Carrington & Marshman.
C. & P. .....Carrington & Payne.
Carth. .....Carthew.
Ch. (preceded by [1891], [1892], or [1893] as the year may be)..... } Law Reports, Chancery Division.
Ch. Cas. .....Cases in Chancery.
Chit. .....Chitty's Reports.
Chit. Arch. ...Chitty's Archbold's Practice.
Chit. Forms ...Chitty's Forms (9th ed.).
Chit. Pl.....Chitty on Pleading (7th ed.).
Cl. & Fin. .....Clark & Finnelly.
Co. Lit. .....Coke upon Littleton.
Co. R.....Lord Coke's Reports.
Cole Ejec. .....Cole on Ejectment.
Coll. C. C. .....Collyer's Chancery Cases.
Comb.....Comberbach.
Com. .....Comyn.
Com. Dig. .....Comyn's Digest.
Conn. & Law...Connor and Lawson (Irish).
Cowp.....Cowper.
Cr. & Ph. .....Craig & Phillips.
Cro. Eliz. .....Croke's Reports, vol. 1.
Cro. Jac. .....Croke's Reports, vol. 2.
Cro. Car. .....Croke's Reports, vol. 3.
C. & M. .....Crompton & Meeson.
C., M. & R. ...Crompton, Meeson & Roscoe.
Dart V. & P....Dart on Vendors & Purchasers.
D. & M. .....Davison & Merivale.
Deac. .....Deacon.
Deac. & Chit....Deacon & Chitty.
De G., F. & J. De Gex, Fisher & Jones.
De G. & J.....De Gex & Jones.
De G., J. & S...De Gex, Jones & Smith.
De G., M. & G.De Gex, Macnaghten & Gordon.
De G. & Sm. ...De Gex & Smale.
Dick. .....Dickens.
Dougl.....Douglas.
Dow .....Dow's Reports in Parliament.
Dow & Cl. .....Dow & Clark.
Dowl. .....Dowling's Practice Cases.
Dowl. N. S. ...Do.—(New Series).
D. & L. .....Dowling & Lowndes.
D. & R. .....Dowling & Ryland.
Drew.....Drewry.
Drew. & Sm. ...Drewry & Smale.
Dru. & W. .....Drury & Warren (Irish).
E. & B. .....Ellis & Blackburn.
E., B. & E. Ellis, Blackburn & Ellis.
E. & E. .....Ellis & Ellis.
Eq. Cas. Abr...Equity Cases Abridged.
Esp. .....Espinasse.
Exch. .....Exchequer Reports.
Fitz. N. B.....Fitzherbert's Natura Brevium.
Fort. .....Fortescue.
F. & F. .....Foster & Finlaison.
Freem. .....Freeman.
Fry.....Fry on Specific Performance.
G. & D. .....Gale & Davison.
G. & J. .....Glyn & Jameson.
G. & M. .....Gale & Merivale.
Giff.....Giffard's Reports.
Godb.....Godbolt.
H. & C. .....Hurlstone & Coltman.
H. & M. .....Hemming & Miller.
H. & N. .....Hurlstone & Norman.
H. & R. .....Harrison & Rutherford.
H. & T. .....Hall & Twells.
Hard.....Hardres.
Hawk. P. C. ...Hawkins's Pleas of the Crown.
Hob. .....Hobart.
Holt, N. P. C....Holt's Nisi Prius Cases.
H. L. Cas. ... } House of Lords Cases, by Clark & Finnelly—and Clark.
Hud. & B. .....Hudson & Brooke (Irish).
Hut. .....Hutton.
Inst. .....Lord Coke's Institutes.
Ir. Ch. .....Irish Chancery.
Ir. Eq. R. .....Irish Equity Reports.
Ir. L. R.....Irish Law Reports.
Jac.....Jacob.
J. & W. .....Jacob & Walker.
Johns.....Johnson.
J. & H. .....Johnson & Hemming.
Jon. & L. .....Jones & Latouche (Irish).

Jon. W. .....Sir. Wm. Jones.
Jon. T.....Sir Thos. Jones.
Jur.....Jurist (Old Series).
Jur., N. S.....Jurist (New Series).
Kay & J. .....Kay & Johnson.
Keb. .....Keble.
Ken., Ld. .....Lord Kenyon's Reports.
L. J.....Law Journal Reports, New Series from 1831.
L. J., O. S.....Do.—Old Series, 1822—1831.
L. R., H. L....The Law Reports (from 1865) —House of Lords Cases.
L. R., H. L. Sc. Do.—Scotch Appeals.
L. R., P. C.....Do.—Privy Council.
L. R., Ch. Ap...Do.—Chancery Appeals.
L. R., Eq. .....Do.—Equity Cases.
L. R., Q. B. ...Do.—Queen's Bench.
L. R., C. P. ...Do.—Common Pleas.
L. R., Ex. .....Do —Exchequer.
L. R., C. C. ...Do.—Crown Cases Reserved.
L. R., P. & D...Do.—Probate and Divorce.
L. R., Adm. & Ecc.....Do.—Admiralty and Ecclesiastical.
L. R., App. Cas.....The Law Reports (from 1875) —House of Lords and Privy Council Cases.
L. R., Ch. D.....Do.—Chancery Division and Appeals therefrom.
L. R., Q. B. D.....Do.—Queen's Bench Division and Appeals therefrom.
L. R., C. P. D.....Do.—Common Pleas Division and Appeals therefrom.
L. R., Ex. D.....Do.—Exchequer Division and Appeals therefrom.
L. T. .....Law Times (New Series).
L. T., O. S. ...Law Times (Old Series).
Leg. Obs. .....Legal Observer.
Leon. .....Leonard.
Lev. .....Levinz.
Lit.....Littleton's Tenures.
L., M. & P.....Lowndes. Maxwell & Pollock.
Lutw.....Lutwyche.
M'Cle. .....M'Cleland.
M'Cle. & You. M'Cleland & Younge.
Mac. & G. .....Macnaghten & Gordon.
Macq. H.L.C.....Macqueen's House of Lords Cases (Scotch Appeals).
Madd.....Maddock.
M. & G. .....Manning *v.* Granger.
M. & P. .....Moore & Payne.
M. & R. .....Manning & Ryland.
M. & S. .....Maule & Selwyn.
M. & W.....Meeson & Welsby.
Marsh. .....Marshall.
Mer. .....Merivale.
Mod. .....Modern Reports.
Mood.....Moody.
Moo. & M.....Moody & Malkin.
Moo. & R. .....Moody & Robinson.
Moor .....Sir F. Moor's Reports (1662).
Moo. .....J. B. Moore (1815—1827).
Moo. & P. .....Moore & Payne.
Moo. & S. .....Moore & Scott.
Morrell .....Morrell's Bankruptcy Reports.
Myl. & Cr.....Mylne & Craig.
Myl. & K. .....Mylne & Keene.
N. & M. .....Nevile & Manning.
N. & P. .....Nevile & Perry.
New R. .....New Reports of Bosanquet & Puller.
P. Wms.....Peere Williams.
P. & D. .....Perry & Davison.
Phil. .....Phillips.
Plow. .....Plowden.
Pollexf. .....Pollexfen.
Q. B. .....Queen's Bench Reports (Adolphus & Ellis, New Series, 1834—1857).
Q. B. (preceded by [1891], [1892], or [1893] as the case may be) .....Law Reports, Queen's Bench Division.
R.....The Reports.
Raym., Ld. ...Lord Raymond.
Raym., T. .....Sir Thos. Raymond.
Roll. Abr. .....Lord Rolle's Abridgment.
Ros. Ev.....Roscoe on Evidence.
R. R. .....Revised Reports.
R. S. C. .....Rules of Supreme Court.
Russ. .....Russell.
Russ. & M.....Russell & Mylne.
Ry. & Moo.....Ryan & Moody.
Salk. .....Salkeld.
Saund. .....Saunders.
Say. .....Sayer.
Sch. & Lef.....Schoale & Lefroy (Irish).
Scott. N. R. ...Scott's New Reports.
Select Ch. Cas. Select Chancery Cases.
Selw. N. P.....Selwyn's Nisi Prius (13th ed.).
Shep. Touch....Sheppard's Touchstone.
Show. .....Shower.
Sid. .....Siderfin.
Sim.....Simons.
Sim., N. S.....Simon's New Series.
Sim. & Stu. ...Simons & Stuart.
Skin. .....Skinner.
Sm. & Giff.....Smale & Giffard.
Smith. L. C. ...Smith's Leading Cases.
Stark.....Starkie.
Stra. .....Strange.
Sty.....Style.
Sug. Pow. .....Sugden on Powers.
Sug. V. & P.....Sugden on Vendors and Purchasers.
Swans. .....Swanston.
Sw. & Tr. .....Swabey & Tristram.
Taunt. .....Taunton.
T. R. .....Term Reports.
T. L. R. .....Times Law Reports.
Turn. & Russ...Turner & Russell.
Tyr. .....Tyrwhitt.
Tyr. & Gr.....Tyrwhitt & Granger.
Vaugh. .....Vaughan.
Vern. .....Vernon.
Ves. .....Vesey, junior.
Vez.....Vesey, senior.
V. & B. .....Vesey & Beames.
Vin. Abr. .....Viner's Abridgment.
W. R. .....Weekly Reporter.
Wightw.....Wightwick.
Wilk. Replev. Wilkinson on Replevin.
Wilm.....Wilmot's Notes.
Wils. .....Wilson.
Wms. Saund.....Saunder's Reports, with Notes by Serjeant Williams, &c.
Yelv. .....Yelverton.
You. .....Younge.
Y. & C. .....Younge & Collyer, Exch.
Y. & C. C. C....Do.—Chancery.
Y. & J. .....Younge & Jervis.

# HISTORICAL OUTLINE, WITH COLLECTION OF LEADING PROPOSITIONS.

## *Historical Outline.*

It is proposed in this Chapter to set out in a concise and readable form the leading propositions of the law of England affecting the relation of landlord and tenant; but it may perhaps be well to begin with a very brief historical sketch of the statute law. We may omit some early statutes, chiefly concerned with the landlord's peculiar remedy for recovery of rent by distress (*a*), and proceed at once to 32 Hen. 8, c. 34. Most of the statutes which will call for notice, and indeed most of the numerous statutes which have from time to time dealt specifically with the subject, are still unrepealed.

By 32 Hen. 8, c. 34, it is provided that grantees of reversions may take advantage of conditions and covenants in leases; and by another act of even date, 32 Hen. 8, c. 37, that executors may sue or distrain for rent due to their testator in his lifetime. 32 Hen. 8, cc. 34, 37.

By 1 & 2 Ph. & M. c. 12, cattle seized for rent may not be driven out of the hundred where they are taken, except to a pound overt within the same shire not above three miles distant. 1 & 2 Ph. & M. c. 12.

By the Statute of Frauds leases for more than three years, and all agreements for leases, however short, must be in writing. 29 Car. 2, c. 29.

It was not until 1689 that distress ceased to be merely a pledge in the hands of the landlord. An act passed in that year provides that goods distrained for rent may be sold unless the tenant shall within five days "replevy" them, that is, proceed in due course of law, and in the peculiar manner appropriate to such procedure, to prove that the seizure was wrongful, whereupon he may recover them. 2 W. & M. st. 1, c. 5.

At common law an assignment of a reversion was not good against a tenant unless the tenant "attorned to" or recognized his new landlord. An act of Anne did away with the necessity for attornment, but provides that the new landlord cannot take advantage of non-payment of rent, without having given notice of the assignment of the reversion to the tenant. 4 Ann. c. 16.

(*a*) 51 Hen. 3, stat. 4; 52 Hen. 3, stat. 4; 3 Edw. 1, c. 16; 3 Edw. 1, c. 17.

8 Ann. c. 14. The Landlord and Tenant Act, 1709 (*b*), 8 Ann. c. 14 (c. 18 in the Statutes Revised), is of great importance. It provides that no goods may be taken in execution without the execution creditor paying the landlord up to one year's arrears of rent; and that a distress may be made at any time within six months after the termination of a lease. A further provision of the same statute—that landlords might follow goods fraudulently removed to avoid a distress—was not long afterwards superseded by a more extensive provision to the same effect.

4 Geo. 2, c. 28. In the reign of George the Second it was enacted by the Landlord and Tenant Act, 1730, that tenants holding over after a landlord's notice might be sued for double the yearly value of the premises, and in order to remedy inconveniences happening "by reason of the many niceties that attend the re-entries at common law," that landlords entitled by law to re-enter might re-enter in case of half a year's rent being in arrear and no sufficient distress being found on the premises, the statute providing at the same time that on the tenant paying all arrears of rent the proceedings should cease. These latter provisions were superseded by enactments to the same effect in the Common Law Procedure Act of 1852.

11 Geo. 2, c. 19. The Distress for Rent Act, 1837, is a long and important one. It extends to thirty the five days which were allowed by the Statute of Anne for following goods fraudulently removed to avoid distress, confers upon the landlord power to break open places of concealment anywhere, and visits with heavy penalties persons in collusion with the tenant. It benefits both landlord and tenant alike by allowing a distress to be impounded on the demised premises. It provides for the recovery by a landlord of compensation for "use and occupation" although the contract of tenancy be written, so long as it is not by deed—thus obviating the nonsuits which might otherwise arise. It allows landlords to recover deserted premises before justices of the peace in cases where one year's rent is in arrear and no sufficient distress is found on the premises, and to recover double rent from tenants holding over after their own notice to quit. This also is the statute which first provided for "apportionment" of rent in the case of a landlord, being himself tenant for life, dying between two rent days: the rule of the common law having been that in such a case the executors of the landlord could recover nothing.

56 Geo. 3, c. 50. The Sale of Farming Stock Act, 1816, provides that sheriffs may not carry off straw or other agricultural produce in cases where the

(*b*) So called by the Short Titles Act, 1896, which act, repealing, re-enacting, and extending the Short Titles Act, 1892, confers, for the first time, "short titles" on 2076 Acts, including many Landlord and Tenant Acts.

tenant has covenanted with the landlord to consume such produce on his farm; and the Distress (Costs) Act, 1817, fixes a limit to the expenses of a distress where the sum due does not exceed 20*l*. 57 Geo. 3, c. 93.

By 1 Geo. 4, c. 87, it was first enacted that tenants holding under a contract in writing, and wrongfully holding over, might be compelled in a summary way to give security for the costs of an ejectment and might be ejected. This provision was superseded by a very similar one of the Common Law Procedure Act, 1852. 1 Geo. 4, c. 87.

By the Small Tenements Recovery Act, 1838, provision is made for the recovery before justices of the peace of small premises wrongfully held over; the statute applying only to tenancies at will, or for not more than seven years, or at a rent of not more than 20*l*. a year. 1 & 2 Vict. c. 74.

By the Real Property Act, 1845, leases for more than three years must be by deed, and a concise form of lease is provided. In this form, the proviso for re-entry applies to breaches of covenant generally. 8 & 9 Vict. c. 106.

Although it had been laid down in *Elwes* v. *Maw*e, in 1803, that the exceptions gradually introduced into the doctrine of irremovability of fixtures did not extend to agriculture, it was not till 1851 that the agricultural tenant obtained relief. The Landlord and Tenant Act, 1851, gives to this class of tenant the right of removing fixtures erected with the written consent of the landlord, this right being subject to an option of purchase by the landlord. The same statute provides for the prolongation till the end of the current year of the term of a tenant determined by the death of a landlord who was himself only a tenant for life, the prolongation being given in lieu of the common law right to the growing crops and other "emblements." 14 & 15 Vict. c. 25, s. 1.

The Common Law Procedure Act, 1852, re-enacted in substance the provisions of 4 Geo. 2, c. 28, and 1 Geo. 4, c. 87, as to recovery of premises in case of non-payment of rent and in case of holding over. The County Courts had not originally jurisdiction in ejectment, but the County Court Act, 1856 (repealed and re-enacted by the County Courts Act, 1888), adopted with little variation the provisions of the Common Law Procedure Act above referred to. 15 & 16 Vict. c. 76. 19 & 20 Vict. c. 108.

The Law of Property Amendment Act, 1859, provides for the relief of the executors of a tenant, having assets, against certain personal liabilities, and for the preservation of the right of re-entry in case of a severance of the reversion. The Law of Property Amendment Act, 1860, 23 & 24 Vict. c. 38, enacts that one waiver of a breach of covenant shall not operate as a general waiver. 22 & 23 Vict. c. 35.

In 1870 the comprehensive Apportionment Act, 1870, was passed, providing for the apportionment of rent between the heirs and executors of a landlord; but occasion was not taken to repeal the many previous acts *in pari materiâ* or any of them. 33 & 34 Vict. c. 35, s. 1.

34 & 35 Vict. c. 79, s. 1. In 1871 the goods of lodgers, which at common law are liable to be seized for rent due to a superior landlord, were first rendered by the Lodgers' Goods Protection Act, 1871, exempt from such distress, and a similar protection was afterwards given in 1872 to railway rolling stock by the Railway Rolling Stock Protection Act.

35 & 36 Vict. c. 50.

38 & 39 Vict. c. 92. The Agricultural Holdings Act, 1875, which applied where applicable unless it had been excluded in writing by the landlord or tenant, extended the notice to quit, which was requisite in the case of an implied tenancy from year to year, from half a year to twelve months; gave to agricultural tenants a *primâ facie* property in fixtures; and allowed such tenants compensation for certain improvements therein specified. The statute was applicable only to such holdings of two acres or more, as were either wholly agricultural or wholly pastoral. Statistics show that the operation of the statute was excluded by landlords taking advantage of its permissive clauses in the vast majority of cases, and that from a variety of causes it was unpopular with the vast majority of agricultural tenants. It is repealed by the Agricultural Holdings Act, 1883, but prospectively only, so that, where not excluded by writing, it still applies to tenancies current or created between the 14th February, 1876, and the 31st December, 1883.

40 & 41 Vict. c. 18. It would not be worth while to notice the Settled Estates Act, 1877, were it not that, in sect. 46, it limits the application of the proviso for re-entry to cases of non-payment of rent, whereas both the corresponding section of the Settled Estates Act, 1856, and (as we have seen) the form provided by the Legislature in 1845, had applied such proviso to the breach of covenants generally.

43 & 44 Vict. c. 47. The Ground Game Act, 1880, for the first time in the history of the subject, interferes with the liberty which landlord and tenant have at common law to make what contracts they please. Where the contract of tenancy was silent, game was always the property of the tenant by virtue of his property in the land. Landlords, however, have for a long time been in the habit of "reserving" the game to themselves by special stipulation, and where this is the case the tenant is punishable upon summary conviction, under the act 1 & 2 Will. 4, c. 31, for taking the game. With respect to hares and rabbits, the Ground Game Act, although it does not interfere with *existing leases*, provides that such reservations shall *in future* only have the effect of giving the landlord a "concurrent right" with the tenant to kill and take them.

44 & 45 Vict. c. 41. The Conveyancing and Law of Property Act, 1881, contains most important provisions respecting "relief against forfeiture" of leases for breach of covenant. It had been for a very long time the practice to insert in the lease a proviso for forfeiture of the lease by the tenant, and re-possession of the premises by the landlord, in case of

breach by the tenant of any of his covenants whatever. In the case of a breach of a covenant to pay rent, a Court of Equity from very early times, and, by the Common Law Procedure Act, 1860, a Court of Law, would interfere to prevent the landlord enforcing this proviso, upon the tenant paying the rent; and in the case of a breach of a covenant to insure, a special and conditional power to relieve against the forfeiture had been created by statute, being given to a Court of Equity by the Law of Property Amendment Act, 1859, and to a Court of Law by the Common Law Procedure Act, 1860. But except in these two cases, and in the cases of accident or surprise, no relief could be given, were the breach ever so trivial, or the improved value of the demised premises accruing to the landlord by insisting on the forfeiture ever so great. The Act of 1881 mitigates this hardship on the tenant, by empowering the Chancery Division of the High Court to grant relief against forfeiture for breach of any covenant or condition, except the covenant not to part with the premises without leave of the landlord and the covenant in a mining lease to allow inspection of books, and the condition for forfeiture in case of bankruptcy; and this enactment takes effect, not only notwithstanding any stipulation to the contrary, but also upon leases made either before or after the commencement of the act.

The Settled Land Act, 1882 (practically superseding, though not repealing, the Settled Land Act, 1877), very greatly extends the powers of tenants for life by authorizing them to make building and mining leases, and to accept surrenders of leases. 45 & 46 Vict. c. 38.

The Agricultural Holdings Act, 1883, is a statute of the highest importance to the landlords and tenants of agricultural or pastoral holdings or market gardens. Modelled to a very great extent upon the Agricultural Holdings Act, 1875, it differs from that act in being mainly compulsory and partly retrospective. The outgoing tenant acquires a right to compensation for certain specified improvements, the act requiring, however, in the case of buildings and other improvements of an expensive character, the consent of the landlord to the execution of them, and in the case of drainage, giving the landlord power to execute drainage works himself, charging the tenant with the cost. The tenant also acquires a property in fixtures and buildings, subject to the landlord's power to acquire them by purchase. The notice to quit in the case of an implied tenancy from year to year, which is a half-year's notice at common law, becomes a year's notice. Travelling into quite a distinct subject-matter, the act also mitigates the hardships of the law of distress by reducing the period within which arrears of rent may be distrained for from six years to one, by exempting from distress 46 & 47 Vict. c. 61.

agricultural machinery and live stock taken in for breeding or feeding, by limiting the charges upon a distress, by extending the time within which a distress may be redeemed, and by requiring all distresses to be taken by certificated bailiffs.

48 & 49 Vict. c. 72. The Housing of the Working Classes Act, 1885, greatly infringed a theretofore leading rule of the law of landlord and tenant by the provision that in every contract for letting a house at a certain low rent there shall be implied a condition that the house is reasonably fit for human habitation. This clause is repeated, without amendment, in sect. 75 of the Housing of Working Classes Act, 1890.

50 & 51 Vict. c. 26. Two Allotment Acts were passed in 1887, the Allotments and Cottage Gardens (Compensation for Crops) Act, 1887, securing compensation to the tenants of allotments and cottage gardens on

50 & 51 Vict. c. 48. quitting for seed and labour, and the Allotments Act, 1887, obliging sanitary authorities to acquire land for letting in allotments to the labouring population in cases where such allotments should not be obtainable from private owners at a reasonable rent.

1 & 52 Vict. c. 8. The Customs and Inland Revenue Act, 1888, by sect. 18 imposed a new and severe penalty for not stamping leases or agreements for leases, such penalty to be borne by the lessee or intending lessee in every case; this enactment is repealed and re-enacted by the Consolidating Stamp Act, 1891.

51 & 52 Vict. c. 21. The Law of Distress Amendment Act, 1888, by dispensing with appraisement on distress except where required by the tenant, by extending the time to replevy from five to fifteen days, and by enacting that no distress shall be levied except by a bailiff holding a certificate from a County Court, applies generally to all tenancies a set of enactments which were specially applied to agricultural holdings only by the Agricultural Holdings Act, 1883. The same act exempts from distress the bedding, clothes and tools of trade of a tenant up to the value of 5*l.* and empowers (without however repealing the Distress (Costs) Act, 1817) the Lord Chancellor to make rules as to distress and to prescribe a scale of expenses, and rules with scales have been issued accordingly.

51 & 52 Vict. c. 43. The County Courts Act, 1888, need merely be mentioned as consolidating prior County Court enactments as to replevin, recovery of small tenements, and ejectment.

51 & 52 Vict. c. 62. The Preferential Payments in Bankruptcy Act, 1888, enacts that in case of a landlord distraining or having distrained on any goods of a bankrupt, or a company being wound up, or a tenant dying insolvent within three months before the receiving order, the winding-up order, or the death respectively, certain preferential debts (*e.g.* rates, taxes, salaries, and wages) shall be a "first charge" on the goods distrained on or the proceeds thereof.

The Tenants' Compensation Act, 1890, greatly mitigates in favour of the tenants of *land*, the hard rule of the common law that the tenants of mortgaged land, being trespassers in like manner as the landlord from which they derive title, have no rights against a mortgagee in possession, but may be ejected by such mortgagee without any notice to quit whatever and without any right against him for compensation under the Agricultural Holdings Act or the custom of the country for improvements or tillages. 53 & 54 Vict. c. 57.

The Conveyancing and Law of Property Act, 1892, amends the 14th section of the Conveyancing and Law of Property Act, 1881, by allowing (except in the case of agricultural, mining and certain other leases,) a limited relief to be given against forfeiture incurred by bankruptcy, by expressly allowing "relief against forfeiture" to be granted to under-lessees, by requiring that no premium is to be exacted by a lessor for a licence to assign or underlet, and in other small particulars. As originally introduced in the House of Commons by Mr. Bolton, this act was not only much more extensive than as it now appears, but was clear in its language. During its passage through Parliament its application was much cut down, and what is of more importance to lawyers as such, its language became very obscure. 55 & 56 Vict. c. 13.

The Law of Distress Amendment Act, 1895, amends the Act of 1888 by enacting that the certificate of a bailiff may be cancelled at any time by the judge of the County Court which granted it, instead of by the judge of any County Court, imposes a fine upon any person without a certificate distraining contrary to the Act of 1888, authorizes the Lord Chancellor to make rules fixing the duration of certificates, and empowers a Court of Summary Jurisdiction to direct restoration or award compensation in cases where clothes or bedding or tools up to 5*l.* value have been seized or sold under a distress. 58 & 59 Vict. c. 27

The Agricultural Holdings Act, 1883, applies to market gardens. The Market Gardeners' Compensation Act, 1895, extends that application by giving compensation for the planting of strawberries, asparagus and fruit trees by market garden tenants, and allows them to remove fruit trees planted by them and not permanently set out, in cases where after the 1st January, 1898, it has been agreed in writing that a holding shall be let or treated as a market garden or where a holding was at that date in use as a market garden with the knowledge of the landlord, and the tenant has planted fruit trees, strawberries, &c., without having received previously to the planting any written notice of dissent by the landlord. Moreover in either case there is a power given to remove market garden buildings and fruit trees, and fruit bushes planted by the tenant and not permanently set out. 58 & 59 Vict. c. 27.

59 & 60 Vict. c. 16.

Lastly, the Agricultural Rates Act, 1896, exempts the occupier of "agricultural land," or owner, if he be rated instead of the occupier, from one-half of the rates for a period of five years.

Such, very briefly, are the principal English (*c*) statutes affecting the relation of landlord and tenant.

## *Leading Propositions of Statute and Case Law.*

### Definitions.

Landlord and Tenant.

The relation of landlord and tenant is created by the landlord allowing the tenant to enjoy the landlord's house or land for a consideration termed rent, recoverable by distress.

Reversion.

Reversion is the interest remaining in the landlord, who is therefore frequently termed the reversioner.

Tenant for Years.

A man is a tenant for years where the landlord lets land or tenements to him for a term of certain years, agreed upon between the landlord and the tenant, and the tenant enters by force of the lease.

Tenant from Year to Year.

A tenant from year to year is one who, by a contract of tenancy, implied from entry and the payment of rent with reference to a yearly tenancy, is entitled to half (*d*) a year's notice to quit, expiring at that period of the year at which his tenancy commenced.

Tenant at Will.

A tenancy at will takes place where the letting is for no certain term, but is to continue for the joint will of both parties, and no longer.

Tenant by Sufferance.

A tenant by sufferance is one who comes in by right and holds over without right, as if a tenant for the life of another continue to hold after the death of him for whose life he entered.

Lease.

Any contract of tenancy is a lease, but the expression "lease" is commonly restricted to a contract of tenancy for years or lives by deed.

### Disabilities of Landlords.

Settled Estates, &c.

Infants, lunatics, owners of settled estates and other persons under disability become landlords under certain statutory restric-

(*c*) But few of the English statutes relate also to Scotland or Ireland. The following are exceptions :—The Emblements Act, 1851 (14 & 15 Vict. c. 25), and the Lodgers' Goods Protection Act, 1871 (34 & 35 Vict. c. 79), relate to Ireland, while the Apportionment Act, 1870 (33 & 34 Vict. c. 35), and the Railway Rolling Stock Protection Act, 1872 (35 & 36 Vict. c. 50), relate both to Ireland and Scotland. The Scotch common law of the subject is widely different from the English, and the Scotch statutes which specifically relate to the subject are very few. See Hunter's Landlord and Tenant. The Irish common law, on the other hand, is identical with the English, and the Irish statutes very numerous. The principal Irish statutes are :—14 & 15 Vict. c. 57 (remedy by tenant distrained on by superior after paying rent to immediate landlord) ; 23 & 24 Vict. c. 154), summary ejectment, prolongation of term in lieu of emblements, distress for one year's rent only) ; 33 & 34 Vict. c. 45 (legality of tenant right) ; and 44 & 45 Vict. c. 49, "The Land Law (Ireland) Act, 1881." *See* Furlong's Landlord and Tenant.

(*d*) If the Agricultural Holdings Act applies (see 361, *post*) the notice is a year's notice.

tions, the principal restriction being that owners for life may bind remaindermen by leases for building purposes for 99 years, for mining purposes for 60 years, and for other purposes for 21 years and no longer, and that those who represent landlords under disability make leases under the supervision of the Chancery Division of the High Court of Justice.

Settled Land Act, 1882, s. 6, p. **7**, *post*.

Ecclesiastical Corporations.

Ecclesiastical corporations may, with the consent of the Ecclesiastical Commissioners, grant building leases for not more than 99 years. Parsons may let glebe for not more than 14 years (or 20 years, if the tenant covenant for improvements), with the consent of bishop and patron.

Ecclesiastical Leases Act, 1842, p. **28**, *post*.

Municipal Corporations.

Municipal corporations may not let lands for more than 31 years without the consent of the Treasury.

Municipal Corporations Act, 1882, s. 108, p. **19**, *post*.

### Disabilities of Tenants.

Spiritual persons.

Spiritual persons may not take leases of more than 80 acres of land without the consent in writing of the bishop of the diocese.

Pluralities Act, 1838, s. 28, p. **73**, *post*.

Infants.

A lease to an infant is not void, but only voidable on his coming of age.

*Baylis* v. *Dyneley*, 3 M. & S. 477, and p. **74**, *post*.

### Agreement for Lease (*e*).

Specific Performance.

An agreement for a lease must be in writing and signed, to be sued upon as such; but he who enters and pays, or agrees to pay rent under an oral agreement for a lease, or otherwise partly performs the agreement, may obtain a decree for a lease.

Stat. Frauds, s. 4, p. **90**, *post*; *Nunn* v. *Fabian*, L. R., Ch. 35, p. **108**, *post*.

Stamp.

The stamp upon an agreement for a lease not exceeding 35 years is the same as the stamp upon a lease, and the stamp upon a lease made in conformity with an agreement duly stamped is sixpence.

Stamp Act, 1891, s. 75, p. **100**.

Title of Landlord.

Under an agreement for a lease for years, the intended tenant may not call for the title of the intended lessor, whether the premises intended to be leased be freehold or leasehold.

Vendor and Purchaser Act, 1874, s. 2, p. **2**, *post*; Conveyancing Act, 1881, s. 13, p. **2**, *post*.

(*e*) As to the position of a person entering and paying rent under an agreement for a lease, see *Walsh* v. *Lonsdale*, 21 Ch. D. 9, and p. 91, *post*.

### Lease.

Mode of making.

A lease for three years or less may be written or oral, but a lease for more than three years must be by deed, otherwise it is void.

Stat. Frauds, s. 1 ; Real Property Act, 1845, s. 3, p. **135**, *post.*

Entry under void.

He who enters and pays, or agrees to pay, rent under a void lease, is tenant from year to year upon such terms of the void lease as are consistent with a yearly tenancy.

*Doe* v. *Bell*, 2 Sm. L. C. 96, and p. **231**, *post.*

Custom of Country.

The custom of the country is incorporated in every lease unless expressly excluded.

*Wigglesworth* v. *Dallison*, 1 Sm. L. C. 598, and p. **146**, *post.*

Discrepancy of Lease and Counterpart.

The ordinary rule is, that where the lease and the counterpart differ, the lease prevails, but this rule does not apply where there is an evident mistake in the lease.

*Burchell* v. *Clark*, 2 C. P. D. 88, and p. **137**, *post.*

### Implied Contracts of Landlord.

Quiet Enjoyment.

The landlord impliedly contracts with the tenant to give him possession, and guarantees the tenant against eviction by any person having a title paramount to that of the landlord, and against the disturbance which would be occasioned by some person enforcing a charge which the landlord ought to have satisfied.

See *Coe* v. *Clay*, 5 Bing. 440 ; 30 R. R. 699 ; *Bandy* v. *Cartwright*, 8 Ex. 913, and p. **718**, *post.*

Fitness of Premises.

There is an implied contract by the landlord of a furnished house that it is fit for occupation ; but with respect to an unfurnished house (unless it be let at a certain low rent) or land there is no such implied contract.

*Wilson* v *Finch Hatton*, 2 Ex. D. 336 ; *Hart* v. *Windsor*, 12 M. & W. 68, and p. **184**, *post.*

### Implied Contracts of Tenant.

To pay rent, &c.

The tenant impliedly contracts with the landlord to pay rent, not to commit or permit waste, and to give up possession at the end of the tenancy.

See Distress for Rent Act, 1737, s. 14 ; *Morrison* v. *Chadwick*, 7 C. B. 266 ; *Henderson* v. *Squire*, L. R., 4 Q. B. 1.

Not to deny Title.

A tenant is estopped from alleging that his landlord had no title at the period of the demise ; but he is not estopped from alleging that the title of the landlord has expired.

*Cook* v. *Loxley*, 5 T. R. 4 ; 2 R. R. 521 ; *Delaney* v. *Fox*, 2 C. B., N. S. 768, and p. **225**, *post.*

### Express Contracts of Landlord.

Quiet Enjoyment.

The express contract of a landlord for quiet enjoyment as usually worded is less than the implied one (which it excludes), and does not guarantee the tenant against eviction by title paramount.

See *Merrill* v. *Frame*, 4 Taunt. 329 ; 13 R. R. 612 ; and p. **718**, *post.*

Repair.

Where a landlord contracts to repair, a notice by the tenant that the premises need repair is an implied condition precedent to the right of action on such contract.

*Makin* v. *Watkinson*, L. R., 6 Ex. 25, and p. **635**, *post.*

### Express Contracts of Tenant.

To pay Rent.

The contract for rent must be performed in all events, and notwithstanding the destruction of the premises by fire or other cause, whether preventible or not.

See *Belfour* v. *Weston*, 1 T. R. 310 ; 1 R. R. 210 ; and p. **631**, *post.*

Insurance.

The contract to insure is broken by a failure to insure for any time, however short, and the breach of such a contract is a continuing breach.

*Doe* v. *Shewin*, 3 Camp. 134 ; *Doe* v. *Gladwin*, 6 Q. B. 953.

To repair.

The contract to repair must be performed in all events, notwithstanding the destruction of the premises by fire or other cause, whether preventible or not.

*Bulloek* v. *Dommit*, 6 T. R. 650, and p. **631**, *post.*

Damages for non-repair.

The damages for non-repair are measured by the injury to the reversion.

*Mills* v. *East London Union*, L. R., 8 C. P. 79, and p. **639**, *post.*

Against Assignment.

The contract not to assign without licence is not broken by an assignment by operation of law.

*Slipper* v. *Tottenham, &c., Rail. Co.*, L. R., 4 Eq. 112, and p. **700**, *post*

Not to do Acts without Licence.

Where there is a contract not to assign without licence, or not to do any other act without licence of the landlord, such licence, if given, extends only to the single assignment or other act for which the licence is required.

Law of Property Amendment Act, 1859, s. 1, and p. **696**, *post.*

### Rent.

Where payable.

Rent is payable on the demised premises where there is no covenant to pay it ; but in the case of a covenant, it is incumbent on the tenant to seek out the person to whom it is payable.

*Haldane* v. *Johnson*, 8 Ex. 689, and p. **425**, *post.*

Deductions.

The tenant may deduct from rent any payment which he is obliged to make in order to protect himself from a distress by a ground landlord.

See *Taylor* v. *Zamira*, 6 Taunt. 524; 16 R. R. 668.

Apportionment in respect of Estate;

Rent is apportioned in respect of estate where part of the demised premises changes hands, *e.g.* where the tenant surrenders or is evicted from part, or where there is a severance of the reversion.

in respect of Time.

All rents as between the heirs and executors of the landlord are considered as growing due from day to day, and are apportionable in respect of time accordingly, but the tenant may not be resorted to for an apportioned part.

Apportionment Act, 1870, p. 434, *post*.

Satisfaction of Rent by Execution Creditor.

As against an execution creditor, the landlord has a claim for 1 year's arrears of rent if the tenancy be for a year or more; and if the tenancy be for less than a year, for the arrears of rent accruing during 4 terms of payment.

Landlord and Tenant Act, 1709, s. 1; County Courts Act, 1888, s. 160, p. 527, *post*.

### Distress for Rent.

Subject-matters of Distress.

A distress for rent may be made by or on behalf of the landlord upon all goods and animals, whether belonging to the tenant or not, found upon the demised premises, except that—

Exemptions from distress.

(1) Fixtures, things in actual use, things in the custody of the law, things perishable, things delivered to the tenant in the way of his trade, bedding, clothes, and tools up to 5*l.* value, animals of a wild nature, the goods of an ambassador, and gas-meters, and if the Agricultural Holdings Act applies (see lxix, *infra*), hired machinery, and live stock not belonging to the tenant which is on the premises for breeding purposes, are absolutely privileged from distress.

(2) The goods of a lodger, and railway rolling stock not belonging to the tenant, are absolutely privileged from distress, upon the lodger or owner complying with the terms of the Lodgers' Goods Protection Act, 1871, and Railway Rolling Stock Protection Act, 1872.

(3) The tools of the tenant's trade, and his sheep and beasts of the plough, and if the Agricultural Holdings Act applies (see lxix, *infra*), live stock not belonging to the tenant taken in to be fed at a fair price to be paid by the owner

to the tenant, are conditionally privileged from distress—that is, they are privileged if there be other sufficient distress upon the premises, and not otherwise.

See Chap. XI., p. **442**, *post*.

Fraudulent Removal.

If any tenant fraudulently, and in order to avoid a distress, remove any goods or chattels from the demised premises, the landlord may, within 30 days, seize and sell them wherever found, except in the hands of a *bonâ fide* purchaser for value.

Distress for Rent Act, 1737, s. 1, p. **499**, *post*.

Distress after Tenancy.

A distress may be made at any time within 6 months after determination of the tenancy.

Landlord and Tenant Act, 1709, s. 6, p. **488**, *post*.

Amount of Rent recoverable.

A distress must be made within 6 years, or if the Agricultural Holdings Act applies, 1 year (see lxix., *infra*, after the rent distrained for is due or acknowledged in writing to be due.

Real Property Limitation Act, 1833, s. 42, p. **489**, *post*.

Distress by Certificated Bailiff.

If the landlord does not distrain in person, the distress can be levied only by a certificated bailiff.

Law of Distress Amendment Act, 1888, s. 7, p. **493**, *post*.

Impounding on Premises.

A distress may be impounded on the premises where taken; and when it is so impounded, any person may enter the premises in order to view, appraise and buy it.

Distress for Rent Act, 1737, s. 10, and p. **508**, *post*.

Impounding Animals.

Persons impounding animals in a pound must supply them with food and water, and may recover the expense from the owner. In default of supply by the impounder, any person may supply food and water, and may recover the expense from the owner, or, after **7** days' impounding, may pay himself by sale of the animal, rendering the overplus to the owner.

Cruelty to Animals Acts, 1849 and 1854, p. **506**, *post*.

Retainer of Distress as Pledge.

The landlord may, if he pleases, retain the distress as a pledge until the rent be paid, or be proved not to have been due by action of replevin. For **5** days, or if the tenant so require in writing, **15** days after seizure, but no longer, the tenant has an absolute right to treat the distress as a pledge, and proceed to recover it by action of replevin. After the **5** or **15** days, the tenant has a conditional right to replevy, exerciseable at any time before an actual sale.

See 2 W. & M. sess. 1, c. 5; *Jacob* v. *King*, 5 Taunt. 451; 15 R. R. 550, p. **509**, *post*.

Sale of Distress.

Unless the tenant replevy, the landlord, at any time after **5** days, or if the tenant so require in writing, **15** days from the seizure, may sell the distress to satisfy the rent and expenses; but he must first give notice in writing to the tenant, and cause the distress to be appraised. He is not bound to sell.

2 W. & M. sess. 1, c. 5 ; *Philpot* v. *Lehain*, 35 L. T. 855, and p. **515**, *post.*

Expenses of Distress.

Two scales of expenses are limited by statutory rules, the one applicable to distresses for amounts exceeding 20*l.*, and the other to distresses for amounts not exceeding 20*l.*

See Distress for Rent Rules, p. **516**, *post.*

Remedies for illegal Distress.

In the case of an illegal distress, *e.g.* where no rent is due, or where goods privileged from distress are seized, the tenant may rescue the goods before impounding, or obtain restitution at any time before sale by replevin, or, at his option, he may sue for damages. If no rent be due, and the distress be sold, he recovers double the value.

See 2 W. & M. sess. 1, c. 5, and Chap. XII., pp. **539**, **557**, *post.*

Remedies for irregular Distress.

In the case of an irregular distress, *e.g.* where the distress is sold without notice, or not for the best price, the tenant may recover full satisfaction for the special damage sustained, and no more.

Distress for Rent Act, 1737, s. 19 ; *Lucas* v. *Tarleton*, 3 H. & N. 116.

Remedy for excessive Distress.

In the case of an excessive distress, the tenant may recover such damages as a jury may find to be the value of the goods seized, less the rent due. He is entitled to at least nominal damages.

See *Chandler* v. *Doulton*, 34 L. J., Ex. 89, and p. **561**, *post.*

### Determination of Tenancy.

Modes of Determination.

The principal modes in which a tenancy is determined are notice to quit, surrender and forfeiture.

Notice to quit Tenancy from Year to Year.

A tenancy from year to year is, in the absence of an agreement otherwise, determinable by half a year's notice to quit, expiring at the end of some current year of the tenancy. If the Agricultural Holdings Act applies [see lxix., *infra*], the notice is a year's notice.

The notice to quit need not be in writing, but it must be binding on the noticor, and the noticee must have reason to believe it so to be.

The notice to quit need not be delivered to the tenant personally. It is sufficient to deliver it to a person on the premises whose duty it would be to deliver it to the tenant.

*Doe* v. *Crick*, 5 Esp. 196 ; 8 R. R. 848 ; *Jones* v. *Phipps*, L. R., 3 Q. B. 567 ; *Tanham* v. *Nicholson*, L. R., 5 H. L. 561,
And see Chap. VIII., p. **312**, *post.*

Option to determine Tenancy for Years.

If a terminable lease be granted without saying who is to have the option of determining it, such option is with the tenant, and not with the landlord.

But where a lease provides that it shall become void upon the lessee breaking any of the covenants contained therein, it is at the option of the lessor, not of the lessee, whether the lease shall or shall not be determined.

*Dann* v. *Spurrier*, 3 B. & P. 399 ; 7 R. R. 797 ; *Doe* v. *Bancks*, 4 B. & A. 401 ; 23 R. R. 318.

Surrender.

Every express surrender must be by writing, and every express surrender of a more than 3 years' term must be by deed.

See Real Property Act, 1845, s. 3, p. **313**, *post*.

A surrender may be implied from anything which amounts to an agreement by the tenant to abandon and by the landlord to resume the premises, *e.g.* by the delivery of keys, by the entering into a new contract of tenancy, or by the landlord accepting a new tenant.

See *Phené* v. *Popplewell*, 12 C. B., N. S. 334, p. **319**, *post*.

Forfeiture.

A forfeiture is incurred ipso facto by breach of a condition in a lease, but not by a breach of covenant, unless the lease contain a proviso for re-entry applicable to the breach.

If the landlord has a right to re-enter for non-payment of rent (but not otherwise), he may re-enter without formal demand of rent on proving that half a year's rent is in arrear, and that no sufficient distress be found on the premises.

See C. L. P. Act, 1852, s. 210, p. **837**, *post*.

Waiver of Forfeiture.

If the landlord at any time, after notice of breach of covenant committed, acknowledges the continuance of the tenancy, *e.g.* if he distrain or sue for rent due after the forfeiture, he waives the forfeiture and loses his right to re-enter.

See *Ward* v. *Day*, 5 B. & S. 364, and p. **341**, *post*.

Continuing Breach.

Some covenants, *e.g.* the covenant to insure, are of such a nature that a breach of them is continuing, so that the effect of a waiver is practically nil.

See *Doe* v. *Gladwin*, 6 Q. B. 953.

Restriction of Waiver to particular Breach.

A waiver does not extend to any breach of covenant other than that to which it specially relates.

Law of Property Amendment Act, 1860, s. 6, p. **346**, *post*.

Relief against Forfeiture.

Relief against forfeiture for non-payment of rent, can be obtained, in cases where judgment has been given for the forfeiting landlord

on proof of no sufficient distress on the premises, at any time within 6 months after execution executed and in other cases within a time limited by the discretion of the relieving court upon payment, in either case, of all arrears of rent and full costs.

See C. L. P. Act, 1852, s. 210, p. **356**, *post*.

Relief against forfeiture for any breach of covenant or condition except the covenant against assignment or sub-letting without licence, or, in a mining lease, to permit inspection of books, or for forfeiture (with certain exceptions and limitations) in case of bankruptcy, may be obtained in the High Court by the tenant, either in the landlord's action, if any, to eject him, or in a separate action brought by himself.

Conveyancing Acts, 1881, s. 14, and 1892, s. 2, sub-s. 2, p. **349**, *post*.

### Rights of Parties on Determination of Tenancy.

Delivery of Possession.

The tenant must deliver up complete possession of the premises and is answerable for the holding over of a sub-tenant. Encroachments on a waste are for the benefit of the landlord.

*Henderson* v. *Squire*, L. R., 4 Q. B. 170, and p. **780**, *post*; *Whitmore* v. *Humphries*, L. R., 7 C. P. 1, and p. **782**, *post*.

Rightful holding over by Tenant for Years.

If a tenant for years hold over, and pays or agrees to pay rent, he may become a tenant from year to year upon such terms of his lease as are consistent with a yearly tenancy, and it is a question of fact whether he becomes such a tenant or not.

See *Hyatt* v. *Griffiths*, 17 Q. B. 505, and p. **783**, *post*.

Wrongful holding over by Tenant for Years.

If a tenant for years wilfully hold over after written demand of possession, the landlord may sue him for damages at the rate of double the yearly value of the premises held over so long as held over.

Landlord and Tenant Act, 1730, s. 1, and p. **784**, *post*.

Holding over by Tenant after his own Notice to Quit.

If any tenant hold over after his own notice to quit, he becomes bound to pay double rent so long as he holds over, recoverable in the same manner as the single rent.

Distress for Rent Act, 1737, s. 18, p. **787**, *post*.

Partial Occupation by Custom of the Country.

Where an existing custom for the tenant of a farm to retain possession after the end of his tenancy is proved as a fact, such tenant has a right to retain possession accordingly, unless he hold under a contract of tenancy inconsistent with the custom.

Compensation for improvements by Custom of the Country.

Where an existing custom for the outgoing tenant of a farm to be paid compensation for improvements is proved as a fact, such tenant has a right to compensation in accordance with such custom unless

he hold under a contract of tenancy inconsistent therewith. Valuations between an outgoing and incoming tenant are a matter of convenience only, and if there be no incoming tenant, the landlord is liable to the outgoing tenant under the custom.

See *Faviell* v. *Gaskoin*, 7 Ex. 273, and p. **792**, *post*.

Application of Agricultural Holdings Act, 1883.

The Agricultural Holdings Act, 1883, applies to all holdings, however small, either wholly agricultural or wholly pastoral, or partly agricultural and partly pastoral, or wholly or partly cultivated as market gardens, held under a landlord for a term of years, or for lives, or for lives and years, or from year to year by a tenant holding no employment under such landlord.

Agricultural Holdings Act, 1883, ss. 54 and 61, p. **813**, *post*.

Compensation for Improvements under Agricultural Holdings Act, 1883.

In cases where the Agricultural Holdings Act, 1883, applies, the tenant, on quitting his holding on the determination of his tenancy, is entitled to compensation for boning, chalking, clay-burning, claying, liming, and marling, and for the application of purchased manure, and consumption on the holding by cattle, sheep, and pigs, of cake or other feeding stuffs not produced on the holding. He is also entitled to compensation for buildings and other permanent improvements if executed with the written consent of his landlord, and for drainage if executed after notice to a landlord refusing to execute it himself.

Agricultural Holdings Act, 1883, p. **819**, *post*.

Prolongation of Term where Landlord had uncertain interest.

The tenant of a farm at rack-rent, in any case where the tenancy determines by the cesser of the estate of a landlord entitled for his life, or for other uncertain interest, may continue to hold the farm till the end of the then current year of the tenancy.

Landlord and Tenant Act, 1851, s. 1, and p. **904**, *post*.

Fixtures.

The primary rule is that all things attached by the tenant to the demised premises become the property of the landlord, and are not removable by the tenant at any time or under any circumstances; but the exceptions to this rule abrogate it in respect to trade fixtures, domestic fixtures and agricultural fixtures in a varying degree.

Trade Fixtures.—Domestic Fixtures.

Trade fixtures, *e.g.*, engines for working collieries, and conservatories, and domestic fixtures, *e.g.*, ornamental chimney-pieces, but not conservatories, may be removed by the tenant during the tenancy, provided that the removal can be effected without doing substantial injury to the freehold.

See *Lawton* v. *Lawton*, 3 Atk. 13; *Buckland* v. *Butterfield*, 2 B. & B. 54.

Agricultural Fixtures.

Agricultural fixtures erected by the tenant before January 1st, 1884, with the written consent of the landlord, become the property of the tenant, and removable by the tenant if the tenant shall have given one month's notice in writing of his intention to remove, and the landlord shall not have exercised an option to purchase them.

Landlord and Tenant Act, 1851, s. 3.

If the Agricultural Holdings Act applies (see lxix., *supra*), any engine, machinery, fencing, or building (except a building for which compensation is payable), erected by the tenant on or after the 1st January, 1884 (whether with the consent of the landlord or not), becomes the property of the tenant and removable by him before or within a reasonable time after the termination of his tenancy, subject to the tenant having discharged all his obligations to the landlord, doing no avoidable damage, repairing all unavoidable damage, giving notice of intention to remove, and subject also to the landlord's option of purchase.

Agricultural Holdings Act, 1883, s. 34, and p. **673**, *post*.

### Assignment.

Mode of Assignment.

Every contract for assignment must be in writing, and every assignment must be by deed.

Stat. Frauds, s. 4 ; Real Property Act, 1845, s. 3.

What Covenants pass to Assignee.

The assignee may sue or be sued upon all covenants which concern the premises demised, *e.g.*, on a covenant to repair, whether the assignor may have covenanted for his assigns or not.

See *Spencer's case*, 1 Sm. L. C., and p. **172**, *post*.

### Assignment of Reversion.

Notice to Tenant.

Before suing for rent, the assignee of the reversion must give notice to the tenant of the assignment to him, but he may avail himself of a condition for re-entry on breach of covenants other than the covenant to pay rent without any such notice.

4 Ann. c. 16, s. 10 ; *Scaltock* v. *Harston*, 1 C. P. Div. 106, and p. **265**, *post*.

Assignment of Part of Reversion, and of Reversion of Part.

Both the assignee of part of the reversion in the premises and the assignee of the reversion of part of the premises may sue and be sued on the covenants in respect of the part assigned or apportioned to him.

See *Stevenson* v. *Lambard*, 2 East, 375 ; 6 R. R. 511 ; Law of Property Amendment Act, 1859 ; Conveyancing Act, 1881, ss. 10—12.

### Assignment of Term.

Every tenant, except a tenant by sufferance, may assign or sub-let, unless expressly restrained by the contract of tenancy from doing so. Right to assign.

See *Church* v. *Brown*, 15 Ves. 258 ; 10 R. R. 74.

A sub-lease for the whole term, or for a period beyond it, is an assignment, and puts the sub-tenant in the place of the tenant. Sub-lease.

See *Beardman* v. *Wilson*, L. R., 4 C. P. 57, and p. **276**, *post*.

A lessee assigning remains liable on his covenants, but an assignee may assign over to a pauper. By such assignment the assignee frees himself from all liability to the lessor, but his liability to the assignor continues. Liability of Lessee and Assignee.

See *Thursby* v. *Plant*, 1 Wms. Saund. 241 ; *Taylor* v. *Shum*, 1 B. & P. 21 ; 4 R. R. 759, and **273**, *post*.

Upon the bankruptcy of the tenant the tenant's estate in the premises is assigned by law to his trustee in bankruptcy, who may, within three months after his appointment, disclaim that estate, *with leave of the Bankruptcy Court,* if the tenant has sub-let or assigned, or the property leased is let for, and is worth, 20*l*. a year or more, or the tenant's estate is not being summarily administered, or if the landlord having notice of the trustee's intention to disclaim, requires the matter to be brought before the Court, *and in other cases* without any such leave. Bankruptcy.

If any person interested requires the trustee to decide whether he will disclaim or not, and he does not decide within 28 days, the option to disclaim is gone, and the tenant's estate is absolutely vested in him with its burdens and benefits.

If no disclaimer is executed, the trustee is personally liable on the covenants of the lease, with a right to be indemnified out of the assets of the bankrupt's estate.

The disclaimer determines the rights and liabilities of the tenant, and of his estate in the lease, as from the date of the disclaimer, and discharges the trustee from personal liability as from the date of his appointment, but does not affect the rights or liabilities of any other person.

Bankruptcy Acts, 1883 and 1890, s. 55 and s. 13, and p. **291**, *post*.

The covenant not to assign without licence is not broken by an assignment by bankruptcy, but a proviso for re-entry on the tenant's bankruptcy is good.

*Doe* v. *Bevan*, 3 M. & S. 353 ; 16 R. R. 293 ; *Roe* v. *Galliers*, 2 T. R. 133 ; 1 R. R. 445, and p. **286**, *post*.

Death.

The tenant's estate is personal property, and passes to his personal representatives. In Scotland the tenant's interest passes to his heirs.

An executor cannot waive a term, although it be worth nothing; he must either renounce the executorship in toto or not at all.

*Rubery* v. *Stevens*, 4 B. & Ad. 244, and p. **304**, *post*.

Personal Liability of Executor.

Personal representatives are personally liable for rent only up to the value of the premises.

Personal representatives having satisfied all existing liabilities on a lease, and having set apart a sufficient sum to answer any future liquidated liability, may assign the lease to a purchaser and distribute assets. Thereupon the personal liability of the personal representatives is extinguished, but the landlord may follow the assets in the hands of the beneficiaries.

Law of Property Amendment Act, 1859, s. 27, p. **310**, *post*.

In cases to which the above two paragraphs are not applicable, the personal representatives of a tenant are personally liable upon his covenants, if they enter upon the demised premises, but otherwise not.

See *Tremeere* v. *Morison*, 1 B. N. C. 86; *Rendall* v. *Andreæ*, 61 L. J., Q. B. 630, p. **306**, *post*.

### Recovery of Premises by Landlord.

Notice before Proceeding for Forfeiture.

A right of re-entry for breach of covenant or condition (except the covenant against alienation, or in a mining lease to allow inspection of books, and the condition for forfeiture on bankruptcy, or taking the lessee's interest in execution) is not enforceable unless the landlord has served on the lessee a notice requiring him to remedy the breach complained of, and the lessee has failed to remedy the breach (if remediable), and also to satisfy the landlord by some pecuniary compensation.

Conveyancing Act, 1881, s. 14, p. **349**, *post*.

Summary Judgment against Tenant holding over.

If the tenant's term has expired or been duly determined by a notice to quit, the landlord may, in an action for the recovery of the premises, obtain final judgment for such recovery from a judge in chambers on affidavit by himself or any other person who can swear positively to the facts, verifying the cause of action and swearing that there is no defence thereto.

R. S. C., 1883, Order XIV., p. **844**, *post*.

Mesne Profits.

The landlord recovers by the verdict of the jury mesne profits from the date of the determination of the tenant's interest down to the date of the verdict.

C. L. P. Act, s. 214, p. **842**, *post*.

Action in County Court where Premises held over.

If neither the value nor the rent of the premises exceed 50*l.* a year, and the tenant refuse to deliver up possession at the end of the tenancy, the landlord may sue the tenant or person holding through him in the County Court of the district in which the premises lie; and the judge of such County Court may, on proof of the landlord's title and other matters, order possession to be given up to the landlord.

County Courts Act, 1888, s. 138, p. **859**, *post*.

Action in County Court where Rent in Arrear.

If neither the value nor the rent of the premises exceed 50*l.* a year, and the rent be in arrear for one half-year, and the landlord be entitled to re-enter for non-payment of rent, the landlord of any premises may, without any formal demand for re-entry, sue the tenant in the County Court of the district where the premises lie. Thereupon, unless the tenant in **5** days pay the rent, on proof of no sufficient distress being found on the premises and other matters, the judge of such County Court will order possession to be given up to the landlord in not less than **4** weeks, unless the rent and costs be sooner paid.

County Courts Act, 1888, s. 139, p. **866**, *post*.

Action in County Court in ordinary Cases.

If neither the value nor the rent of the premises exceed 50*l.* a year, the landlord may, upon any cause of forfeiture whatsoever, eject the tenant by action brought in the County Court of the district where the premises lie. But if the causes of action be either non-payment of rent or holding over, the landlord must follow the special procedure provided for such causes of action.

County Courts Act, 1888, s. 59, p. **871**, *post*.

Recovery before Justices of Premises held over.

If the tenant occupy at will or for a term of not more than **7** years, or at a rent of not more than **20***l.* a year, and refuse to quit at the end of the tenancy, the landlord may summon the tenant before two justices of the peace, who, upon proof of the landlord's claim and other matters may issue a warrant to the constables of the district commanding them to give possession within a period not less than **21** nor more than **30** days from the date of the warrant. But the execution of the warrant may be stayed if the tenant will become bound with sureties to sue the landlord for trespass.

Small Tenements Recovery Act, 1838, p. **877**, *post*.

Recovery before Justices of deserted Premises.

If a tenant at rack-rent or at a rent of three-fourths of the yearly value of the demised premises, be in arrear for one half-year's rent, and desert the demised premises, and leave no sufficient distress thereon, two or more justices of the peace may view the premises at

the request of the landlord, and affix thereon a notice stating what day, at the distance of **14** days at least, they will return to take a second view. If upon such second view the tenant do not pay the rent, or if there be no sufficient distress upon the premises, the justices may put the landlord into possession, and the contract of tenancy becomes void.

Distress for Rent Act, 1737, s. 16 ; Deserted Tenements Act, 1817, and p. **883**, *post*.

### Criminal Law.

Letting infected House.

If a person let any house or room in which any person has been suffering from an infectious disorder, without having such house or room disinfected, he is liable to a penalty of 20*l*., and if he falsely answer any question of an intending tenant as to an infected person being, or having been within **6** months, on the premises, he is liable to a penalty of 20*l*., or a month's imprisonment with hard labour.

Public Health Act, 1875, ss. 128, 129, and p. **888**, *post*.

Larceny by Tenant.

Any tenant stealing any fixture is guilty of felony, and is liable to two years' imprisonment, with whipping, if a male ; and, if the value of the fixture exceed 5*l*., to penal servitude for 7 years.

Larceny Act, 1861, s. 74, and p. **890**, *post*.

Demolition by Tenant.

Any tenant unlawfully demolishing any building demised to him or severing any fixture from the freehold, is guilty of a misdemeanour, and liable to fine or imprisonment, or both, at the discretion of the Court.

Malicious Damage Act, 1861, s. 13, and p. **890**, *post*.

# ADDENDA.

*At page* 52, *insert:*—

In whom does reversion of intestate landlord vest during the period between death and grant of letters of administration ?

The important question, in whom does the reversion of an intestate landlord, dying after the commencement of the Land Transfer Act, 1897, *i.e.*, dying at any time on or after the 1st January, 1898, vest during the period (which is seldom short), between his death and the grant of letters of administration to some person so as to become his personal representative, is a very difficult one. An executor derives his title from the will of the deceased and can act immediately on his death and before probate; but an administrator derives his title from the letters of administration, which may relate back, but only to an act for the benefit of the estate (*a*).

Section 1 (1) of the Act provides that—

Where real estate is vested in any person without a right in any other person to take by survivorship, it shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time as if it were a chattel real vesting in them or him.

And section 2 (2) provides that—

All enactments and rules of law relating to the effect of probate or letters of administration as respects chattels real, and as respects the dealing with chattels real before probate or administration, and as respects the payment of costs of administration and other matters in relation to the administration of personal estate, and the powers, rights, duties and liabilities of personal representatives in respect of personal estate, shall apply to real estate so far as the same are applicable, as if that real estate were a chattel real vesting in them or him, save that it shall not be lawful for some or one only of several joint personal representatives, without the authority of the Court, to sell or transfer real estate.

And section 24 (2) provides that—

In this Act the expression "personal representative" means an executor or administrator.

The concluding words of s. 1 (1) so closely resemble (*b*) words in s. 30 of the Conveyancing Act, 1881, whereby trust and mortgage estates vest in personal representatives, that any decision

(*a*) See *Morgan* v. *Thomas*, 8 Ex. 302.

(*b*) From "shall" to "him" the words are identical except that the Act of 1881 has "in like manner" after from "time to time."

on the earlier enactment would be an authority as to the construction of the latter; but Pearson, J., in granting a vesting order under the earlier Act, raised the difficulty without solving it (*b*); and in two subsequent cases vesting orders have been made (*c*) without the point being cleared up.

To whom then, during the period between death and administration granted, must rent be paid? Who can give a legal discharge for it? Who can distrain or sue for it? Who can grant a lease, or determine a tenancy, by notice to quit or otherwise? To whom is to be given the notice of claim of compensation under s. 7 of the Agricultural Holdings Act, 1883?

On the whole, it is submitted that the heir-at-law stands in the shoes of the deceased landlord for all these purposes until the administrator has acquired a title, and that the position of a tenant in respect to the heir-at-law and administrator successively would be similar to that of a tenant before the Act to a devisee and the devisee of a devisee successively (*d*).

(*b*) In *Pilling's Trusts, In re*, 26 Ch. D. 432; 53 L. J., Ch. 1052; 32 W. R. 853.

(*c*) In *Rackstraw's Trusts, In re*, 52 L. T. 612; 33 W. R. 559, per Kay, J.; and in *Williams's Trusts, In re*, 36 Ch. D. 231; 56 L. J., Ch. 1088; 56 L. T. 884; 36 W. R. 100.

(*d*) See further as to the meaning of the Act, Robbins's Devolution of Real Estate, p. 18, and Tyssen's Real Representative Law, p. 18.

The 19th section of the Court of Probate Act, 1858, 21 & 22 Vict. c. 95, vests personal estate in the Judge of the Court of Probate between death and administration, and it may possibly be that this section is incorporated in the Land Transfer Act by the general words of s. 2 (2). If this be so, it might perhaps follow (see Tyssen, at p. 20), that the land vests in all the Judges of the High Court as joint tenants.

*At page* 386, *insert*:—

Determination of Lease by Notice—By whom Notice to be given—Equitable Charge.

Where a lease for 21 years contains the usual proviso for its determination by the lessee or his assigns by six months' notice at the expiration of the first seven or fourteen years of the term, such notice, in order to be valid, must be given by or on behalf of the person in whom the term is vested, and therefore the first assignee of a lease, who has purchased an equitable charge created by a second assignee by the deposit of the lease with the assignments as a security for a loan, is not entitled to give such notice, as he is not the person in whom the term is vested (*e*).

(*e*) *Seaward* v. *Drew*, 67 L. J., Q. B. 322, per Channell, J.

*At page* 714, *insert:—*

Covenant properly to conduct Hotel.

*Bryant* v. *Hancock*.

*Bryant* v. *Hancock & Co.* (*a*) is a very important case upon the construction of public-house covenants.

In that case a lease for 21 years of an hotel, of which the defendants were assignees, contained a covenant that the lessee, his executors, administrators, and assigns would conduct the business of the hotel "in a proper and orderly manner so as to afford no ground or pretence for discontinuing the licences thereof; and would not wilfully do or suffer any act or thing which might be a breach of the rules and regulations established by law for the conducting of licensed public-houses or be a reasonable ground for the withdrawing or withholding of all or any of the licences for the sale of beer, ale, wine, and spirituous liquors therein"; and would from time to time apply for and do or cause to be done whatsoever should be requisite for obtaining the renewal of such licences, and would at the end of the term deliver up the premises with the licences. Some cases of drunkenness had occurred on the premises while they were in the occupation of a monthly tenant of the defendants, and the licensing justices had refused to renew the licence for the house on the application of such monthly tenant. The applicant appealed to quarter sessions, and, on their refusal to hear the appeal on the ground that the notices were not in proper order, obtained a mandamus for them to hear and determine it. After they had heard it the applicant again applied for a mandamus, and, on failing to obtain it in the Queen's Bench Division, appealed unsuccessfully to the Court of Appeal and the House of Lords (*b*). The plaintiff having recovered 5,300*l.* in an action on the covenant by the judgment of Lawrance, J., the Court of Appeal reversed the judgment on the ground that no breach had been committed. "It is clear" observed the Court in a considered judgment, "that the defendants took all possible steps to obtain a renewal of the licence, which the justices refused to renew at the next general annual licensing meeting, their ground for refusal being that Mrs. Evans had upon one occasion permitted drunkenness upon the premises upon the occasion above-mentioned. It was thus that the licences of the Princess Royal Hotel were lost. In these circumstances the defendants are sued as being assignees for the residue of the term, and it is upon the true construction of the covenant therein contained that this case depends. Whether the covenant sued on is one covenant or different covenants is not material, for it is clear that there are three separate and distinct

(*a*) *Bryant* v. *Hancock*, 14 Times Law Reports, 320 (decided March 25th, 1898); Law Times Newspaper for April 2nd, 1898, p. 503.

(*b*) See *Evans, Ex parte*, [1894] A. C. 16; 63 L. J., M. C. 81; 70 L. T. 45; 50 J. P. 260; from which it appears that on hearing the appeal to quarter sessions a Court of four justices was evenly divided.

parts of the covenant, under each of which a different obligation is undertaken by the covenantors. The first part commences, 'And further that he,' and ends with the words 'for discontinuing the licences thereof.' In our opinion this part of the covenant relates to the forfeiting of the licence when existing as distinguished from the renewal thereof, which is dealt with in the second part of the covenant. It would be wholly unreasonable to hold that both the first and second parts of the covenant referred to the same thing, so that both an absolute and qualified covenant existed as to the same thing. This first part in our judgment is an absolute covenant by the covenantor, his executors, administrators, and assigns against the forfeiture of an existing licence of the Princess Royal Hotel, and does not embrace the question of renewal of such licence. The second part of the covenant is a limited covenant, and is confined to the covenantor, his executors, administrators, and assigns wilfully doing or suffering anything which should be a reasonable ground for withdrawing or withholding the licences—*i.e.*, which should afford a reasonable ground for the justices refusing to renew. This is clearly not an absolute covenant. And the third part of the covenant is a covenant by the covenantor, his executors, administrators, and assigns to apply for and do all that shall be reasonably requisite for the renewal of the licence, and that when renewed he will deliver up the same at the determination of the term. This is not an absolute covenant. Now, as regards the first part of the covenant, no liability attaches to the defendants, for the simple reason that the then existing licences have not been forfeited. As regards the second part, the covenantor or his assigns have not wilfully done or suffered anything which should be a reasonable ground for the justices refusing to renew the licence. If the covenantor or his assigns are to be liable for a tenant of an assignee causing the licence not to be renewed, it seems to us there should either be a clear and absolute covenant that they would be so liable, or a covenant that such tenant would do nothing to jeopardize a renewal. We give no opinion upon whether Mrs. Evans's act was such as to afford reasonable ground for the justices refusing to renew. As regards the third part of the covenant the facts show that the defendants have done all in their power to obtain a renewal, but without avail."

FOR NOTES.

FOR NOTES.

# THE LAW

OF

# LANDLORD AND TENANT.

## CHAPTER I.

BY WHOM TERMS MAY BE GRANTED.


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### Sect. 1.—*Generally.*

All persons who are not under any legal disability may grant leases for such terms as are not inconsistent with the nature and quantity of the estates which they have: but if a lease be made for a longer term than the estate of the lessor will warrant, it will generally operate as a valid demise during so much of the term as he has power to grant. Thus, if a tenant for life demise by deed for a long

CH. 1. SECT. 1. *Who may lease generally.*

term (say ninety-nine years), it will operate as a valid lease during his life (*a*).

Person having mere Right of Entry may demise.

At one time it was necessary that the party granting the lease, who is called the lessor, should be in possession of the lands intended to be leased or in receipt of the rents and profits thereof; for if he had a mere right of entry, he could not grant it to another (*b*). But by the Real Property Act, 1845 (*c*), 8 & 9 Vict. c. 106, s. 6, not only contingent, executory and future interests, and possibilities coupled with an interest, but also "a right of entry whether immediate or future, and whether vested or contingent, into or upon any tenements or hereditaments in England of any tenure, may be disposed of by deed." This enactment does not relate to a right to re-possess or re-enter for a condition broken, but only to an original right where there has been a disseisin, or where the party has a right to recover lands, and his right of entry and nothing but that remains (*d*).

Lessor's Title.

A lease is, both in contemplation of law and in fact, a *conveyance* of the demised premises for the term therein mentioned, subject to the rent, covenants, and conditions. It usually contains a very qualified and restricted covenant for quiet enjoyment, such as any person may safely enter into who never had title to the demised premises (*e*). By the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 2, it is enacted that "under a contract to grant or assign a term of years, whether derived or to be derived out of a freehold or leasehold estate, the intended lessee or assign shall not be entitled to call for the title to the *freehold*;" and by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), ss. 3 and 13, there are similar enactments as to the title to a *leasehold* reversion; but all these enactments are "subject to any stipulation to the contrary in the contract."

Lease by Estoppel.

As to lease by estoppel, see post, Ch. V. sect. 22.

## SECT. 2.—*By Tenants in Fee.*

Tenants in fee may make leases without limit or restraint, for any number of lives or years, and upon such terms and conditions as they

(*a*) *Bragg* v. *Wiseman*, Brownlow & G. 22.

(*b*) 32 Hen. 8, c. 9, ss. 2, 4; *Doe* d. *Williams* v. *Evans*, 1 C. B. 717.

(*c*) This "short title" of 8 & 9 Vict. c. 106 is derived from the Short Titles Act, 1896, 59 & 60 Vict. c. 14, which gave numerous short titles to acts not having them before, and repealed but re-enacted the Short Titles Act, 1892, 55 & 56 Vict. c. 10, which had also conferred numerous short titles. Acts passed in or after 1845 have short titles given to them by themselves in gradually increasing number, and now every act has a short title so given. In the following pages every act having a short title is cited by that title and by the regnal year and chapter as well.

(*d*) *Hunt* v. *Bishop*, 8 Exch. 675, 680; 22 L. J., Ex. 337; *Hunt* v. *Remnant*, 9 Exch. 635; 23 L. J., Ex. 135; *Bennett* v. *Herring*, 3 C. B., N. S. 370.

(*e*) See post, Chap. XVII. sect. 8 (b).

*Lease by Tenants in Fee.*

may think fit (*f*). A lease of lands of which the lessor was seised in fee, and of other lands of which he was seised for life (with power of leasing), at one entire rent, but which was not well executed according to the power, was held to be good after the death of the lessor for the lands held by him in fee, though not for the other lands (*g*).

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## Sect. 3.—*By Tenants in Tail.*

At Common Law.

By the common law a tenant in tail could make no lease which would bind his issue in tail, or remaindermen, or the reversioner.

Under the Fines and Recoveries Act, 1833.

By the Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), s. 15, "every actual tenant in tail," [*i.e.*, every tenant of an estate tail which shall not have been barred], "whether in possession, remainder, contingency, or otherwise, shall have *full power to dispose of*, for an estate in fee simple absolute, *or for any less estate*, the lands entailed," as against the issue in tail, and all persons whose estates are to take effect after the determination or in defeasance of the estate tail. But by sect. 21, this power is not given to expectant heirs or issue in tail.

A Lease is a "Disposition" *pro tanto*.

A lease for any number of years, or for a life or lives, is a "disposition" *pro tanto* within the meaning of the above act. But by sect. 34, if there be a protector of the settlement, his consent is necessary to make the lease valid, not as against the issue in tail, but as against persons whose estates are to take effect after the determination or in defeasance of the estate tail; and if the tenant in tail making the disposition is a married woman, the concurrence of her husband is necessary to give effect to the same; and any deed which may be executed by her for effecting the disposition must be acknowledged by her before a judge, or before a perpetual or special commissioner (*h*), or before a county court judge (*i*).

Enrolment when necessary.

By sect. 41, no assurance by which a disposition of lands is effected under the act by a tenant in tail thereof (*except a lease for any term not exceeding twenty-one years* at a rack rent or not less than one-sixth of a rack rent) has any operation under the act unless it be enrolled in the Court of Chancery (*k*) within six months after execution.

It is to be observed that a lease for less than twenty-one years must be enrolled pursuant to this section, if the rent reserved does not amount to at least five-sixth parts of a rack rent, or if the term is not to commence for more than one year from the date thereof. So if the

(*f*) Com. Dig. *Estates by Grant* (G. 2).

(*g*) *Doe* d. *Vaughan* v. *Meyler*, 2 M. & S. 276; 15 R. R. 244.

(*h*) Sect. 40; sect. 79, as amended by sect. 7 of the Conveyancing Act, 1882, 45 & 46 Vict. c. 39.

(*i*) County Courts Act, 1888, s. 184, re-enacting s. 73 of the act of 1856.

(*k*) Now the Chancery Division of the High Court; Judicature Act, s. 34.

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*Lease by Tenants in Tail.*

lease is for a longer term than twenty-one years, and in all other cases not within the above exception.

A lease for years by a tenant in tail, not made in pursuance of the Fines and Recoveries Act, was not absolutely determined by his death, but the issue in tail was at liberty either to affirm or avoid it, as he might think fit (*l*). Acceptance by the issue in tail of the rent (*m*), or bringing an action for the recovery thereof, or an action of waste, were considered such acts as amounted to a confirmation of the lease, because they plainly manifested an intent to continue the lessee in possession upon the terms of his lease. A lease at common law by the tenant in tail differs from a rent granted by such tenant; for the last is void by the death of the grantor: whereas the former is only voidable by the issue in tail, whose acceptance of rent amounts to a confirmation (*n*).

Settled Estates Acts.

The power of tenants in tail to grant leases, &c., pursuant to the Fines and Recoveries Act was unaffected by the Settled Estates Act, 1856 (19 & 20 Vict. c. 120), and 1877 (40 & 41 Vict. c. 18), but those acts successively allowed the Court of Chancery and the Chancery Division of the High Court to authorize leases by a tenant in tail.

Settled Land Act.

And the Settled Land Act, 1882 (45 & 46 Vict. c. 38, s. 38), confers upon a tenant in tail the same powers under that act as that act confers upon a tenant for life, so that leases made after the act of 1882 came into operation [*i.e.*, after the 31st December, 1882] are not subject to the operation of the Fines and Recoveries Act, but may be made in all ways as a lease by a tenant for life.

By Tenants in Tail after Possibility of Issue extinct.

The like is the case with a tenant in tail after possibility of issue extinct, that is, where one is tenant in special tail, and the person from whose body the issue was to spring dies without issue, or, having issue, that issue becomes extinct (*o*). See therefore the next section.

## SECT. 4.—*Lease by Tenant for Life.*

### (a) *At Common Law.*

At Common Law.

At common law a tenant for his own life (not having any special power to grant leases) can make no leases to continue longer than his own life (*p*). This inconvenience to the tenant was partially modified by the right to "emblements" (*q*), for which was substituted by the Landlord and Tenant Act, 1851, 14 & 15 Vict. c. 25, s. 1 (post,

(*l*) Bac. Abr. tit. *Leases* (D.).

(*m*) *Doe* d. *Southouse* v. *Jenkins*, 5 Bing. 469; *Doe* d. *Phillips* v. *Rollings*, 4 C. B. 188.

(*n*) Cruise's Dig. tit. II. c. 2, s. 8; Bro. Abr. tit. *Grant*, 145; 2 Ld. Raym. 779; *Andrew* v. *Pearce*, 1 New R. 158; 8 R. R. 776.

(*o*) 2 Blac. Com. 124.

(*p*) Bac. Abr. tit. *Leases* (I.); *Adams* v. *Gibney*, 6 Bing. 656.

(*q*) See post, Chap. XX. sect. 3.

Appendix A. sect. 4), the right of the lessee of "a farm or lands" to hold until the expiration of the current year of the tenancy, at which expiration he becomes bound to quit without any notice to quit.



(b) *Under Special Powers.*

Special powers of Leasing.

The settlements, however, whether by deed or will, under which a tenant for life holds his estate, frequently contain "special powers of leasing," enabling the tenant for life to make leases binding after his death, for a limited period, upon the parties in remainder. Where these powers did not exist, or were found to be insufficient, they were in many cases conferred by private Act of Parliament. In 1856 these private acts were in a great measure rendered unnecessary by s. 32 of the general "Settled Estates Act, 1856," 19 & 20 Vict. c. 120, which empowered tenants for life to make leases for 21 years.

(c) *Under Settled Estates Act*, 1877.

The Act of 1856 was repealed but in great part re-enacted by the Settled Estates Act, 1877, 40 & 41 Vict. c. 18, s. 46 of which act replaced s. 32 of the act of 1856, in terms which, *although they were entirely superseded* (though not expressly repealed), *as from the commencement of the Settled Land Act*, 1882, by the more comprehensive enactments of that act presently to be referred to, it is still necessary to set out here, inasmuch as leases actually granted by tenants for life, &c., before the commencement of the act of 1882, would be set aside as invalid (*r*), unless made in accordance with such terms.

Settled Estates Act, 1877.—Tenants for Life, &c., may grant Leases for 21 Years.

Sect. 46 of the act of 1877 allowed any person entitled to the rents and profits of any *settled estates* for any life, or lives, or for any greater estate, either in his own right or in right of his wife, unless the settlement should contain an express declaration to the contrary, and also any person entitled to the rents and profits of any *unsettled estates* as tenant by the curtesy, or in dower, or in right of a wife seised in fee, *without any application to the court*, to demise the same or any part thereof, except the principal mansion-house and other lands usually occupied therewith, from time to time for any term *not exceeding* 21 *years*. The section further provided that every such demise should be made by deed; that the best rent that could reasonably be obtained should be thereby reserved; that the demise should not be made without impeachment of waste (*r*), and should contain a covenant for payment of rent and such other usual and proper covenants as the lessor should think fit; and also a condition of re-entry on non-payment of the rent for a period of 28 days, or

Demise to be by Deed for Rent, without Fine.

Waste.

(*r*) See *Davies* v. *Davies*, 36 W. R. 399, and p. 6, post.

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some less period to be specified; and that a counterpart of every deed of lease should be executed by the lessee (*s*).

This section did not apply to a case where trustees had the management of an estate, of which they paid the net annual rents to the tenant for life (*t*). In such a case the tenant for life was not even entitled to petition under the act (*u*).

Sect. 47. Validity of Demise against Remaindermen, &c.

By sect. 47, every demise authorized by the last preceding section was made valid against the person granting the same, and all other persons entitled to estates subsequent to the estate of such person under or by virtue of the same settlement, if the estates be settled (*x*), and in the case of unsettled estates against the wife of any husband granting such demise of estates to which he was entitled in right of such wife, and against all persons claiming through or under the wife or husband (as the case might be) of the person granting the same.

Quashing of Lease by Remainderman.

Where, however, the lease was not as authorized by sect. 46, the remainderman could get it set aside upon coming into his estate, as appears from the case in which a 21 years' lease by a tenant for the curtesy containing a covenant to repair, "fair wear and tear and damage by tempest excepted," was set aside as having been made without impeachment of waste (*y*).

Sect. 48.

By sect. 48, the execution of a lease by the lessor "shall be deemed sufficient evidence" that a counterpart of such lease has been duly executed by the lessee as required by the act.

By sect. 57, the provisions in the act respecting demises to be made without application to the court, extended only to settlements made after the 1st of November, 1856 (*z*).

### (d) *Lease by Tenant for Life under Settled Land Act*, 1882.

Settled Land Act, 1882.—Act of 1882 is retrospective and compulsory.

The Settled Land Act, 1882 (45 & 46 Vict. c. 38), not only goes far beyond the Settled Estates Act in the powers which it gives to a tenant for life, but is retrospective,—that is, it takes effect whether the settlement was made before or after the commencement of the act (sect. 2), and is compulsory,—that is, it takes effect whether the settlor expressed a wish that it should take effect or not (sect. 51).

(*s*) The only material alteration was the omission of the direction that the condition of re-entry should apply to non-observance of covenants, as well as to non-payment of rent. And as to the act generally, see s. 17, post.

(*t*) *Taylor* v. *Taylor*, L. R., 20 Eq. 297; 44 L. J., Ch. 727; 33 L. T. 89; 23 W. R. 947, per Jessel, M.R.

(*u*) Id., 1 Ch. D. 426.

(*x*) As to concurrence in an application to the court on behalf of lunatics, &c., see sect. 49.

(*y*) *Davies* v. *Davies*, 38 Ch. D. 499; 58 L. T. 514; 36 W. R. 399, per Kekewich, J. Observe that sect. 6 of the act of 1882, p. 7, post, expressly authorizes a lease involving waste.

(*z*) This being the date of the original Settled Estates Act, 1856 (19 & 20 Vict. c. 120), the 44th section of which contained a similar saving.

*Lease by Tenant for Life.*

Sect. 6 of the Settled Land Act, 1882, is as follows :—

Settled Land Act, 1882, s. 6.

A tenant for life may lease the settled land, or any part thereof, or any easement, right, or privilege of any kind over or in relation to the same, for any purpose whatever, whether involving waste or not, for any term not exceeding,

Duration.

(i.) In case of a building lease, ninety-nine years :
(ii.) In case of a mining lease, sixty years :
(iii.) In case of any other lease, twenty-one years.

Mode of Lease, whether by Deed or Writing.

By sect. 7, subs. 1, as amended by s. 7 of the Settled Land Act, 1890, 53 & 54 Vict. c. 69, every lease must be by *deed* and be made to take effect in possession not later than 12 months after its date except in cases where the term does not extend beyond 3 years from the date, in which cases it may be made by any writing under hand only containing an agreement instead of a covenant by the lessee for the payment of rent.

Effect of Oral Lease.

An oral lease of settled land for however short a term is absolutely void against the remainderman unless and until it is confirmed by him as pointed out hereafter.

Notice to Trustees.

By sect. 45 of the Act of 1882, a tenant for life when intending to make a lease must give notice to each of the trustees of the settlement under which he is tenant for life, but "a person dealing in good faith with the tenant for life is not concerned to inquire respecting the giving of any such notice."

Settled Land Act, 1882, s. 7.

The exact words of sect. 7 of the Act of 1882 are as follows :—

Deed.

(1.) Every lease shall be by deed, and be made to take effect in possession not later than twelve months after its date (*a*).

Best Rent.

(2.) Every lease shall reserve the best rent that can reasonably be obtained, regard being had to any fine taken, and to any money laid out (*b*), or to be laid out, for the benefit of the settled land, and generally to the circumstances of the case.

Proviso for Re-entry.

(3.) Every lease shall contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified not exceeding thirty days.

Counterpart.

(4.) A counterpart of every lease shall be executed by the lessee and delivered to the tenant for life; of which execution and delivery the execution of the lease by the tenant for life shall be sufficient evidence.

Evidence.

(5.) A statement contained in a lease, or in an indorsement thereon, signed by the tenant for life, respecting any matter of fact or of calculation under this act in relation to the lease, shall, in favour of the lessee and those claiming under him, be sufficient evidence of the matter stated.

Settled Land Act, 1890, s. 7.

The exact words of sect. 7 of the Act of 1890 are as follows :—

A lease for a term not exceeding twenty-one years at the best rent that can reasonably be obtained without fine, and whereby the lessee

(*a*) The effect of subs. (1) is that an existing lease must be surrendered unless it be within one year of expiring : *Farnell, In re*, 33 Ch. D. 599.

(*b*) This does not include money voluntarily laid out : *Chawner's Estate, In re*, note (*f*), infra.

CH. I. SECT. 4. *Lease by Tenant for Life.*

is not exempted from punishment for waste may be made by a tenant for life—

(i.) Without any notice of intention to make the same having been given under section forty-five of the Act of 1882; and

(ii.) Notwithstanding that there are no trustees of the settlement for the purposes of the Settled Land Acts, 1882 to 1890; and

(iii.) By any writing under hand only containing an agreement instead of a covenant by the lessee for payment of rent in cases where the term does not extend beyond three years from the date of the writing.

Act of 1882, ss. 53, 54.

The tenant for life is, by s. 53 of the Act, trustee for all parties interested under the settlement, and it is also provided by sect. 54 of the Act of 1882 that—

Lessee dealing in good faith to be taken to have complied with the Act.

On a sale, exchange, partition, *lease*, mortgage or charge, a purchaser, *lessee*, mortgagee or other person dealing in good faith with a tenant for life shall, as against all parties entitled under the settlement, be conclusively taken to have given the best price, consideration, or *rent*, as the case may require, that could reasonably be obtained by the tenant for life, and to have complied with all the requisitions (*sic*) of this act.

The question of disputed leases by tenants for life was fully considered in *Mogridge* v. *Clapp* (*c*), in which a building lease by a tenant by the curtesy believing himself to be a freeholder was held good, and in *Sutherland* v. *Sutherland* (*d*), in which a lease of a house by a tenant for life to his wife was set aside, but it was intimated

Lease to wife.

that a lease to a wife was not *per se* objectionable. In the most recent case, a lease for seven years at 25*l.* a year was set aside on the ground that the lessee had paid the tenant for life 20 guineas to grant it (*dd*).

"Best Rent" in the case of Agricultural Holdings.

The 43rd section of the Agricultural Holdings Act, 1883 (post, Ch. XXI.), authorizes past voluntary expenditure of a tenant upon improvements to be taken into account in estimating the "best rent;" and, similarly, settled land may be let for working men's

Working Men's Dwellings.

dwellings at less than the "best rent," under s. 14 of the Housing of the Working Classes Act, 1890, 53 & 54 Vict. c. 70.

By sect. 12 of the Settled Land Act, 1882, the power of leasing under the act extends to the making of a lease either (1) in pursuance of a contract for lease by a predecessor in title, or (2) for giving effect to a covenant of renewal, or (3) a lease for confirming a previous void or voidable lease.

Mansion-House.

By sect. 10 of the Settled Land Act, 1890, however (substituted for s. 15 of the Act of 1882, which it repeals) the "principal mansion-house on any settled land, and the demesnes thereof, and other lands usually occupied therewith" may not be leased without

(*c*) *Mogridge* v. *Clapp*, [1892] 3 Ch. 382; 61 L. J., Ch. 534; 67 L. T. 100; 40 W. R. 663; C. A. affirming Kekewich, J.

(*d*) *Sutherland* (*Dowager Duchess of*) v. *Sutherland* (*Duke of*), [1893] 3 Ch. 169; 62 L. J., Ch. 946; 69 L. T. 186; 42 W. R. 13; 3 R. 650, per Romer, J.

(*dd*) *Chandler* v. *Bradley*, [1897] 1 Ch. 315; 66 L. J., Ch. 214; 75 L. T. 581; 45 W. R. 296, per Stirling, J.

the consent of the trustees of the settlement, or an order of the court (*e*), *i.e.*, by sects. 2, sub-sect. 9, and 46 of the act of 1882, the Chancery Division of the High Court; but by sub-sect. 3 of the same section "where a house is usually occupied as a farm-house, or where the site of any house and the pleasure grounds and park and lands, if any, usually occupied therewith, do not together exceed 25 acres in extent, the house is not to be deemed a principal mansion-house" within the section.

Farm-House or Small Site.

Special regulations respecting building and mining leases are provided by sects. 8—11, the more important of which are, that in the case of a building lease, the lease is to be granted partly in consideration of the lessee having erected or agreeing to erect buildings or having improved or agreeing to improve buildings (*f*), &c. (sect. 8, sub-sect. 1); "that a peppercorn rent, or a nominal or other rent less than the rent ultimately payable, may be made payable for the first five years, or any less part of the term" (sect. 8, sub-sect. 2), that in the case of a mining lease, the rent may vary according to the quantities of the mineral gotten (sect. 9), and that, in the case of either kind of lease, the court may authorize, in accordance with the proved circumstances of the district, leases "for any term, or in perpetuity, at fee farm or other rents, secured by condition of re-entry or otherwise, as in the order of the court expressed."

Building and Mining Leases.

The Settled Land Act, 1889, 52 & 53 Vict. c. 36, provides that "any building lease and any agreement for granting building leases" under the Act of 1882 may contain an option "to be exercised at any time within an agreed number of years not exceeding ten, for the lessee to purchase the land leased at a price fixed at the time of the making of the lease or agreement for the lease, such price to be the best which having regard to the rent reserved can reasonably be obtained, and to be either a fixed sum of money, or such a sum of money as shall be equal to a stated number of years' purchase of the highest rent reserved by the lease or agreement."

Building Lease with option of Purchase.

The Settled Land Act, 1890, 53 & 54 Vict. c. 69, s. 8, provides that "in a mining lease the rent may be made to vary according to the *price* of the minerals or substances gotten, or any of them," which "price" may be "the saleable value, or the price or value appearing in any trade or market or other price list, or return from time to time, or may be the marketable value as ascertained in any manner prescribed by the lease (including a reference to arbitration),

Mining Lease at Sliding Scale Rent.

(*e*) See *Bruce* v. *Aylesbury* (*Marquis of*), [1892] A. C. 356 (order for *sale* of mansion-house refused); *Sutherland* v. *Sutherland*, [1893] 3 Ch. 169 (lease granting easement over park occupied with principal mansion-house held void).

(*f*) These expressions do not include past voluntary improvements, so as to justify the tenant for life in taking less than the "best rent:" *Chawner's Settled Estates, In re*, [1892] 2 Ch. D. 192, per Chitty, J.

CH. I. SECT. 4. *Lease by Tenant for Life.*

or may be an average of any such prices or values taken during a specified period."

Mining Lease in pursuance of Contract by absolute Owner.

A mining lease in pursuance of a contract by an absolute owner may be made by the tenant for life irrespective of the conditions imposed by sect. 11 of the Act of 1882, as to setting aside part of the rent as capital (*g*).

Leases by Tenants for Life under express Powers.

A tenant for life, with express power to grant leases for any limited term, or building, repairing, or mining leases, &c., subject to certain restrictions and conditions, may grant any such lease in accordance with the power (*h*), if such power be larger than the power he would have under the Settled Land Act; but if such power be more limited than his power under the act, then the act prevails, and enlarges such power (*i*).

Quashing by Remainderman.

A lease not in conformity with the Settled Estates Act, 1877, was quashed by the court on application by the remainderman (*k*), and it has been said to be probable that a lease would be void if the considerations of the Act of 1882 should not be observed (*l*).

### (e) *Confirmation of Invalid Lease by Remainderman.*

*Davies* v. *Davies.*

Confirmation by Remainderman.

A lease by a tenant for life, except as authorized by the Settled Estates Act, or by the Settled Land Act, or by some express powers in the settlement or will from which he derives his title, is absolutely void against a remainderman, and cannot be confirmed by such remainderman's acceptance of rent, suffering the tenant to remain in possession (*m*), or even by a grant of the freehold treating the lease as valid (*n*); but in a case where the remainderman lay by, and suffered an assignee of an invalid lease to lay out money in re-building, and might be presumed to have had notice of the fact, Lord Hardwicke directed a new lease, *with proper covenants*, to be granted to the assignee for the remainder of the term (*o*); and subsequent acceptance of rent, or other acknowledgment of tenancy, may be evidence of a new demise from year to year by the remainderman (*p*); the lessee being a mere tenant by sufferance in the

(*g*) *Kemeys Tynte* v. *Kemeys Tynte*, [1892] 2 Ch. 211; 61 L. J., Ch. 377; 66 L. T. 752; 40 W. R. 423, per North, J.

(*h*) See Chap. V. s. 19.

(*i*) Settled Land Act, 1882, ss. 55–57.

(*k*) *Davies* v. *Davies*, 38 Ch. D. 499, and p. 6, ante.

(*l*) *Mogridge* v. *Clapp*, [1892] 3 Ch. at p. 398, per Kay, L.J. Quære, would not the knowledge, &c., of the lessee be a necessary element of invalidity?

(*m*) *Doe* d. *Simpson* v. *Butcher*, Doug. 50; *Jenkins* d. *Yates* v. *Church*, Cowp. 482; *James* d. *Aubray* v. *Jenkins*, Bull. N. P. 96; *Doe* d. *Martin* v. *Watts*, 7 T. R. 83; 2 Esp. 501; 4 R. R. 387; *Doe* d. *Collins* v. *Weller*, 4 R. R. 496; 7 T. R. 478; *Jones* d. *Cooper* v. *Verney*, Willes, 169.

(*n*) See *Smith* v. *Widlake*, 3 C. P. D. 10; 47 L. J., C. P. 282; C. A., 26 W. R. 52, reversing judgment of Cockburn, C.J.

(*o*) *Stiles* v. *Cooper*, 3 Atk. 692; compare *East India Co.* v. *Vincent*, 2 Atk. 83; *Jackson* v. *Cater*, 5 R. R. 144; 5 Ves. 688.

(*p*) *Roe* d. *Jordan* v. *Ward*, 2 R. R. 728; 1 H. Blac. 97; *Doe* d. *Collins* v. *Weller*, 7 T. R. 478; 4 R. R. 496; *Doe* d. *Pennington* v. *Taniere*, 12 Q. B. 998;

interval (*q*). It was also held, prior to the Settled Estates Act, that the lessee was not estopped from showing that the estate had determined by the death of the lessor (*r*); but that if a tenant for life, seised also of the remainder in fee expectant on an intervening estate tail in the premises, made a lease, the demise, though defeated by his death as to his life estate, might ultimately take effect for the residue of the term out of his remainder in fee, by the decease of the tenant in tail without issue, and without his having acquired the fee by a proper mode of assurance (*s*); that if a tenant for life granted a lease for years, and then surrendered or forfeited his estate, the lease would remain good during his life, if the years so long continued (*t*); and that a lease executed by a tenant for life, in which the reversioner, who was then under age, was named as one of the lessors, but which was not executed by him, was void on the death of the tenant for life, and an execution of it by the reversioner afterwards was no confirmation so as to bind the lessee, for it was not his covenant (*u*).

Covenant to pay for improvements. *Oakley* v. *Monck*.

Prior to the Settled Land Act, it was held in *Oakley* v. *Monck* (*x*), that a remainderman was not bound by a covenant in a life-tenant's lease to pay the lessee, a nurseryman, at the end of the term for trees planted during the term (there being no evidence that there was a continuing tenancy on the terms of the lease), but it is conceived that the effect of the Settled Land Act would be to bind a remainderman by such a covenant in the same manner as if the lease had been made by himself; and further, that the effect of that act is to bind a remainderman by any covenants made by the life-tenant with a lessee acting in good faith, and by any lease omitting any, however usual, covenants with a lessee so acting (*y*), provided only that sect. 6 of the act has been complied with.

Covenants of Tenant for Life generally.

## Sect. 5.—*Lease by Tenant for Life of another.*

Where a person holds for the term of another's life, he is called tenant pur autre vie; leases made by him, of course, determine on the death of the cestui que vie, or persons during whose life he

*Cornish* v. *Stubbs*, L. R., 5 C. P. 334; and see Ch. VI. sect. 1, post.

(*q*) *Roe* d. *Jordan* v. *Ward*, 1 H. Blac. 96; 2 R. R. 728.

(*r*) *Neave* v. *Moss*, 1 Bing. 360; *Weld* v. *Baxter*, 11 Exch. 816; 1 H. & N. 568.

(*s*) *Taylor* v. *Stibbert*, 2 Ves. jun. 437; 2 R. R. 278; 3 & 4 Will. 4, c. 47, s. 40.

(*t*) *Sutton's case*, 12 Modd. 557, 558.

(*u*) *Ludford* v. *Barber*, 1 T. R. 86; 1 R. R. 156.

(*x*) *Oakley* v. *Monck*, L. R., 1 Ex. 159; 35 L. J., Ex. 87; Ex. Ch.

(*y*) See ss. 20, 53, 54, of the act. As to binding of remainderman by contracts for leases, see sect. 31 of the act; and as to powers to agree for improvements under Agricultural Holdings Act, see sect. 42 of that act, post, Appendix A.

CH. I. SECT. 5. *Lease by Tenant for Life of another.*

holds (*z*), or in the case of a farm, at the end of the then current year of the tenancy (*a*), but not on his own death (*b*); and a lease by him may be made to commence after his death (*c*). The cases and statutes affecting the "lease for lives" are considered hereafter (*d*).

### SECT. 6.—*By Tenants by the Curtesy, Tenants in Dower or Jointure.*

Tenant by the curtesy.

At common law a widowed husband has an estate for life in the lands of which a wife, by whom he had issue capable of inheriting her estate, was seised during the marriage (*e*), and a widow has an estate for life in the third part in value of her husband's lands (*f*), an estate however which the husband may bar at his pleasure, and usually does bar, by the operation of the Dower Act, 3 & 4 Will. 4, c. 105.

Tenant in dower.

Tenants by the curtesy or in dower may grant leases pursuant to the Settled Estates Act, in like manner as tenants for life (*g*).

Leases granted by any such tenants, not made in pursuance of the above act, become absolutely void at their death (*h*), or, if the holding be agricultural, at the end of the then current year of the tenancy (*i*). If the lessee then holds over he becomes tenant on sufferance; but a new tenancy at will, or from year to year, may be created with the express or implied assent of the reversioner, or by his acceptance of subsequent rent. That, however, will not confirm the original lease for the term therein expressed to be granted (*k*), but will only create a new tenancy. If a tenant in dower lease for years, and marry, her second husband's executors are entitled to the arrears of rent due at his death (*l*).

### SECT. 7.—*By Joint Tenants and Tenants in Common.*

Co-owners.

Co-owners are either joint tenants, or tenants in common, and where two or more persons are seised or possessed as such co-owners, each of them may make leases of his or her respective share; or they may all join in one lease, which in the case of joint tenants, will operate as a joint lease of the whole, but in the case of tenants in common, as a lease by each of his respective share, and

(*z*) *Blake* v. *Foster*, 8 T. R. 487; 5 R. R. 419; *Fenner* v. *Duplock*, 2 Bing. 10; *Hill* v. *Saunders*, Id. 112; S. C., in error, 4 B. & C. 529; 28 R. R. 375; *Doe* d. *Strode* v. *Seaton*, 2 C. M. & R. 728.

(*a*) Landlord and Tenant Act, 1851, 14 & 15 Vict. c. 25, s. 1.

(*b*) Com. Dig. tit. *Estates* (E. 1); 2 Blac. Com. 136.

(*c*) *Utty Dale's case*, Cro. Eliz. 182.

(*d*) Post, Ch. V. s. 6 (*c*).

(*e*) See Co. Litt. 29a–30b; *Buckworth* v. *Thirkell*, 3 B. & P. 652 n.

(*f*) See Co. Litt. 30b–41a; *Moody* v. *King*, 2 Bing. 447.

(*g*) Ante, sect. 4.

(*h*) Bac. Abr. tit. *Leases* (I. 1); *Miller* v. *Maynwaring*, Cro. Car. 399.

(*i*) Landlord and Tenant Act, 1851, 14 & 15 Vict. c. 25, s. 1.

(*k*) Bac. Abr. tit. *Leases* (I. 1); *Miller* v. *Maynwaring*, Cro. Car. 399.

(*l*) *Anon.*, Moor. pl. 25.

a confirmation by each as to the shares of the others (*m*); and this is so, even in the case of a lease by tenants in common which is joint in its terms (*n*).

Joint Tenancy.

Joint tenants have unity of title, unity of commencement of title, unity of interest, so as to have equal shares in the joint estate, unity of possession, as well of every part as of the whole, and right of survivorship. And it follows from the right of survivorship, that where joint tenants concur in granting a lease, the interest of the lessee continues, notwithstanding the decease of either of the lessors, and the survivor is entitled to the whole rent (*o*). So, if the lease be at will, the death of one of the lessors does not operate as a countermand of the tenancy even for a moiety; all survives to the other, and if the lessee continue his possession, the survivor may maintain an action for the whole rent (*p*). So, if one joint tenant make a lease of his moiety for years, and die before the lessee's entry, the lease will bind the survivor, and the lessee will retain his interest in the moiety demised until his term expire. And so one joint tenant may make a lease to commence after his death, and his co-tenant, if he survive, will be bound by it (*q*).

Alienation.

But though each joint tenant is considered entitled to the whole while the joint tenancy continues, and is said to be seised "per my et per tout" (*r*), yet for the purposes of alienation, each has an exclusive right to and dominion over, his own share or proportion; and, therefore, if one of two joint tenants make a lease of the whole, his moiety only will pass (*s*). So a lease purporting to be made by both, and executed by one only, is a good lease for the moiety of him only who has executed (*t*).

Marriage.

A joint tenancy in freeholds and leaseholds is not severed by the marriage of a female joint tenant, or by a subsequent demise by her husband and the other joint tenant (*tt*).

Tenancy in Common.

Tenants in common have neither unity of title, or of commencement of title, or of interest (so that they may have unequal shares in the estate in common), but only unity of possession, nor have they any right of survivorship.

Action of Account by one against another.

It is provided by 4 & 5 Anne, c. 16 (*c.* 3 in the Revised Statutes), that actions of account may be brought and maintained by one joint tenant or tenant in common against another as bailiff for receiving

(*m*) *Heatherly* d. *Worthington* v. *Weston*, 2 Wils. 232; *Doe* v. *Errington*, 1 A. & E. 750; *Burne* v. *Cambridge*, 1 Moo. & R. 539.

(*n*) *Thompson* v. *Hakewill*, 19 C. B., N. S. 713; 35 L. J., C. P. 18.

(*o*) *Henstead's case*, 5 Co. R. 10 b; *Doe* d. *Aslin* v. *Summersett*, 1 B. & Ad. 135.

(*p*) *Henstead's case*, 5 Co. R. 10 b.

(*q*) Lit. s. 289; *Grute* v. *Locroft*, Cro. Eliz. 287; *Harbin* v. *Barton*, Moor. 395; *Whitlock* v. *Horton*, Cro. Jac. 91; *Bellingham* v. *Alsop*, Cro. Jac. 52; *Clerk* v. *Clerk*, 2 Vern. 323.

(*r*) Lit. s. 288; Co. Lit. 186 a.

(*s*) Co. Lit. 186 a; *Bellingham* v. *Alsop*, Cro. Jac. 52.

(*t*) *Curtwright's case*, cited 1 Vent. 136.

(*tt*) *Palmer* v. *Rich*, [1897] 1 Ch. 134; 66 L. J., Ch. 69; 75 L. T. 484; 45 W. R. 205, per Stirling, J.

CH. I. SECT. 7. *Leases by Joint Tenants, &c.*

more than comes to his just share and proportion; but there is no relationship of trust or agency in one co-owner of a property towards the other; and where one collects the rents of the whole he does so not in the capacity of agent, but of owner (*tt*).

Co-owners usually join in demising.

It is obviously convenient, whether the co-ownership be in common or joint, for the co-owners to join in demising, and they not only usually do so, but usually do so through a common agent. If they differ as to the tenant to be accepted, or the terms of any proposed tenancy, each may demise his share to a separate tenant, or to the same tenant on separate rents. In the case of land already jointly demised, notice to quit by one to quit his share is a notice by all to quit the whole; but if the demise be not joint and a share of land held in common is separately demised, although another share be separately demised also, the notice to quit any share is separate also, and does not operate as a notice to quit the whole.

Lease by one to another.

One joint tenant or tenant in common may make a lease for years of his part to his companion; for it only gives the latter a right of taking the whole profits instead of the moiety; and he may contract with his companion for that purpose, as well as he may with a stranger (*u*); and such a lease extinguishes the jointure for the time (*x*), and gives a right to distrain for the agreed rent (*y*), and also a right of action for use and occupation in case of a holding over (*z*). If there be three or more joint tenants, the lessee would hold the share demised to him as tenant in common with the others (*a*).

Expense of Repairs.

One tenant in common who has expended money on repairs which are ordinary repairs only, has no right of action against his co-tenant for contribution (*b*).

## SECT. 8.—*By Coparceners.*

Where a tenant in fee or in tail dies, leaving several daughters and no son; or several sisters and no issue, father or brother; or several aunts and no issue, &c.; lands descend among all the daughters, sisters, aunts, &c., equally, who make but one heir, and are called coparceners (*c*). Although they have an unity, they have not an entirety of interest, but are properly entitled each to the whole of a distinct share, and there is no survivorship among them (*d*). Until partition is made (*e*), they may either join in a lease or each may

(*tt*) *Kennedy* v. *De Trafford*, [1897] A. C. 180; 66 L. J., Ch. 413; 76 L. T. 427; 45 W. R. 671.

(*u*) *Cowper* v. *Fletcher*, 6 B. & S. 464; 34 L. J., Q. B. 187; *Leigh* v. *Dickeson*, 15 Q. B. D. 60; 54 L. J., Q. B. 18; 33 W. R. 538—C. A.

(*x*) Co. Lit. 186 a.

(*y*) *Cowper* v. *Fletcher*, supra.

(*z*) *Leigh* v. *Dickeson*, supra and infra.

(*a*) *Jurdain* v. *Steere*, Cro. Jac. 83; *Blackaster's case*, Noy, 13.

(*b*) *Leigh* v. *Dickeson*, supra, note (*u*).

(*c*) Com. Dig. tit. *Parceners* (A. 1), (A. 3).

(*d*) Co. Lit. 164 a.

(*e*) See the Partition Acts, 1868 and 1876 (31 & 32 Vict. c. 40, and 39 & 40 Vict. c. 17), Chitty's Statutes, tit. "Partition."

make a lease of her own share. If they join in a lease, it operates (as with tenants in common) as the separate demise by each of her share, and should be so pleaded (*f*). If they join in a lease they hold the rent reserved in common (*g*); the observations, therefore, made as to leases by tenants in common (*h*) apply also to leases by coparceners. One cannot sue separately for her portion of rents accruing to her and her fellows (*i*).

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### Sect. 9.—*Sublease, by Tenant for Years.*

Sublease.

A lessee or tenant for years, who is not restrained by his lease from subletting, may demise for any less term than he himself has, at such rent, and subject to such covenant, &c., as may be agreed on (*k*).

Rent-charge.

A rent-charge granted for life to a tenant for years is not void, but is good as a chattel interest; and the goods of a stranger not shown to hold the premises by title paramount to the rent-charge (as by a prior demise) may be distrained for the arrears (*l*).

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### Sect. 10.—*Sublease, by Tenant for less than Years.*

Tenants for less periods than for years, but who are possessed of a certain quantity of interest, may alienate the whole, or any part of it, unless expressly restricted from so doing. In fact, every tenant, except a tenant at will or at sufferance, has a right, in the absence of a contract to the contrary, to make a sub-tenancy, as incident to his tenancy.

By Tenants from Year to Year.

A tenant from year to year, therefore, may assign his term, or may underlet part of it, as for three-quarters of a year, or so many months, &c.; but he cannot by underletting grant an interest exceeding his own in point of duration. If he grant a lease by deed for twenty-one years, such term will continue in force during his own yearly tenancy (*m*). If he underlet from year to year, the sub-tenancy will take effect during his own tenancy, and he will have a sufficient reversion to enable him to distrain for the rent (*n*).

A tenant for a less term than one year, as for half a year, a quarter, or a month, or the like, may grant his interest, or any portion of it, to another, unless some agreement subsists between him and his lessor, which expressly restricts him from making such disposition.

(*f*) *Milliner* v. *Robinson*, Moor. pl. 939.
(*g*) 2 Prest. Abstr. 74.
(*h*) Ante, sect. 7.
(*i*) *Decharms* v. *Horwood*, 10 Bing. 526.
(*k*) Bac. Abr. tit. *Leases*; *Rex* v. *Wilson*, 5 M. & Ry. 157, n. See further Ch. VII. sect. 7, post, tit. *Sub-Lease*.
(*l*) *Saffery* v. *Elgood*, 1 A. & E. 191.
(*m*) *Mackay* v. *Mackreth*, 4 Doug. 213; *Oxley* v. *James*, 18 M. & W. 209.
(*n*) *Pike* v. *Eyre*, 9 B. & C. 909; *Curtis* v. *Wheeler*, Moo. & M. 493.

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*Sublease, by Tenant for Years.*

By Tenants at Will.

A tenant at will cannot demise, for that would amount to a determination of his estate at will (*o*); but a demise by a tenant at will, with possession thereunder, will create a tenancy by estoppel as between him and his lessee (*p*), and will be good as against himself (*q*).

By Tenants on Sufferance.

A tenant on sufferance cannot demise (*r*); but a demise by such tenant, with possession, will create a tenancy by estoppel (*s*).

## SECT. 11.—*Lease by the Crown.*

Restrained by 1 Anne, stat. 1, c. 7, s. 5.

The sovereign is a corporation sole, and at common law might have granted leases for lives or for years to any extent, and have thereby bound the successors (*t*). But by 1 Anne, c. 1, s. 5, every grant and lease by the crown of any lands and tenements thereto belonging (except advowsons and vicarages) shall be void, unless made for a term not exceeding one-and-thirty years, or three lives, or for some term of years determinable upon one, two, or three lives, to commence from the date or making thereof: and if made to take effect in reversion or expectancy, the same, together with the estate or estates in possession, not to exceed three lives, or the term of one-and-thirty years in the whole: the tenant to be liable to punishment for waste: the ancient or most usual rent or more, or such other rent as in the said act mentioned, to be reserved and made payable during the whole term. By sect. 6, where the greatest part of the yearly value of any such crown land consists of buildings thereon which want to be repaired or re-edified, a lease thereof may be granted for any term not exceeding fifty years or three lives, subject to similar restrictions and conditions to those above mentioned (*u*).

Leases for 31 Years or Three Lives.

Building or Repairing Leases for 50 Years.

Leases by the Commissioners of Woods and Forests.

The above enactments, however, are to a very great extent repealed (*x*); and in modern times most of the crown lands have been placed under the management of the Commissioners of Woods, Forests, and Land Revenues, who act under the orders, directions, instructions and rules of the Lords of the Treasury (*y*). They may

(*o*) 1 Inst. 57; *Moss* v. *Gallimore*, 1 Doug. 279; 1 Smith, L. C.; *Birch* v. *Wright*, 1 T. R. 382; 1 R. R. 223.

(*p*) Post, Chap. V. sect. 22.

(*q*) *Blunden* v. *Bough*, Cro. Car. 302; *Doe* d. *Goody* v. *Carter*, 9 Q. B. 865; Cole Ejec. 449.

(*r*) *Thunder* d. *Weaver* v. *Belcher*, 3 East, 499; Cole Ejec. 456.

(*s*) Post, Chap. V. sect. 22.

(*t*) Com. Dig. *Grant* (G. 3).

(*u*) See also 1 Geo. 3, c. 1; 34 Geo. 3, c. 75; but none of the restrictions in any of these acts apply or extend to the *private* estates of her Majesty, which are regulated by 25 & 26 Vict. c. 37.

(*x*) See 19 Geo. 3, c. 45, s. 1; 34 Geo. 3, c. 75, s. 1; and 52 Geo. 3, c. 161, s. 1.

(*y*) 10 Geo. 4, c. 50; 2 & 3 Will. 4, cc. 1, 112; 3 & 4 Will. 4, c. 1; 2 & 3 Vict. c. 80; 3 & 4 Vict. c. 87; 4 & 5 Vict. c. 40; 7 & 8 Vict. c. 1; 8 & 9 Vict. c. 99; 14 & 15 Vict. c. 42 (and the numerous acts mentioned in the schedule to that act); 15 & 16 Vict. c. 62; 29 & 30 Vict. c. 62.

grant leases for any term not exceeding thirty-one years (*z*), or building leases for any term not exceeding ninety-nine years (*a*), subject in each case to certain restrictions and conditions (*b*), amongst which there is a restriction that "in each such lease there *shall* be contained" a proviso for re-entry on non-payment of rent, or non-observance, or non-performance of the covenants (*c*); a survey report as to the value, &c., must be previously made (*d*), and the lease must be enrolled in the office of Land Revenues, Records, and Inrolments (*e*).

Proviso for Re-entry.

Leases of mines, minerals, and quarries of the crown in Dean Forest, Gloucestershire, are granted by the Commissioners of Woods and Forests, pursuant to 1 & 2 Vict. c. 43, as amended by 24 & 25 Vict. c. 40 (*f*).

Dean Forest, Mines and Quarries.

Lands belonging to the crown, in right of the Duchy of Lancaster, may be demised pursuant to 48 Geo. 3, c. 73; 1 & 2 Geo. 4, c. 52; which are not repealed by 10 Geo. 4, c. 50, so far as they relate to the Duchy of Lancaster. As to sales and purchases of lands on behalf of the Duchy, see 18 & 19 Vict. c. 58.

Duchy of Lancaster.

Lands belonging to the Duchy of Cornwall may be demised pursuant to the Duchy of Cornwall Management Acts, 1863 and 1868 (*g*). When such lands happen to be vested in the crown they may be demised pursuant to 1 & 2 Will. 4, c. 5.

Duchy of Cornwall.

When the Admiralty or any other government board are authorized to acquire land for public purposes, they are generally empowered to sell, exchange *or demise* such parts thereof as in their opinion will not be required for the public service. In any such case the provisions of the particular statute must of course be strictly complied with (*h*).

By Admiralty or other Board.

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## Sect. 12.—*By Corporations generally.*

Corporations are either ecclesiastical or lay, the latter being divided into eleemosynary and civil. The universities of Oxford and Cambridge are regarded as civil corporations (*i*).

Corporations cannot make any disposition of their property otherwise than by deed sealed with their common seal; thus they cannot,

Lease by Deed.

(*z*) 10 Geo. 4, c. 50, ss. 22, 26. See Chit. Stat. tit. *Crown*.
(*a*) Sects. 23, 24, 26.
(*b*) Sect. 27—28.
(*c*) Sect. 27.
(*d*) Sect. 61.
(*e*) 2 Will. 4, c. 1. s. 21.
(*f*) *Goold* v. *Great Western Deep Coal Co.*, 2 De Gex, J. & S. 600; the other Dean Forest Acts are 20 Car. 2, c. 8; 1 & 2 Will. 4, c. 12; 6 & 7 Will. 4, c. 3; 1 & 2 Vict. c. 42; 5 & 6 Vict. cc. 48, 65; 29 & 30 Vict. c. 62, ss. 4, 5; 29 & 30 Vict. c. 70.
(*g*) 26 & 27 Vict. c. 49; 31 & 32 Vict. c. 35.
(*h*) 5 & 6 Vict. c. 94, s. 12; 18 & 19 Vict. c. 117; 24 & 25 Vict. c. 41, ss. 14, 15, 16.
(*i*) *Parkinson's case*, Carth. 93; *R.* v. *V.-C. of Cambridge*, 3 Burr. 1656.

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without deed, make a lease for years (*k*). But one who enters upon, occupies and pays rent for corporate property under a lease for years which is not sealed, becomes a tenant from year to year on such terms of the lease as are applicable to a yearly tenancy (*l*).

Name of the Corporation.

A corporation cannot either take or grant but by its proper name of incorporation; though sometimes a minute variation in the name is not so material as to avoid a grant (*m*). As to naming the corporation, it need only be observed, that corporations *aggregate*, as dean and chapter, mayor and commonalty, warden and fellows, &c., may make or confirm leases without expressing either the christian or surname of the dean, mayor, warden, &c., because in their politic capacity as a corporation aggregate, they continue always the same, and are said never to die; but in leases or confirmations by a bishop, dean, or other *sole* corporation, both the christian and surname, or at least the christian name and title, ought to be expressed; as, "John, Bishop of P." (*n*).

Appointment of Attorney when necessary.

Where any personal act is necessary in the case of a corporation, that act must be done by attorney appointed by deed under their common seal (*o*); for however it may be as to ordinary services, they cannot appoint a person to do any act which concerns their interest or title in land, unless it be by deed (*p*). A corporation cannot appear in court otherwise than by attorney (*q*), who ought, for his own security, to have a retainer under their common seal (*r*).

A lease to charitable uses by a corporation of lands already in mortmain was not affected by the repealed Mortmain Act, 9 Geo. 2, c. 36 (*s*). Where a corporation has by private act of parliament power to sell and exchange land, a power to lease the land and give the option of purchase to the lessee is implied (*t*).

Lease for Working Men's Dwellings.

By s. 74 of the Housing of the Working Classes Act, 1890, 53 & 54 Vict. c. 70, "any body corporate holding land may sell, exchange or lease the land for the purpose of the erection of dwellings for the working classes at such price, or for such consideration, or for such rent, as having regard to the said purpose, and to all the circumstances of the case, is the best that can reasonably be obtained, notwithstanding that a higher price consideration or rent might

(*k*) *R.* v. *Chipping-Norton*, 5 East, 239, 242; *Bird* v. *Higginson*, 6 A. & E. 284; *R.* v. *North Duffield*, 3 M. & S. 247; 1 Kyd on Corp. 263.

(*l*) *Ecclesiastical Commissioners* v. *Merral*, L. R., 4 Ex. 162; 38 L. J., Ex. 93; 30 L. T. 573; 17 W. R. 676.

(*m*) 1 Kyd on Corp. 234, 237; *Mayor, &c., of Carlisle* v. *Blamire*, 8 East, 487; 9 R. R. 422.

(*n*) 2 Inst. 666; Bac. Abr. tit. *Leases* (G. 3).

(*o*) *Doe* d. *Bank of England* v. *Chambers*, 4 A. & E. 410; 1 Kyd on Corp. 268.

(*p*) Bac. Abr. tit. *Corporations* (E. 3).

(*q*) 1 Kyd on Corp. 270.

(*r*) *Arnold* v. *The Mayor, &c., of Poole*, 4 M. & G. 860; 2 Dowl., N. S. 574, cited 5 Q. B. 546; *Lewis* v. *The Mayor, &c., of Rochester*, 9 C. B., N. S. 401. See form of retainer, Id. 408.

(*s*) *Walker* v. *Richardson*, 2 M. & W. 882; *Att.-Gen.* v. *Glyn*, 12 Sim. 84; *Ashton* v. *Jones*, 28 Beav. 460.

(*t*) *In re Female Orphan Asylum*, 15 W. R. 1056; 17 L. T. 59.

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have been obtained if the land were sold, exchanged, or leased for another purpose" (*u*).

Lease by Company under Companies Acts.

Companies incorporated by special act of parliament for the purpose of carrying on any undertaking, may demise lands by their directors or a committee of directors under the common seal of the company if the lease be for more than three years, and by writing or parol if it be for a less period, by virtue of the 97th section of the Companies Clauses Consolidated Act, 1845 (8 & 9 Vict. c. 16); and companies incorporated under the Companies Act, 1862 (25 & 26 Vict. c. 89), have similar powers under the 37th section of the Companies Act, 1867 (30 & 31 Vict. c. 131).

Lease by Railway Company under Railway Clauses Act.

A railway company may not lease their line except by virtue of some special act; and when such lease is authorised, it must, by virtue of the 112th section of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), contain all usual and proper covenants on the part of the lessee for maintaining the railway.

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## Sect. 13.—*By Borough, County, and Parish Councils.*

At Common Law.

At common law there was no restraint on *civil* corporations granting such leases as they pleased, consistently with their own estates, bye-laws and private statutes (*x*).

Under Municipal Corporations Acts. Leases for 31 Years without Fine.

By the Municipal Corporations Act, 1882, 45 & 46 Vict. c. 50, s. 108, as amended by s. 72 of the Local Government Act, 1888, 51 & 52 Vict. c. 41, and replacing, without material alteration, the repealed ss. 94—96 of the Municipal Corporations Act, 1835, 5 & 6 Will. 4, c. 76, municipal corporations cannot demise their lands, without the consent of the Local Government Board (*y*), for a longer term than thirty-one years, reserving during the whole term such clear yearly rent as to the council of the borough shall appear reasonable, without any fine; or in the case of a building lease, or of a lease of buildings as specified below, for a longer term than seventy-five years. When the council deem it expedient to lease for a longer term, or upon different terms and conditions to those above mentioned, they must obtain the approbation of the Local Government Board; and it seems to follow from a case arising upon a sale (*z*), that the approbation by the Local Government Board of all the terms of the lease, or at any rate of all the terms imposing a burden on the corporation, would be requisite to give validity to the lease.

Other Leases with approbation of Local Government Board.

Market Rights.

Where a cattle salesman, who occupied premises under a lease by a corporation, with a covenant for quiet enjoyment, which afterwards

(*u*) See also p. 20, post.

(*x*) *Smith* v. *Barrett*, 1 Sid. 161.

(*y*) Substituted for the Lords of the Treasury by s. 72 of the Local Government Act, 1888.

(*z*) *Davis* v. *Leicester Corporation*, [1894] 2 Ch. 208; 63 L. J., Ch. 440; 70 L. T. 599; 42 W. R. 610—C. A.

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established a market, was convicted for selling cattle for which no toll had been paid in his sale yard, which, however, was not within the limits of the market, it was held that he had not acquired any "right," within s. 166 of the Public Health Act, 1875, so as to be exempt from the penalty under s. 13 of the Markets and Fairs Clauses Act, 1847, for selling elsewhere than in the market (*a*).

Renewed Leases.

By sect. 110, replacing the repealed sect. 95 of the act of 1835, in certain specified cases, leases may be *renewed* by the council of the borough, for such term of years, either absolutely or determinable with any life or lives, or for such life or lives, and at such rent, and upon the payment of such fine, and with or without any covenant for future renewal, as might have been permissible in case that act had not passed.

Building Leases for 75 years.

This section is to be construed liberally; but although renewals need not be on precisely the same terms, there must be such an uniformity as to show that the same lease has been renewed. A renewal on a fine, and at an undervalue, with variations in the covenants, and a different rent reserved, is not valid (*b*).

By sect. 108, also replacing without material alteration the repealed sect. 96 of the act of 1835, the council of a borough may make a lease for not exceeding seventy-five years, and either at a reserved rent or on a fine or both, as the council think fit, (i.) of tenements or hereditaments, the greater part of the yearly value of which, at the date of the lease, consists of buildings; or (ii.) of land proper for the erection of any houses or other buildings thereupon, with or without gardens, &c.; or (iii.) where the lessee agrees to erect a building or buildings thereon of greater yearly value than the land, of land proper for gardens, &c., to be used with any other house or other building erected or to be erected on any such land, belonging either to the borough or to any other proprietor, or proper for any other purpose calculated to afford convenience or accommodation to the occupiers of any such house or building.

Building Leases.

Working Men's Dwellings.

By sect. 111, reproducing the Working Men's Dwellings Act, 1874, the council of a borough may make leases for 999 years, or for any shorter term, of corporate land converted by them into sites for working men's dwellings, with the approval of the Local Government Board, for the purpose of such dwellings being erected thereon by the lessee.

The adoptive Labouring Classes Lodging Houses Act, 1851 (14 & 15 Vict. c. 34), contained provisions (see s. 2), having a similar object; but that act was little, if at all, adopted. The Housing of

(*a*) *Spurling* v. *Bantoft*, [1891] 2 Q. B. 384; 60 L. J., Q. B. 745; 65 L. T. 584; 40 W. R. 157.

(*b*) *Att.-Gen.* v. *Great Yarmouth*, 21 Beav. 625.

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the Working Classes Act, 1885 (48 & 49 Vict. c. 72), enlarged (see s. 2) the scope of the Act of 1851, by allowing the erection of separate houses, in the event of that act being adopted, and the Housing of the Working Classes Act, 1890, 53 & 54 Vict. c. 70, by Part III. re-enacts the Acts of 1851 and 1885, with amendments, the most important of which is that Part III. of the Act, which is adoptive, may be adopted by any town council without any such previous notice to the ratepayers, as was previously required.

County Councils.

By sect. 165, sub-s. 3, of the Local Government Act, 1888, County Councils may, with the consent of the Local Government Board, "alienate" county lands.

Parish Councils.

A parish council may let any land or buildings vested in the council, but the power of letting for more than a year may not be exercised in the case of property acquired at the expense of any rate or was in 1894 applied in aid of any rate, or would but for want of income be so applied, without the consent of the Local Government Board, or in any other case (except where the letting is for allotments), without such consent and approval as is required under the Charitable Trusts Acts for the sale of charity estates (*c*).

Small Holdings.

As to letting of "small holdings," see sect. 19, *post*.

## Sect. 14.—*Ecclesiastical Leases.*

### (a) *The "Enabling" and "Disabling" Statutes.*

At Common Law.

By the common law, all ecclesiastical corporations *aggregate* might make any leases they thought fit, without the confirmation of any person, and so might eleemosynary corporations, as masters and fellows of colleges, masters of hospitals and their brethren (*d*). But ecclesiastical corporations *sole*, as archbishops, bishops, deans, prebendaries, parsons and vicars, and others, could not make leases *binding on their successors*, of lands and tenements whereof they were seised in their corporate right, except with the consent, and in some cases with the confirmation, of such persons as the law required (*e*).

The exercise of such powers having been much abused by owners to the prejudice of their successors, the legislature from time to time interfered and passed various *disabling* or *restraining* statutes (*f*). *Prior to certain acts, such as "The Ecclesiastical Leasing Act*, 1842," *all passed in the reign of Queen Victoria*, which will be presently

(*c*) Local Government Act, 1894, 56 & 57 Vict. c. 73, s. 8 (2).
(*d*) Co. Lit. 44 a.
(*e*) Co. Lit. 44 a, 67 a; Shep. Touch. 281; Woodf. L. & T. 20—23 (9th ed.).
(*f*) See Chit. Stat. tit. "Landlord and Tenant (Ecclesiastical, &c., Leases)."

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adverted to, no lease from any ecclesiastical corporation, aggregate or sole, could safely be made otherwise than in pursuance of some or one of these statutes, with such consent (if any) and subject to such restrictions, and containing such covenants and conditions as were prescribed by the act or acts pursuant to which the lease was made. The "disabling" statutes, however, although not repealed (*g*) are almost entirely superseded (*h*) by the statutes of Queen Victoria, and are now of consequence chiefly in relation to the vested interests created under them, as showing the course of legislation on the subject, and as explaining the phraseology of ecclesiastical leases.

The Enabling Act.

Leases for 21 Years or 3 Lives.

Parsons and Vicars excepted.

By 32 Hen. 8, c. 28 (commonly called the Enabling Act), all persons seised of lands in fee simple *in right of their churches* (*i*) (except parsons and vicars (*k*) ), may by indenture demise such parts thereof as have been most commonly letten to farm and occupied by the farmers thereof for twenty years next before such demise, for any term not exceeding twenty-one years or three lives, reserving yearly during the whole term the most accustomed rent or more; such lease not to be made without impeachment of waste, nor whilst there is any old lease, unless the same shall expire or be surrendered or ended within one year next after the making of the new lease.

No confirmation necessary.

It is to be observed that leases made in pursuance of this act do not require any confirmation whatever.

Who within Act.

Archbishops, bishops, and other ecclesiastical corporations *sole* (except parsons and vicars) may grant leases pursuant to the above act. A prebendary appears to be within the act (*l*) ; and so does the chancellor of a cathedral church (*m*), but not a perpetual curate, whose curacy has been augmented by a grant of lands under the Queen Anne's Bounty Acts; for either he is not seised in fee in right of his church, or he is a quasi-vicar (*n*). Corporations aggregate, such as deans and chapters, universities, colleges, &c., are not within the statute (*o*) ; nor are copyhold lands (*p*).

1 Eliz. c. 19, s. 5. The first Disabling Act.

By the Disabling or Restraining Act (1 Eliz. c. 19), s. 5, all leases *by any archbishop or bishop* of any parcel, &c., for more than twenty-one years or three lives, or whereupon the old accustomed yearly rent or more shall not be reserved and made payable yearly during the whole term, "shall be utterly void" (*q*).

(*g*) See *Jenkins* v. *Green*, 27 Beav. 440.

(*h*) See Phillimore's Ecclesiastical Law, vol. ii. p. 1647.

(*i*) This act is repealed by the Settled Land Act, 1856, s. 35, "except so far as relates to leases made by persons having an estate in right of their churches."

(*k*) Sect. 4.

(*l*) *Acton* v. *Pritcher*, 4 Leon, 51 ; *Watkinson* v. *Man*, Cro. Eliz. 349 ; but see Lit. ss. 644—648 ; *Doe* d. *Richardson* v. *Thomas*, 9 A. & E. 556.

(*m*) *Bisco* v. *Holte*, Lev. 112 ; Sid. 158 ; *Ensden* v. *Dennis*, Palm. 105.

(*n*) *Doe* d. *Richardson* v. *Thomas*, 9 A. & E. 556.

(*o*) 10 Co. R. 60 a.

(*p*) As to copyholds, see post, sect. 32.

(*q*) The exception in this act of leases to the crown was repealed by 1 Jac. 1, c. 3, which renders all such leases utterly void.

It is to be observed that only archbishops and bishops are restrained by this statute. But the act applies to all leases made by them, *although confirmed by the dean and chapter*, except leases made pursuant to 32 Hen. 8, c. 28 (*r*), which are not interfered with. Concurrent leases, if confirmed by the dean and chapter, are valid provided they do not exceed (together with the lease in being) the term permitted by the above act.

Only extends to Archbishops and Bishops.

By the Restraining Act (13 Eliz. c. 10), s. 3, all leases by any master and fellows of any college, dean and chapter of any cathedral or collegiate church, master or guardian of any hospital (*s*), parson, vicar or any other having any spiritual or ecclesiastical living of any parcel, &c., for more than twenty-one years or three lives, or not reserving the accustomed yearly rent or more, "shall be utterly void and of none effect to all intents, constructions, and purposes; any law custom or usage to the contrary notwithstanding"—words as strong as it is possible to make them. The act applies to eleemosynary corporations (*t*), such as a hospital for the reception of penitent prostitutes (*u*). Sect. 4 contains a saving of private statutes.

13 Eliz. c. 10, s. 3. Leases by Ecclesiastical and Eleemosynary Corporations, for 21 Years or 3 Lives.

This act does not enable parsons or vicars to make any leases whatever without the consent of the patron and ordinary (*x*). But it restrains them from making any lease, *even with such consent*, for more than twenty-one years or three lives, or without reserving the accustomed yearly rent or more. A lease by a vicar (with such consent) for three lives of uninclosed waste land not let before is void as against his successor, notwithstanding the lessee covenants to inclose the land and pay a rack-rent for it (*y*).

This Act does not enable, but only restrains.

Although this statute declares that all leases not made according to its provisions shall be utterly void, it has been frequently held that such leases are good during the life of the lessor (*z*); and even after the lessor's death they were for a long time held to be not void, but only voidable by the successor, who might confirm them (*a*); but the House of Lords has held that they are void (*b*). In this case both Jessel, M.R. (*c*), and the Court of Appeal (*d*) treated the lease as voidable, but Jessel, M.R., held that the Real Property Limitation Act, 1833, 3 & 4 Will. 4, c. 27, did not begin to run until

Lease contrary to 13 Eliz. c. 10, void.

(*r*) Ante, p. 22.

(*s*) Explained, as to hospitals, by 14 Eliz. c. 14; and see 39 Eliz. c. 5, s. 6; post, p. 25.

(*t*) *Attorney-General* v. *Glyn*, 12 Sim. 87.

(*u*) *Magdalen Hospital* v. *Knotts*, 4 App. Cas. 324; 48 L. J., Ch. 579.

(*x*) Bac. Abr. tit. *Leases* (I. G.).

(*y*) See *Goodtitle* d. *Clarges* v. *Funucan*, 2 Doug. 565; *Doe* d. *Tennyson* v. *Lord Yarborough*, 1 Bing. 24; 25 R. R. 575; *Bp. of Hereford* v. *Scory*, Cro. Eliz. 874.

(*z*) *Doe* d. *Bryan* v. *Bancks*, 4 B. & A. 407, Bayley, J.

(*a*) *Edwards* v. *Dick*, 4 B. & A. 217; *Doe* d. *Pennington* v. *Taniere*, 12 Q. B. 998; *Pennington* v. *Cardale*, 3 H. & N. 656, 666.

(*b*) *Magdalen Hospital* v. *Knotts*, 4 App. Cas. 324; 48 L. J., Ch. 579; and compare *Bishop of Bangor* v. *Parry*, [1891] 2 Q. B. 277, and p. 38, post.

(*c*) *Magdalen Hospital* v. *Knotts*, 46 L. J., Ch. 149; 5 Ch. D. 175.

(*d*) *Magdalen Hospital* v. *Knotts*, 8 Ch. D. 709.

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action brought for recovery of the property, whereas the Court of Appeal held that the statute began to run from the date of the lease. The House of Lords affirmed the Court of Appeal, but on the ground of the lease being void, intimating, however, that if rent, however small, had been paid, the legal relation of a tenancy from year to year would have been created, and the statute could not have run in a case where the governors of a hospital granted a lease in 1783 for ninety-nine years at a pepper-corn rent, and their successors brought an action to set the lease aside in 1876.

14 Eliz. c. 11. Houses and Grounds in Towns, &c.

By 14 Eliz. c. 11, s. 5, the Restraining Act, 13 Eliz. c. 10, does not extend to any lease of any houses of any colleges, deans and chapters, hospitals, or parsons, situated in any city, borough, town corporate or market town, or the suburbs of any of them; but all such houses and grounds may be granted, demised and assured as by the laws of the realm, and the several statutes of the said colleges, &c., they lawfully might have been before the making of the said statute, or lawfully might be if the said statute were not; so always that such house be not the capital or dwelling-house used for the habitation of the persons above said, nor have ground to the same belonging above the quantity of ten acres, anything in the said act to the contrary notwithstanding.

Not for more than 40 Years.

Sect. 17 provides, "That no lease shall be permitted to be made by force of this act, in reversion, nor without reversing the accustomed yearly rent at the least, nor without charging the lessee with the reparations (*e*), nor for longer term than *forty years* at the most."

Covenant to put in Lives

A covenant by the trustees of a charity to put in a new life so often as one of three lives drops, in the case of a lease for more than forty years will not be enforced (*f*). But a lease by a vicar of messuages in the city of London—of which the dwelling-house used for the habitation of the vicar formed no part, and the ground demised was less than ten acres—for twenty-one years from the date of the lease, made at a time when a former lease of the said premises for forty years was in being, but within three years of its expiration, was held not void under either of the restraining acts of *Elizabeth* (*g*).

18 Eliz. c. 11, s. 2. Concurrent Leases.

The 18 Eliz. c. 11, after reciting the 13 Eliz. c. 10, s. 3, enacts (s. 2), that all leases of any ecclesiastical, spiritual or collegiate

(*e*) *Crane* v. *Taylor*, Hob. 269.

(*f*) *Moore* v. *Clench*, 1 Ch. D. 447; 45 L. J., Ch. 80; 34 L. T. 13; 24 W. R. 169. Here the lease was in 1836 for 40 years and a month, with a concurrent term of 99 years for three lives, and a covenant during the 40 years and the month to add a life. In 1857 a new life was put in, but in 1872 the Charity Commissioners having vetoed the lease under 18 & 19 Vict. c. 124, s. 29, the governors refused to put in another life. Jessel, M.R., in refusing specific performance of the covenant to put in the life expressed an opinion that the Charity Commissioners could not have vetoed the renewal of the lease if it had been originally valid.

(*g*) *Vivian* v. *Blomberg*, 3 Bing. N. C. 311; 3 Scott, 681; 7 Sim. 548.

lands, tenements or hereditaments, whereof any former lease for years is in being, and not to be expired, surrendered or ended within three years next after the making of such new lease, shall be void, as well as all bonds and covenants for the renewal of the same. And by 43 Eliz. c. 9, s. 8, all payments had for the intent to have and enjoy any lease contrary to these statutes shall be void in the same manner as bonds and covenants are appointed to be.

39 Eliz. c. 5, s. 6. Leases by Hospitals, &c.

By 39 Eliz. c. 5, s. 6, all leases, grants, &c., made by any corporation founded in pursuance of that act as a hospital, mission de Dieu, abiding place or house of correction, exceeding twenty-one years in possession, or whereupon the accustomed yearly rent or more by the greater part of twenty years next before the making of such lease shall not be reserved and yearly payable, shall be void (*h*).

Ancient Offices not within the Statutes.

The grants of ancient offices belonging to ecclesiastical persons are not within any of these acts, and therefore stand as at common law (*i*). By the Ecclesiastical Leases Act, 1800, 39 & 40 Geo. 3, c. 41, where any part of the possessions of any archbishop, bishop, master and fellows, dean and chapter, master or guardian of any hospital, or any other person or persons, or body or bodies politic or corporate, *having any ecclesiastical living*, shall be demised by several leases which was formerly demised by one lease under one rent; or where a part shall be demised for less than the ancient rent, and the residue shall be retained in the possession of the lessor; the several rents reserved on the separate demises of the specific parts shall be taken to be the ancient rents within the meaning of the statutes 32 Hen. 8, c. 28; 1 Eliz. c. 19; 13 Eliz. c. 10; and 14 Eliz. c. 11: and are to be equitably apportioned in manner therein provided (*k*).

Ancient Rents may be Apportioned.

Land-Tax redeemed by a Bishop.

By the Land-Tax Redemption Act (42 Geo. 3, c. 116), ss. 69, 83, 88, the land-tax, when redeemed by any bishop, shall be considered as yearly rent, and shall be reserved in all demises. A lease by a bishop in which such land-tax is not expressly reserved as rent is voidable by the successor (*l*).

Renewed Leases.

The Ecclesiastical Leases Act, 1836, 6 & 7 Will. 4, c. 20, contains various restrictions on leases by way of renewal by spiritual persons or any master or guardian of any hospital.

Previous Lease to be recited.

By sect. 2, the new lease must contain a recital or statement of the previous lease, &c.; but by 6 & 7 Will. 4, c. 64, no such renewed lease shall be void "by reason only of its not containing such recital or statement."

Short renewal.

By sect. 3, where it has been the usual practice to renew leases for forty, thirty or twenty-one years respectively at shorter periods than

(*h*) And see 13 Eliz. c. 10, s. 3, ante, p. 23, explained by 14 Eliz. c. 14.

(*i*) *Bp. of Salisbury's case*, 10 Co. R. 61 a.

(*k*) Sect. 2 *et seq.*

(*l*) *Doe* d. *Murray* v. *Bridges*, 1 B. & A. 847. As to the sale of land for the redemption of land-tax, see *Warner* v. *Potchett*, 3 B. & Ad. 921.

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fourteen, ten or seven years respectively, and that practice is certified as in this section provided, such leases may be renewed at shorter intervals, according to the practice so certified.

Under Special Acts.

Sect. 6 provides, that nothing in this act contained shall prevent any grants or renewal of leases which may have been authorized by acts of parliament specially relating to the particular estates demised by such leases (*m*).

By way of confirmation only.

By sect. 7, renewed leases, by way of confirmation only for the same life or term, may be granted.

By sect. 8, no lease not authorized by the laws and statutes now in force "shall be rendered valid by anything in this act contained."

By sect. 9, leases "contrary to this act shall be void;" but this was qualified as to sect. 2 by 6 & 7 Will. 4, c. 64, as before mentioned.

(b) *The Acts of Queen Victoria.*

Lease of Parsonage to contain Condition for avoiding it.

By the Pluralities Act, 1838, 1 & 2 Vict. c. 106, s. 59, "any agreement made for the letting of the house of residence, or the building, gardens, orchards, or appurtenances necessary for the convenient occupation of the same, belonging to any benefice, to which house of residence any spiritual person may be required, by order of the bishop as aforesaid, to proceed and to reside therein, or which may be assigned or appointed as a residence to any curate by the bishop, shall be made in writing, and *shall contain a condition for avoiding the same*, upon a copy of such order, assignment or appointment being served upon the occupier thereof or left at the house, and otherwise shall be null and void." And a summary remedy is provided for enforcing such condition.

Incumbents may grant Leases for 14 Years with Consent of Bishop and Patron.

By the Ecclesiastical Leases Act, 1842, 5 & 6 Vict. c. 27, which applies to farming leases, incumbents of ecclesiastical benefices (*n*) may, *with the consent of the bishop and patron*, lease lands belonging to their benefices, except the parsonage house and offices and ten acres of glebe situate most convenient to be occupied therewith, for any term *not exceeding fourteen years*, subject to the restrictions and conditions imposed upon them by the said act for the benefit and protection of their successors. But it is provided that "the term to be granted by any such lease as aforesaid may be *twenty years* in any case where the lessee shall covenant thereby to adopt and use any mode or system of cultivation more expensive than the usual course, or to drain or subdivide, or embank and warp at his expense any part of the demised premises, or to erect, at his own expense,

In certain cases the Leases may be for 20 Years.

(*m*) See 18 Eliz. c. 11, ante, p. 24.

(*n*) By s. 15, "the word 'benefice' shall be construed to comprehend every rectory, vicarage, perpetual curacy, donative, endowed public chapel, parochial chapelry and district chapelry; the incumbent of which in right thereof shall be a corporation sole."

on the said premises any buildings, or to repair in a more expensive manner and at a greater expense than is usually required of lessees of farms any buildings on the demised premises, or in any other manner to improve at his expense the demised premises or any part thereof" (*o*). No lease granted under this act can be surrendered without the consent of the bishop and patron (*p*). The act itself must be referred to for details. At common law a lease granted by the incumbent of a benefice, in whatever terms it was framed, operated as a demise so long only as he continued incumbent, for he could not pass a greater interest (*q*).

Effect of Consents as Evidence.

By sect. 4, the execution by the bishop and patron whose consents are made requisite is conclusive evidence that the lease does not comprise any lands which ought not to be leased under the provisions of the act, that a proper portion of the glebe lands remains unleased, that the rent reserved is the best and most improved rent that could be reasonably gotten, and that all the covenants contained in such lease are proper covenants.

Validity of irregular Lease.

In consequence of sect. 4, a lease which is executed by the patron and ordinary as well as the incumbent may be valid in favour of the lessee, although it does not strictly comply with all the requisitions of the statute: for instance, where it reserves the rent half-yearly instead of quarterly (*r*). *Quod fieri non debet factum valet.*

The Act does not repeal 13 Eliz. c. 10.

The above act does not repeal 13 Eliz. c. 10: and therefore a rector, with the consent of the patron and bishop, may demise his glebe under the powers of the common law, subject to the provisions of the statute of Elizabeth, though the lease may not be conformable to the restrictions imposed by the statute of Victoria (*s*).

Tenancies from Year to Year.

Parsons and other corporations sole could not at common law bind their successors even by tenancies from year to year, nor under any of the Ecclesiastical Leasing Acts can they bind their successors by such tenancies without having obtained the consents in those acts mentioned. Such tenancies, however, where the subject-matter is "farm or lands," if created without such consents, do not determine ipso facto by the death of the parson, but continue to the end of the current year of the tenancy by virtue of the Landlord and Tenant Act, 1851, 14 & 15 Vict. c. 25, s. 1 (post, Appendix), under which statute also the tenant "shall then quit." The successor is entitled to a fair proportion of the rent for the period which may have elapsed from the day of the death of the predecessor to the

(*o*) Sect. 1.

(*p*) Sect. 5.

(*q*) *Wheeler* v. *Heydon*, Cro. Jac. 328; *Price* v. *Williams*, 1 M. & W. 6; *Doe* d. *Kerby* v. *Carter*, Ry. & Moo. 237; *Doe* d. *Tennyson* v. *Lord Yarborough*, 1 Bing. 24; 25 R. R. 575.

(*r*) *Jenkins* v. *Green*, 27 Beav. 440; but the Ecclesiastical Leases Acts, 1861 and 1862, 24 & 25 Vict. c. 105, and 25 & 26 Vict. c. 52, post, seem, to a great extent, to get rid of the effect of this decision.

(*s*) *Jenkins* v. *Green*, 28 Beav. 87

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end of such current year, and no notice to quit is necessary or required by or from either party to determine the tenancy.

If, however, the subject-matter of the tenancy be merely a dwelling-house, the above statute does not apply, and the tenancy if made without the required consents determines ipso facto by the death of the parson.

Ecclesiastical Leasing Act, 1842.

By "The Ecclesiastical Leasing Act, 1842" (*t*), as amended by "The Ecclesiastical Leasing Act, 1858" (*u*), any ecclesiastical corporation, aggregate or sole, except any college (*x*) or corporation of vicars choral, priest vicars, senior vicars, custos and vicars or minor canons, and except also any ecclesiastical hospital, or the master thereof, may, *with the consent of the Ecclesiastical Commissioners for England*, and with such further consents as in the said acts mentioned, grant building and repairing leases for any term not exceeding ninety-nine years: also leases of running water and way-leaves, and other rights and easements, for any term not exceeding sixty years: also mining leases, for any term not exceeding sixty years: all of which leases must be made subject to certain restrictions and conditions for the protection and benefit of their successors. The acts must be referred to for details, but it may be mentioned here that sect. 1 of the act of 1842 expressly authorizes a lease "with or without a proviso that no breach of covenant (except the covenant for payment of rent and other such covenants, if any, as may be agreed between the parties to be so excepted) *shall occasion any forfeiture* unless judgment shall have been obtained in an action for such breach of covenant, nor unless the damages and costs to be recovered in such action shall have remained unpaid for the space of three calendar months after judgment shall have been obtained in such action." The execution of any such lease by the necessary consenting parties is to be conclusive evidence that the requisites of the above acts have been complied with. Under sect. 30 of the first-mentioned act they were prohibited from taking any premium, fine or foregift; but that was repealed by 21 & 22 Vict. c. 57, ss. 1, 2.

Ecclesiastical Commissioners.

Proviso for Re-entry.

A Premium or Fine may be taken.

By sect. 8 of the first-mentioned act, previous powers of leasing are not interfered with.

Ecclesiastical Leasing Act, 1858.

By "The Ecclesiastical Leasing Act, 1858" (21 & 22 Vict. c. 57), s. 1, where it is made to appear to the Ecclesiastical Commissioners that all or any part of the lands, houses, mines, minerals or other property of any ecclesiastical corporation which are by the act of

(*t*) 5 & 6 Vict. c. 108.

(*u*) 21 & 22 Vict. c. 57. The Leases Act, 1849, 12 & 13 Vict. c. 26, for granting relief against defects in leases under powers, does not (see sect. 7) apply to ecclesiastical leases, or to leases of the possessions of any college, hospital, or charitable foundation.

(*x*) As to leases by colleges, see post, Sect. 15.

1842 authorized to be leased, might to the permanent advantage of the estate or endowments of such corporation be *leased in any manner*, any ecclesiastical corporation, aggregate or sole, *except as in the said act is excepted*, may, with such consents as in the said recited act mentioned, and *with the approval of the said commissioners*, lease all or any part or parts of the lands, houses, mines, minerals or other property, *either in consideration or partly in consideration of premiums or not*, or for such other considerations, and for such terms, and subject to such covenants, &c., &c., on the part of the lessee as the Commissioners should think proper.

Mines. *Ecclesiastical Commissioners v. Wodehouse.*

The effect of these acts and of ecclesiastical law generally on the working of mines under the glebe by a tenant of a rector was fully considered by Romer, J., in *Ecclesiastical Commissioners* v. *Wodehouse* (*y*), in which an agreement by the defendant to grant a lease of gypsum at a dead rent of 100*l.* a year and royalties was held void, and the defendant's tenant restrained from working, on the ground that the sanction of the plaintiffs had not been obtained.

14 & 15 Vict. c. 104, &c. Episcopal and Capitular Estates Act.

By the Episcopal and Capitular Estates Act, 1851, 14 & 15 Vict. c. 104 (*z*), the ecclesiastical corporations, sole or aggregate, with the approval in writing of the Church Estate Commissioners, may sell, enfranchise or exchange their church lands, or purchase the interest of their lessees. And by sect. 9 no lease of any lands purchased or acquired, or in which the estate or interest of a lessee is purchased or acquired, by any ecclesiastical corporation under the act, may except as thereinafter provided, be granted otherwise than from year to year, or for a term *not exceeding fourteen years*, at the best annual rent that can be reasonably gotten, without fine, the lessee not to be exempted from liability in respect of waste: the corporations however having power, with the approval of the Church Estate Commissioners, to grant mining or building leases, as therein mentioned (*a*).

23 & 24 Vict. c. 124, s. 8. Leases by Bishops.

By the Ecclesiastical Commissioners Act, 1860, 23 & 24 Vict. c. 124, s. 8, no lands assigned or secured as the *endowment of any see under this act* may be granted by the archbishop or bishop otherwise than from year to year, or for a term *not exceeding twenty-one years*, at the best annual rent that can be reasonably gotten, without fine, the lessee not to be exempted from liability in respect of waste; and the like covenants, &c., to be entered into, with or for the benefit of the archbishop or bishop and his successors, as under sect. 1 of the Ecclesiastical Leases Act, 1842, 5 & 6 Vict. c. 27, are to be

(*y*) *Ecclesiastical Commissioners* v. *Wodehouse*, [1895] 1 Ch. 552; 64 L. J., Ch. 329; 72 L. T. 257: 43 W. R. 395; 13 R. 372.

(*z*) A temporary act, amended by 17 & 18 Vict. c. 116; 22 & 23 Vict. c. 46; 23 & 24 Vict. c. 124; 31 & 32 Vict. c. 114, s. 10; and continued by numerous Expiring Laws Continuance Acts; and lastly by the Expiring Laws Continuance Act, 1897 (60 & 61 Vict. c. 54), until the 31st December, 1898.

(*a*) See also the Ecclesiastical Leasing Acts, 1842, 1858, ante, p. 28.

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entered into, for the benefit of the incumbent and his successors, or as near thereto as the circumstances of the case will permit. Mining and building leases are also authorized by the same section with the approval of the Church Estate Commissioners.

By sect. 9, the estates committee may inspect repairs and give notice of dilapidations; and by sect. 11, may, on request, manage and demise lands for an archbishop or bishop.

By sect. 31, rights of renewal and other obligations under special acts, &c., preserved, notwithstanding anything done under sect. 10.

24 & 25 Vict. c. 105. Leases of Copyholds by Incumbents.

By the Ecclesiastical Leases Act, 1851, 24 & 25 Vict. c. 105, "to Prevent the Future Grant by Copy of Court Roll and certain Leases of Lands and Hereditaments in England belonging to Ecclesiastical Benefices" (*b*), after reciting "that there are in England certain ecclesiastical benefices to which belong manors, lands, tenements and hereditaments, which by custom or otherwise, the rectors, vicars, perpetual curates or incumbents thereof have power to grant and lease out for lives and long terms of years, and such grants have been made by them at nominal annual rents to the prejudice of their successors, and it is expedient to determine and put an end to the power to make such grants;" it is enacted as follows:—

Fines prohibited.

By sect. 1, "it shall not be lawful for any prebendary of any prebend, not being a prebend of any cathedral or collegiate church, rector, vicar, perpetual curate or incumbent, *who after the passing of this act may become possessed* of or entitled to any manors, lands, tenements or hereditaments belonging to any ecclesiastical benefice in England to make any grant by copy of court roll or lease of any such manors, lands, tenements, or hereditaments in consideration of any fine, premium or foregift, but the same may, by any rector, vicar, perpetual curate or incumbent appointed after the passing of this act, be *leased*, sold, exchanged, or enfranchised, or disposed of under the provisions of" the Ecclesiastical Leases Act, 1842, the Ecclesiastical Leasing Act, 1842, 5 & 6 Vict. c. 27; 5 & 6 Vict. c. 108; and 21 & 22 Vict. c. 57, or such of the provisions of such acts respectively as are now in force.

By sect. 2, rights of incumbents and others at the time of the passing of the act are preserved.

Powers to Incumbents.

By sect. 3, notwithstanding anything contained in the 11th section of the Episcopal and Capitular Estates Act, 1851, 14 & 15 Vict. c. 104, any rector, vicar, perpetual curate or incumbent shall have such and the same powers of sale, exchange and enfranchisement as are possessed by any ecclesiastical corporation, sole or aggregate,

(*b*) Amended by the Ecclesiastical Leases Act, 1862, 25 & 26 Vict. c. 52, post, p. 31. None of the previous Disabling or Restraining Acts extended to copyholds except the Ecclesiastical Leases Act, 1842, 5 & 6 Vict. c. 27.

under any act now in force ; and the provisions of the Ecclesiastical Commissioners Act, 1860, 23 & 24 Vict. c. 124, shall, so far as the same relate to powers for the raising or application of money by trustees, allowances to lessees, arbitration, valuation, rate of interest, apportionment of rent and substitution of titles on exchange, be applied, mutatis mutandis, to sales, exchanges or enfranchisements of any manors, lands, tenements or hereditaments in this act comprised; but the proceeds of any such sales or enfranchisements and any moneys received by way of equality of exchange, shall be applied according to the provisions in that behalf contained in the said Ecclesiastical Leasing Act, 1842, 5 & 6 Vict. c. 108, and in the said act 21 & 22 Vict. c. 57.

25 & 26 Vict. c. 52.

By 25 & 26 Vict. c. 52, the prohibition to make any grant by copy of court roll or lease contained in 24 & 25 Vict. c. 105, s. 1, shall not only extend to grants made in consideration of any fine, premium, or foregift; but shall also extend to all grants and leases made for a longer term or in any other way than according to the provisions of the several statutes mentioned in sects. 1, 3 of that act.

31 & 32 Vict. c. 114, s. 9. Leases by Deans and Chapters when re-endowed.

By the Ecclesiastical Commission Act, 1868, 31 & 32 Vict. c. 114, s. 9, none of the deans and chapters mentioned in the schedule to 31 & 32 Vict. c. 19 [including *York, Carlisle, Peterborough, Chester, Gloucester, St. Asaph, Worcester, Chichester, Winchester, Salisbury, Bristol, Canterbury, Exeter, Wells, Rochester, St. David's, Llandaff, and Windsor,*] *and no dean and chapter after making of any order in council respecting them,* in pursuance of this act, shall demise any land vested in them, otherwise than from year to year, or for a term of years in possession not exceeding twenty-one, at the best annual rent that can be reasonably got without fine ; and shall not make the lessee dispunishable for or exempt from liability in respect of waste ; and in every such lease such or the like covenants, conditions and reservations shall be entered into, reserved or contained with or for the benefit of the dean and chapter and their successors, as under sect. 1 of the Ecclesiastical Leases Act, 1842, 5 & 6 Vict. c. 27, are to be entered into, reserved or contained with or for the benefit of the lessor and his successors in a lease granted under that section, or as near thereto as the circumstances admit (*c*).

(*c*) This enactment was intended to put an end to the custom which had long prevailed of renewals of leases by deans and chapters at the end of each seven years, or on the dropping of each life, upon payment of a large fine, which was immediately divided between the members for the time being.

CH. I. SEC. 15. *Leases by Universities and Colleges.*

## SECT. 15.—*By Universities and Colleges.*

They are *Civil* Corporations.

The Universities of Oxford and Cambridge are regarded as civil corporations (*d*) ; so also are the universities of Durham and London; and the several colleges in all such universities.

Powers of Leasing at Common Law.

Like other corporations aggregate, they had at common law power to make such leases of their lands as they thought fit under their common seal, without the consent or confirmation of any other person (*e*), provided such leases were in conformity with their own private statutes, charters and bye-laws. But as such power was often much abused by the members for the time being, to the impoverishment of their successors, they have been restrained by divers statutes from leasing their lands, *and especially their church property*, except for limited terms and subject to certain covenants and conditions intended for the protection and benefit of their successors.

Restraining or Disabling Acts.

Corn Rents under 18 Eliz. c. 6.

Thus it was provided by 18 Eliz. c. 6, that one-third of the rent then paid should be reserved in wheat or malt, as to which statute and reservation, see post, Ch. X. sect. 2 (a).

Oxford, Cambridge, Durham, Eton and Winchester.

Now by the Universities and College Estates Act, 1858 and 1860 (*f*), the universities of *Oxford*, *Cambridge*, and *Durham* and the colleges in those universities respectively (including Christ Church, Oxford), and also the colleges at *Winchester* and *Eton*, have extensive powers (without the consent or control of the Copyhold Commissioners or of the Church Estates Commissioners, or of any other person or persons whomsoever), to grant leases for any term *not exceeding twenty-one years*, subject to certain restrictions and conditions for the protection and benefit of their successors ; also to grant building and repairing leases for ninety-nine years, and to enter into previous contracts for any such leases ; also to lease running water and way-leaves, and other rights and easements for sixty years ; also to grant mining leases for sixty years, and various other powers.

Proviso for Re-entry.

The acts must be referred to for details (*g*), but it may be mentioned here that the Act of 1858 authorises leases containing a proviso against forfeiture without prior action for damages similar to that allowed by the Ecclesiastical Leasing Act, 1842, previously referred to.

Previous Powers not affected.

By sect. 30 of the first-mentioned act, "nothing in this act contained shall restrain the said universities or colleges respectively from exercising any powers of sale, enfranchisement, exchange, purchase or borrowing moneys, *or from granting any leases*, or making any grants, whether by way of renewal or otherwise, which the said universities,

(*d*) *Parkinson's case*, Carth. 93 ; *R.* v. *V.-C. of Cambridge*, 3 Burr. 1656.
(*e*) Co. Lit. 44 a.
(*f*) 21 & 22 Vict. c. 44; 23 & 24 Vict. c. 59.
(*g*) See Chit. Stat. tit. "Lease" (*Ecclesiastical*, *College*, and *Hospital*).

or any such college as aforesaid, might have exercised or granted under the provisions of any public or private act of parliament, or under any other authority, or in any other manner whatsoever in case this act had not been passed" (*h*).

Lands once leased at Rack-rent not thereafter to be leased upon Fines.

By the Universities and College Estates Act, 1860, 23 & 24 Vict. c. 59, s. 3, "where any lands belonging to any such university or college as aforesaid shall at any time have been leased at the best and most improved yearly rent, without fine, no fine, premium or foregift, or anything in the nature thereof, shall hereafter be taken by any such university or college for the grant or renewal of any lease of the same lands." The above universities and colleges have also powers to raise moneys for certain purposes, *with the consent of the Board of Agriculture*, the successors by virtue of the Board of Agriculture Act, 1889, of the *Copyhold Commissioners*, by way of mortgage for a term of years determinable, &c. (*i*).

Mortgagees by Demise.

## Sect. 16.—*By Parish Officers.*

59 Geo. 3, c. 12. Leases of small Pieces of Parish Land.

The Poor Relief Act, 1819, 59 Geo. 3, c. 12, s. 13, provides "that for the promotion of industry amongst the poor, it shall be lawful for the churchwardens and overseers of the poor of any parish *with the consent of the inhabitants in vestry assembled* (*k*), to let any portion or portions of such parish lands as aforesaid, or of the land to be so purchased or taken on account of the parish (*l*), to any poor and industrious inhabitant of the parish, to be by him or her occupied and cultivated on his or her own account, and for his or her own benefit, and at such reasonable rent and for such terms as shall by the inhabitants in vestry be fixed and determined."

Previous Law.

Before this act a person, who held under a lease granted by parish officers, was only a tenant from year to year (*m*).

Leases under the above Act, how made.

In the making of leases under this act, the terms of it must be strictly observed; therefore a memorandum not signed by all the parish officers, or by their order, is not a lease pursuant to the statute (*n*); not only the churchwardens, but also the overseers, must

(*h*) See 18 Eliz. c. 11, ss. 5, 6, ante, sect. 14 (*b*). Under 19 & 20 Vict. c. 88, s. 48, any college at Cambridge or Eton may, with the consent of the Church Estates Commissioners, sell or exchange any lands or hereditaments vested in such college. So, under 19 & 20 Vict. c. 95, the university of Oxford, and the colleges in the said university, and Winchester College, may, with the like consent, sell or exchange lands, &c.

(*i*) 21 & 22 Vict. c. 44, ss. 27, 28; 23 & 24 Vict. c. 59, s. 1.

(*k*) The consent of the Local Government Board does not appear to be necessary. See the concluding proviso in the Poor Law Amendment Act, 1834, 4 & 5 Will. 4, c. 76, s. 21.

(*l*) As mentioned in sect. 12, not exceeding twenty acres.

(*m*) *Doe* d. *Higgs* v. *Terry*, 4 A. & E. 274; *Doe* d. *Hobbs* v. *Cockell*, Id. 478.

(*n*) *Doe* d. *Landsell* v. *Gower*, 17 Q. B. 589; 21 L. J., Q. B. 57.

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join in the lease (*o*). An invalid lease made by some of the parish officers, coupled with possession thereunder, will determine a previous tenancy at will, and enable the new lessee to maintain trespass (*p*).

Copyholds.

The above enactment does not apply to copyhold land (*q*).

Cottage Allotments.

Where, in parishes inclosed under acts of parliament, allotments are made for the benefit of the poor, it is provided by the Allotments Act, 1832, 2 & 3 Will. 4, c. 42, and the Inclosure Act, 1845, 8 & 9 Vict. c. 118, s. 109, as amended by the Poor Allotment Management Act, 1873 (36 & 37 Vict. c. 19), that a committee appointed by the allotment trustees and parish officers, or by the "allotment wardens," as the case may be, may let the allotments to "industrious cottagers" or "poor inhabitants of the parish," as the case may be. A year's rent may be required to be paid in advance. It was provided by the Allotments Act, 1832, 2 & 3 Will. 4, c. 42, that no allotment should be made of less than one quarter of an acre, but this provision is repealed by the 10th section of the act of 1873 above referred to (*r*). The Allotments Extension Act, 1882 (45 & 46 Vict. c. 80), imposes further obligations upon the trustees to let the land in allotments (*s*).

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### SECT. 17.—*By Trustees of Settled Estates.*

The extensive powers of leasing conferred by the Settled Land Act, 1882, upon tenants for life [ante, sect. 4], have rendered almost unnecessary any resort to the court by trustees under sect. 4 of the Settled Estates Act, 1877; but as that enactment is not repealed, it is apprehended that resort may still be had to it in particular cases, and it may also be sometimes necessary to consider its provisions in connection with leases prior to 1883.

Order of Court under Settled Estates Act.

Sect. 4 of the Settled Estates Act, 1877 (*t*), provides that, "it shall be lawful for the court" (*i.e.*, the Chancery Division of the High Court), "if it shall deem it proper and consistent with a due regard for the interest of all parties entitled under the settlement (*u*), and subject to the provisions and restrictions in that act contained, to authorize leases of any settled estates (*u*): or of any rights or

(*o*) *Woodcock* v. *Gibson*, 4 B. & C. 462; *Phillips* v. *Pearce*, 5 B. & C. 433; *Doe* d. *Jackson* v. *Hiley*, 10 B. & C. 885; *Allason* v. *Stark*, 9 A. & E. 255; *Att.-Gen.* v. *Lewin*, 8 Sim. 366; *Rumball* v. *Munt*, 8 Q. B. 382; *St. Nicholas, Deptford* v. *Sketchley*, Id. 394.

(*p*) *Wallis* v. *Delmar*, 29 L. J., Ex. 276.

(*q*) *Doe* d. *Bailey* v. *Foster*, 3 C. B. 215.

(*r*) See further as to these acts and the power to recover the demised premises by proceedings before justices, Chap. XXII., Sect. 4 (c), post.

(*s*) See post, Sect. 18, and for the more important "Allotments Act, 1887," by which *sanitary authorities* may acquire land for allotments, see post, Sect. 19.

(*t*) 40 & 41 Vict. c. 18. This act consolidates the original Settled Estates Act, 1856 (19 & 20 Vict. c. 120), with four amending acts, all being repealed by the schedule.

(*u*) The words "settlement" and "settled estates" are defined by sect. 2.

privileges over or affecting any settled estates, for any purpose whatsoever, whether involving waste or not," provided five specified conditions be observed, viz. :—

Five Conditions.

1. The lease must take effect in possession at or within one year next after the making thereof, and be for a term of years not exceeding for an agricultural or occupation lease, twenty-one years; for a mining lease, or a lease of water-mills, wayleaves, waterleaves or other rights or easements, forty years; for a repairing lease, sixty years (*x*); and for a building lease, ninety-nine years: but, except in the case of agricultural leases, where the court shall be satisfied that it is the usual custom in the district and beneficial to the inheritance to grant leases for longer terms, then for such term as the court shall direct (*y*). 2. The best rent must be reserved that can be reasonably obtained, to be made payable half-yearly or oftener, without taking any fine or other benefit in the nature of a fine. 3. If the lease be of minerals, &c., a certain portion of the rent must be set aside and invested. 4. The felling of trees, except so far as is necessary, must not be authorized. 5. "Every such lease shall be by deed, and the lessee shall execute a counterpart thereof, and every such lease shall contain a condition for re-entry on non-payment of the rent for a period of twenty-eight days after it becomes due, or for some less period to be specified in that behalf" (*z*).

Proviso for Re-entry.

With reference to the second condition, that "the best rent shall be reserved," the same 4th section provides, that "in the case of a mining lease, a repairing lease, or a building lease, a peppercorn rent, or any smaller rent than the rent to be ultimately made payable, may, if the court think fit so to direct, be made payable during all or any part of the first five years of the term of the lease" (*a*).

Peppercorn Rent.

The 5th section provides, that, "subject and in addition to the conditions hereinbefore mentioned, every such lease shall contain such covenants, conditions and stipulations as the court shall deem expedient with reference to the special circumstances of the demise."

Special Covenants.

The court cannot authorize a lease under this act, if any one of the parties interested under the settlement opposes the application (*b*). Leases granted by trustees under the provisions of this act must be settled in judge's chambers (*c*). If an act of parliament be necessary, the court will make a declaratory decree that it is proper that an application should be made to parliament to extend the leasing powers (*d*).

(*x*) Taken from 21 & 22 Vict. c. 77, s. 2.
(*y*) Taken from 21 & 22 Vict. c. 77, s. 4.
(*z*) Note, that the condition for re-entry does not apply to breaches of covenant generally. See Chap. IV., sect. 7, post.
(*a*) Suggested apparently by *Cust* v. *Middleton*, 3 De G. F. & J. 33.
(*b*) *In re Merry*, 36 L. J., Ch. 168; 15 W. R. 307.
(*c*) *In re Proctor*, 26 L. J., Ch. 464.
(*d*) *Savil* v. *Bruce*, 29 Beav. 557.

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*Leases by Trustees of Settled Estates.*

We have already seen (*ante*, p. 8) that the principal mansion-house, &c. on a settled estate cannot be let without the consent of the trustees of the settlement, or an order of the court.

Lease of Mansion House, &c.

Leases under Powers in Settlements.

Where any settlement made by deed, will, or otherwise, before or after the passing of the Settled Estates Act, 1856, contains powers to the trustees for the time being (with the consent of the tenant for life) to grant leases, such leases may be granted in accordance with such powers, the powers granted by the Settled Land Act, 1882, being cumulative. The provisions of that act, however, prevail in case of conflict with the provisions of the settlement, so that the consent of the tenant for life is in every case necessary (*e*).

Where lands are devised to trustees in fee upon trusts or with powers which, in their execution, require the exercise of judgment and discretion, such as granting leases, and the trustees disclaim, so that the estate in fee descends to the testator's heir-at-law, such powers or trusts cannot be exercised or carried into execution by the heir, although he holds the estate subject to the trusts of the will (*f*). Where the heir of a surviving trustee is the proper party to demise, a lease granted by the executors of such trustee is void, and not cured by the Leases Act, 1849, 12 & 13 Vict. c. 26 (*g*).

Effect of Leases under Powers.

When an appointment by way of demise is made in pursuance of a power of leasing contained in a settlement, it will take effect in preference and priority to any long term of years limited in the settlement for providing any jointure or portions for younger children or the like. The leasing power is considered as controlling and superseding such term, until it is called into action, after which the leasing power will be put an end to (*h*). The person entitled under the settlement, whose estate is displaced or superseded *pro tanto* by any such lease, is considered as the immediate reversioner upon such lease, and may sue for any breach of covenant therein contained (*i*), and may sue or distrain for the rent thereby reserved (*k*).

Leases by Trustees not in pursuance of Settled Estates Act nor of a Power.

Before the Settled Estates Act, 1856 (19 & 20 Vict. c. 120), a trustee having the legal estate in lands might have made leases which would have been valid, provided they were justified by the quantity of his estate although no express power of leasing was vested in him by the settlement. But a party taking a lease from a trustee, with notice of the trust, and without the concurrence of the cestui que trust, was subject to the control of equity (*l*). There was no general

(*e*) Settled Land Act, 1882, s. 56.

(*f*) *Robson* v. *Flight*, 34 L. J., Ch. 226; 13 W. R. 393.

(*g*) *Ex parte Cooper*, *re North London R. Co.*, 34 L. J., Ch. 373.

(*h*) *Doe* d. *Courtail* v. *Thomas*, 9 B. & C. 288, 293; *Doe* d. *Rogers* v. *Rogers*, 5 B. & Ad. 764; *Rogers* v. *Humphreys*, 4 A. & E. 299; *Maundrell* v. *Maundrell*, 10 Ves. 246; 2 Chance on Powers, sect. 1410; *Carpenter* v. *Parker*, 3 C. B., N. S. 231.

(*i*) *Isherwood* v. *Oldknow*, 3 M. & S. 382.

(*k*) *Rogers* v. *Humphreys*, 4 A. & E. 299.

(*l*) Platt on Leases, 345.

*Leases by Trustees of Settled Estates.*

rule as to what leases might be granted by trustees, but they were authorized to do what was reasonable in each particular case (*m*). No lease could be safely taken from them without the concurrence of the cestui que trust, or the sanction of the Court of Chancery (*n*).

Trustees need not be Parties under Act of 1882.

Where a lease is granted under the Settled Land Act, 1882, by the tenant for life, it is neither necessary nor desirable that the trustees should be made formal parties thereto.

Lease by Trustees for Infant.

If an infant is tenant for life, the trustees of the settlement may act for him (*o*).

## Sect. 18.—*By Trustees of Charities.*

Charitable Trusts Acts.

The estates of charities are subject to the provisions of "The Charitable Trusts Act, 1853" (16 & 17 Vict. c. 137), as amended by the Charitable Trusts Acts of 1855, 1860, and 1869, 18 & 19 Vict. c. 124, 23 & 24 Vict. c. 136, and 32 & 33 Vict. c. 110.

Leases, &c., authorized by Charity Commissioners.

By the Charitable Trusts Act, 1853, 16 & 17 Vict. c. 137, s. 26, leases authorized by any two of the Charity Commissioners sitting as a board under the powers of that act have the like effect as if they had been authorized by the express terms of the trust affecting the charity.

18 & 19 Vict. c. 124, s. 15. Official Trustees of Charity Lands constituted.

By the Charitable Trusts Act, 1855, 18 & 19 Vict. c. 124, s. 15, the secretary of the board is a corporation sole, by the name of "The Official Trustee of Charity Lands," for taking and holding charity lands and by that name (instead of the name of "Treasurer of Public Charities") has perpetual succession; and all lands vested in the "Treasurer of Public Charities" by that name became vested in like manner and upon the same trusts in "The Official Trustee of Charity Lands."

Sect. 16. Power to Acting Trustees to grant Leases.

By sect. 16, "the acting trustees of every charity, or the majority of them, provided that such majority do not consist of less than three persons, shall have at law and in equity power to grant all such leases or tenancies of land belonging thereto, and vested in the official trustee of charity lands, as they would have power to grant in the due administration of the charity if the same land were legally vested in themselves; and all covenants, conditions and remedies contained in or incident to any lease or tenancy so granted shall be enforceable by and against the trustees or persons acting in the administration of the charity for the time being, and their alienees or assigns, in like manner as if such lands had been legally vested in the trustees granting such lease or tenancy at the time of the

(*m*) *Att.-Gen.* v. *Owen*, 10 Ves. 555. *Ackland*, 3 Russ. 373.
(*n*) Platt on Leases, 347; *Malpas* v. (*o*) Post, sect. 22.

CH. I. SEC. 18. *Leases by Trustees of Charities.*

execution thereof, and had legally remained in or had devolved to such trustees or administrators for the time being, their alienees or assigns, subject to the same lease or tenancy."

Prohibition of Lease for more than 21 years, &c.

By sect. 29 of the same act "it shall not be lawful for the trustees or persons acting in the administration of any charity to make or grant otherwise than with the express authority of Parliament, under any act already passed, *or* of a court or judge of competent jurisdiction, *or* according to a scheme legally established, *or* with the approval of the board" [*i.e.*, the Charity Commissioners], "any sale, mortgage, or charge of the charity, estate or any lease thereof in reversion after more than three years of any existing term, or for any term of life, or in consideration wholly or in part of any fine, or for any term of years exceeding twenty-one years."

Lease for more than 21 years, without consent of Charity Commissioners, void.

A lease in contravention of this section is absolutely void, as was held by Charles, J., in the case of a lease of a part of the property of "Bishop Rowland's Charity" for forty-five years without the approval (which they had in fact refused to give) of the Charity Commissioners (*p*).

Power of majority of Trustees to let Charity Estates.

By the Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136, s. 16), a majority of *two-thirds* of the trustees of any charity assembled at a meeting of their body duly constituted, and having power to determine on any lease of any property of the charity, was empowered to lease the charity property. A clear majority was substituted for the two-thirds majority by s. 12 of the Charitable Trusts Act, 1869, 32 & 33 Vict. c. 110 (s. 17 of which act repealed s. 16 of the act of 1860). This section, which, it will be observed, is retrospective, is as follows :—

Char. Trusts Act, 1869, s. 12.

> Where the trustees or persons acting in the administration of any charity have power to determine on any sale, exchange, partition, mortgage, *lease* or other disposition of any property of the charity, a majority of those trustees or persons who are present at a meeting of their body duly constituted and vote on the question shall have and be deemed to have always had full power to execute and do all such assurances, acts and things as may be requisite for carrying any such sale, exchange, partition, mortgage, *lease*, or disposition into effect, and all such assurances, acts and things shall have the same effect as if they were respectively executed and done by all such trustees or persons for the time being and by the official trustee of charity lands.

Before the act of 1860, trustees of charities might have granted leases of the lands belonging to the charities, provided they were such in all their circumstances as were beneficial to the interests of the charities; but if otherwise, the Court of Chancery would have

(*p*) *Bishop of Bangor* v. *Parry*, [1891] 2 Q. B. 277; 60 L. J., Q. B. 646; 65 L. T. 379; 39 W. R. 541, per Charles, J.; decided by analogy to *Magdalen Hospital* v. *Knotts*, 4 App. Cas. 324, and p. 23, ante.

*Leases by Trustees of Charities.*

set them aside at any distance of time (*q*), until protected by the Real Property Limitation Act, 1833 (*r*). Where it was necessary to grant a large number of building leases of charity lands in nearly the same form, under the provisions of an act of parliament, and one lease had been settled in chambers, the Court of Chancery allowed the charity to grant other building leases from time to time in the same form, without reference to chambers, the model lease being appended to the order (*s*). Trustees of a charity have been authorized to grant building leases for 600 years, such being the custom of the neighbourhood, and it appearing beneficial (*t*).

Letting of Charity Land under Allotments Extension Act, 1882, to cottagers, &c.

We have seen (*ante*, sect. 16) that under various statutes parish officers and others are empowered to let lands in allotments to "industrious cottagers" and the like. The principle of these statutes is applied to charity lands generally by the "Allotments Extension Act, 1882" (45 & 46 Vict. c. 80). By s. 4 of this act "all trustees in whom lands are vested, or by whom the same are held or managed for the benefit of the poor of any parish or place in or adjoining to that in which such lands are situate, and whereof the rents or produce are distributed in gifts of money doles, fuel, clothing, bread or other articles of sustenance or necessity, *shall*, where such lands are not otherwise used for the benefit of the parish in which it is situate as a recreation ground, or otherwise, for the enjoyment or general benefit of the inhabitants, take proceedings" in manner in the act mentioned "for letting such lands to cottagers, labourers and others." By s. 10, if the trustees neglect to comply with the act, the Charity Commissioners may compel compliance, on the application of not less than four persons who would be entitled to the benefit of the act. By s. 12, rent or possession may be recovered under ss. 110, 111 of the Inclosure Act, 1845, and by s. 13 every allotment shall be let free of all charges "at such rent as land of the same quality is usually let for in the same parish," and "one person shall not hold any allotment exceeding one acre."

Letting of Allotment to other person than cottager.

By sub-sect. 6 of s. 13, "if at any time the trustees are unable to let any allotment or any portion thereof, they may let the same, or such portion thereof as may be unlet, at the best annual rent which can be obtained for the same, without any premium or fine, and on such terms as may enable them to resume possession thereof within a period not exceeding twelve months, if it should at any time be required to be let for allotments."

(*q*) *Att.-Gen.* v. *Cross*, 3 Mer. 540 ; *Att.-Gen.* v. *Brooke*, 18 Ves. 320 ; *Att.-Gen.* v. *Lord Hotham*, 3 Russ. 415.

(*r*) 3 & 4 Will. 4, c. 27, ss. 24, 25, 26, 27, which extend to charities ; *Att.-Gen.* v. *Davey*, 19 Beav. 521 ; 4 De Gex & J. 136 ; *Att.-Gen.* v. *Payne*, 27 Beav. 168 ; *Att.-Gen.* v. *Magdalen College, Oxford*, 6 H. L. Cas. 189, 206 ; 26 L. J., Ch. 620.

(*s*) *Att.-Gen.* v. *Christ Church, Oxford*, Giff. 514 ; 8 Jur., N. S. 989.

(*t*) *In re Cross*, 27 Beav. 592.

CH. I. SEC. 19. *Leases of Allotments and Small Holdings.*

SECT. 19.—*By Sanitary Authorities in Allotments and by County or Parish Councils in Small Holdings.*

The Allotments Act, 1887 (50 & 51 Vict. c. 48), enables, and to a certain extent and under certain circumstances obliges, sanitary authorities to acquire, either by hiring or purchase, land for the purpose of letting it in allotments "to persons belonging to the labouring population resident in their districts."

When acquired, the land, by s. 7 of the act, is to be let under regulations framed by the sanitary authority under the control of the Local Government Board, and the regulations "may define the persons eligible to be tenants, the notices to be given for the letting, the size of the allotments, the conditions under which they are to be cultivated, and the rent to be paid." But the regulations are by the same section "to make provision for reasonable notice to be given to any tenant of the determination of his tenancy," and are also generally "subject to the provisions of the act," and the 7th section contains a set of important provisions, enacting that—

Conditions of Letting Allotments.

The rents shall be such as may ensure the sanitary authority from loss:

The sanitary authority shall for the purposes of rates and taxes be deemed the occupiers, but may add the sums paid by them for such purposes to the rents:

One person shall not hold more than one acre, and an allotment shall not be sublet:

No building "other than a toolhouse, shed, greenhouse, fowlhouse or pigstye" shall be erected:

A tenant may remove fruit and other trees planted by him, for which he has no claim for compensation.

Letting of Allotments by Parish Councils.

The Local Government Act, 1894, 56 & 57 Vict. c. 73, by s. 10 (6) applies sects. 5—8 of the Allotments Act, 1887, to any allotment hired by a parish council as if that council were the sanitary authority and also the allotment managers, but also provides that the parish council may let more than one acre to one person, and may permit any stable, cowhouse, or barn to be erected on the allotment, but shall not break up, or permit to be broken up, any permanent pasture without the assent of the landlord.

Letting of "Small Holding" by County Council.

The Small Holdings Act, 1892, 55 & 56 Vict. c. 31, which empowers a County Council to acquire land for sale in small holdings of not less than one acre or more than fifty acres, also empowers the council in the case of a holding of not more than fifteen acres in extent or of not more than 15*l.* in annual value, to offer to let it, if either (1) persons desiring to cultivate are

unable to buy, or (2) the land has been hired by the council on lease or otherwise (*u*).



## Sect. 20.—*By Infants.*

At common law leases made by infants are not absolutely void, but voidable on their attaining their majority (*x*), and that notwithstanding the rent reserved is not the best obtainable (*y*). The lessee can in no case avoid the lease on account of the infancy of the lessor (*z*). The lease is voidable by the infant when he becomes of age (*a*), but not before (*b*); or by his heir if he die under age (*c*). To avoid a lease by an infant under which the lessee is in possession upon the lessor attaining twenty-one, some act of notoriety, ex. gr., ejectment, entry, or demand of possession is requisite: the mere execution of a new lease to another lessee is not sufficient to divest the estate created by the first lease (*d*). If when of age he receives any rent payable after he became of age, he thereby ratifies the lease from the day of its execution (*e*). A mortgage of the land to the lessee by a deed reciting the lease amounts to a ratification (*f*). Subject to the above qualification, all gifts, grants or deeds made by infants, by matter in deed, or in writing, which take effect by delivery of his hand, are voidable by himself, by his heirs, and by those who have his estate (*g*). The words "take effect" are the essential part of the definition, and exclude letters of attorney, or deeds which delegate a mere power and convey no interest (*h*). The lease of an infant, to be good, must be his own personal act (*i*).

At Common Law Leases by Infants are not void, but voidable.

*Zouch* v. *Parsons.*

By the custom of gavelkind an infant seised of land in socage may at the age of fifteen years make leases for years, which bind him after he comes of age, inasmuch as the custom makes the age of fifteen his full age for that purpose (*k*).

Leases in Gavelkind.

The legal and practical difficulties attaching to leases by infants at common law (*l*) were almost entirely cured by the Infants' Property Act, 1830, 11 Geo. 4 & 1 Will. 4, c. 65, under which (ss. 16 and 17)

Leases by Infants under the Direction of the Court.

(*u*) See Chitty's Statutes, 5th ed., tit. "Allotments and Small Holdings."

(*x*) *Ketsey's case*, Cro. Jac. 320; *Ashfield* v. *Ashfield*, Sir W. Jon. 157.

(*y*) *Slator* v. *Brady*, 14 Ir. Com. L. R. 61.

(*z*) *Zouch* d. *Abbot* v. *Parsons*, 3 Burr. 1794.

(*a*) *Slator* v. *Brady*, 14 Ir. Com. L. R. 61.

(*b*) *Slator* v. *Trimble*, 14 Ir. Com. L. R. 342. The doctrine laid down in *Maddon* v. *White*, 2 T. R. 159, that a lease for the benefit of the infant binds him, seems to be exploded. See Platt on Leases, Vol. I., p. 31.

(*c*) 4 Cruise, 74, s. 67.

(*d*) *Slator* v. *Brady*, 14 Ir. Com. L. R. 61; *Slater* v. *Trimble*, Id. 342.

(*e*) See note (*b*), supra.

(*f*) *Storry* v. *Johnson*, 2 Y. & C. 386.

(*g*) Perk. chap. i. sect. 12; Bac. Abr. tit. *Leases* (B.); *Baylis* v. *Dineley*, 3 M. & S. 477; 2 Prest. Conv. 248.

(*h*) *Zouch* d. *Abbot* v. *Parsons*, 3 Burr. 1794.

(*i*) *Doe* d. *Thomas* v. *Roberts*, 16 M. & W. 788.

(*k*) Co. Lit. 45 b.

(*l*) See Smith, L. & T., 2nd ed., p. 61; Platt on Leases, Vol. I., p. 29.

CH. I. SEC. 20. *Leases by Infants.*

infants were empowered to grant renewals of leases under the direction of the Chancery Division of the High Court, obtained on their own petition or that of their guardians (*m*): and the court was authorized to direct leases of land belonging to infants when it was to the benefit of the estate (*n*). In either case there was no restriction upon the term to be granted to the lessee, which might be such as the court should direct.

By sect. 31 of the act, leases granted under it were as valid as if the infant had been of full age. The court had power under this act to sanction a building lease of an infant's freehold estate when he was seised in fee simple in reversion after a life estate by the courtesy vested in his father (*o*).

This act is not expressly repealed, and is expressly referred to in an Order of Court (R. S. C. 1883, Order LV. rule 2) made after the commencement of the Settled Land Act, 1882. But ss. 59 and 60 of that act appear to impliedly repeal it so far at all events as the term for which the lease may be made. We will presently consider the effect of this and other acts, but must first deal shortly with leases by guardians.

## SECT. 21.—*By Guardians.*

Division of the Subject.

Guardians are either :—1. Guardians in socage or by the common law; 2. Testamentary guardians under the statute 12 Car. 2, c. 24, or Guardianship of Infants Act, 1886, 49 & 50 Vict. c. 27; 3. Widowed mothers, "either alone when no guardian has been appointed by the father, or jointly with any guardian appointed by the father," by virtue of sect. 3 of the Guardianship of Infants Act, 1886; 4. Guardians by nature; 5. Guardians for nurture; 6. Guardians by election; 7. Guardians appointed by the Chancery Division of the High Court. Of these the guardians appointed by the Court are of the first practical importance, and guardians under the acts of 12 Car. 2 or 1886 come next; guardianship of any of the other kinds so far as regards property, has little more than a historical value.

Leases by Guardians in Socage.

1. A Guardian *in socage*, or by the common law, is a person appointed, by the law, in respect of the freehold lands descended to the infant, so that where no freehold lands descend there can be no such guardian (*p*): and this guardianship devolves upon such of the next of kin to whom the inheritance cannot descend (*q*). It ceases at

(*m*) Judicature Act, 1873, s. 34; R. S. C. Ord. LV., r. 2, sub-r. 9.

(*n*) *Re Spencer*, 37 L. J., Ch. 18; 17 L. T. 200.

(*o*) *Re Letchford*, L. R., 2 Ch. D. 719; 45 L. T., Ch. 530.

(*p*) Bac. Abr. tit. *Leases*, (I. 9); *Shopland* v. *Ryoler*, Cro. Jac. 55, 99; Blac. Com. 461.

(*q*) 1 Blac. Com. 461; Cole Ejec. 582.

the age of fourteen years; and the father may also supersede the authority of the guardian by appointing a testamentary guardian under 12 Car. 2, c. 24.

To enable guardians in socage to take especial care of the infant and his property, the law has invested them, not with a *bare authority* only, but also with an *interest*, till the guardianship ceases (*r*), and to prevent abuse, the law has made them accountable to the infant, either when he comes to the age of fourteen years, at which time the authority of the guardians terminates, or at any time after, as the infant thinks fit; and therefore their authority and interest extend only to such things as may be for the benefit of the infant, and whereof they may give an account. During the time the guardianship exists, a guardian in socage may make leases for years in his own name, as any other who has an interest in lands may do; for he is *quasi dominus pro tempore* and the lessee may maintain ejectment on such leases (*s*). If he makes leases for years to continue beyond the time of his guardianship, such leases seem not to be absolutely void by the infant's coming of age, but only voidable by him if he thinks fit; consequently the infant, when he comes of age, may by acceptance of rent, or other act, make such leases good and unavoidable (*t*). The lease will be determined by the death of the infant, and also by the death of the guardian (*u*).

By Testamentary Guardians.

2. A testamentary guardian, or one appointed by the father pursuant to 12 Car. 2, c. 24, ss. 8, 9, 10, 11, or by the mother, or both parents under the Guardianship of Infants Act, 1886, 49 & 50 Vict. c. 27, is the same in office and interest as a guardian in socage, but his authority continues until the infant attains the age of twenty-one years (*x*); and it seems clear that a lease by him stands on the same footing as a lease by a guardian in socage, with the additional advantage to the lessor that the period of minority is extended from fourteen to twenty-one years (*y*). Special guardians, by custom of London and other places, do not fall within the statute (*z*).

By Guardians by Nature.

3. Guardians by nature are the father or his heir, heiress, or heiresses, and in some cases the mother, until the age of twenty-one years (*a*). They may, perhaps, possess the power of leasing at will, but not for a term (*b*).

(*r*) Co. Lit. 87 b; *R.* v. *Oakley*, 10 East, 494; *R.* v. *Sutton*, 3 A. & E. 597.

(*s*) *Wade* v. *Baker*, 1 Ld. Raym. 131; Hutt, 16; *Osborn* v. *Carden*, Plowd. 293; Bac. Abr. tit. *Leases* (I. 9); *Willis* v. *Whitewood*, 1 Leon. 323; *R.* v. *Oakley*, 10 East, 494; Keilw. 46 b.

(*t*) Bac. Abr. tit. *Leases* (I. 9).

(*u*) *Balder* v. *Blackborn*, Brownl. 79.

(*x*) 1 Blac. Com. 462; *Bedell* v. *Constable*, Vaugh. 179; *Roe* d. *Parry* v. *Hodgson*, 2 Wils. 129; Cole Ejec. 583.

(*y*) Smith, L. & T. 59; *Roe* v. *Hodgson*, 2 Wils. 129, so far as it is an authority to the contrary, is not law. See Platt on Leases, Vol. I., p. 376.

(*z*) Sect. 10.

(*a*) 1 Blac. Com. 461; *R.* v. *Thorp*, Carth. 384.

(*b*) *Pigot* v. *Garnish*, Cro. Eliz. 678, 734.

CH. I. SEC. 21. *Leases by Guardians.*

By Guardians for Nurture.

4. The father or mother is guardian of all the children for nurture until they attain the age of fourteen years (*c*). A guardian for nurture cannot make any leases for years, either in his own name, or in the name of the infant, for he has only the care of the person and education of the infant; for there may be such guardian, though the infant has no lands at all, although in such a case there cannot be a guardian in socage: but such guardian, it seems, may make leases at will (*d*).

By Guardians by Election.

5. An infant seised of freehold lands, and being unprovided with a testamentary guardian, may, on attaining fourteen years, elect a guardian to act until he attains twenty-one (*e*). This guardianship, like that of socage, involves a similar power on leasing the estate of the infant (*f*).

By Guardians appointed by High Court.

6. From a very early period guardians have been appointed by the Court of Chancery under a power which by the Judicature Act, 1873, s. 34, is exerciseable by the Chancery Division of the High Court. Guardians so appointed might, by virtue of the Infants' Property Act, 1830, 11 Geo. 4 & 1 Will 4, c. 65, s. 17, but not otherwise (*g*), make such leases as the court should direct without fine, which leases may be made to extend beyond minority (*h*). We have already seen that this statute is not expressly repealed, and it is no doubt in force so far as the Settled Land Act, 1882, 45 & 46 Vict. c. 38, is not in conflict with it.

The Settled Estates Act, 1877, 40 & 41 Vict. c. 18, s. 44, empowered guardians to exercise on behalf of infants all powers given by the act, and the words would include the leasing powers, as to which see sect. 4, *ante*. This enactment also is unrepealed.

Guardians for purposes of Agricultural Holdings Act.

The 25th section of the Agricultural Holdings Act, 1883, 46 & 47 Vict. c. 61, provides that where a landlord is an infant the county court may, on the application of any person interested, appoint a guardian for the purposes of that act.

## SECT. 22.—*By Trustees for Infants.*

Conveyancing Act, 1881, and Settled Land Act, 1877.

The Conveyancing and Law of Property Act, 1881, 44 & 45 Vict. c. 41, by s. 41 provided that:—

"Where a person in his own right seised of or entitled to land for an estate in fee simple is an infant, the land shall be deemed

(*c*) 1 Blac. Com. 461; *Roach* v. *Garvan*, 1 Ves. 158; 3 Cro. R. 38.

(*d*) *Willis* v. *Whitewood*, Owen, 45; 1 Leon. 322; *Shopland* v. *Radlen*, Owen, 115; Cro. Jac. 55, 98; Godb. 143; 4 Leon. 238; *Pigot* v. *Garnish*, Cro. Eliz. 678; Bac. Abr. tit. *Leases* (I. 9).

(*e*) 1 Blac. Com. 462; Co. Lit. 87 b; 2 Atk. 624; 1 Ves. 91.

(*f*) Bac. Abr. tit. *Leases* (I. 9); *Pitcairn* v. *Ogbourne*, 2 Ves. 375.

(*g*) See Simpson on Infancy, p. 333.

(*h*) *Anstey* v. *Hobson*, 1 Sm. & G. 505.

to be a settled estate within the Settled Estates Act, 1877." We have already seen what powers of leasing were given by that act (*i*), and also that s. 49 of the same act further provided that all powers given by the act might be exercised by *guardians* on behalf of infants.

Settled Land Act, 1882, ss. 59, 60.

The Settled Land Act, 1882, 45 & 46 Vict. c. 38, though not repealing the above enactments, appears by ss. 59, 60 to supersede them. The exact words of these sections are :—

"Settled land," where owner infant.

59. Where a person who is in his own right seised of or entitled in possession to land, is an infant, then for purposes of this act the land is settled land, and the infant shall be deemed tenant for life thereof.

Powers of infant tenant for life exerciseable by trustees.

60. Where a tenant for life, or a person having the powers of a tenant for life under the act (*k*), is an infant, or an infant would, if he were of full age, be a tenant for life, or have the powers of a tenant for life under this act, the powers of a tenant for life under this act may be exercised on his behalf by the trustees of the settlement, and if there are none, then by such person and in such manner as the Court, on the application of a testamentary or other guardian or next friend of the infant, either generally or in a particular instance, orders.

Section 60 appears to comprise within its terms the case of an infant tenant in fee simple, and therefore somewhat to abridge the powers of guardians. By the act of 1881 as read with the act of 1877, they might themselves lease without any application to the Court; by the act of 1882, an application to the Court would seem to be necessary if the land proposed to be demised should be unsettled, and although guardians are pointed at as being proper persons to make the application, the leasing power is not to be exercised as a matter of course by them, but only in case of their being directed to exercise it by the Court. In case the land should be settled, and there should be trustees, such trustees could, it is conceived, exercise the leasing powers without any application to the Court.

Management of demised land by trustees for infants.

Trustees acting for infants have special powers of management conferred upon them by s. 42 of the Conveyancing Act, 1881. Amongst these powers is a power "to make allowances to and arrangements with tenants and others, and to determine tenancies, and to accept surrenders of leases and tenancies, and generally to deal with the land in a proper and due course of management."

## Sect. 23.—*By or for Married Women.*

Married Women's Property Act, 1882.

The Married Women's Property Act, 1882, 45 & 46 Vict. c. 75, repealing and with extensive amendments re-enacting the Married

(*i*) Ante, sect. 4.

(*k*) See s. 58 of the act, giving powers of the act to tenants in tail, and other limited owners.

CH. I. SEC. 23. *Leases by or for Married Women.*

Women's Property Act, 1870 (*l*), places married women in respect of making leases of land *not subject to marriage settlement* as well as in respect of their separate property generally (leases, however, being nowhere specifically mentioned in the act), in the same position as if they were unmarried. This act has abolished the old common law doctrine that a wife had no legal existence apart from her husband.

Act of 1882, not retrospective.

The Act of 1882, however, is not retrospective, but applies only to women married after its commencement [*i.e.*, married after the 1st January, 1883], except in case of property acquired after its commencement, in which case the act has full application.

Lease by Husband and Wife at Common Law.

At common law a lease *by deed* made by the husband and wife of the wife's freeholds, was good during the coverture (*m*). Upon the death of the husband in the wife's lifetime it became *voidable* by her; and might be confirmed by her acceptance of rent becoming due after the husband's death, or the like (*n*), her executors having power to sue for such rent (*o*). If the husband survived his wife and became tenant by the curtesy, the lease was good as against him during his life or until the end of the term, which first happened. But if he did not become tenant by the curtesy (not having ever had any issue by his wife which might by possibility have inherited), the lease, upon the wife's death, became *void* as against his heir at law. When the husband did not become tenant by the curtesy, he could not distrain or sue for the rent which became due after his wife's death, under a demise made by them both or by him on her behalf (*p*).

Without Deed.

A lease by husband and wife *without deed* was void as against the surviving wife, for it could not be said to be her lease (*q*), but it was good during the coverture if the term continued so long (*r*).

By Husband alone.

If a husband seised of lands in right of his wife made a lease for years by deed, the term did not become void on his death, but only voidable by the entry of the widow (*s*).

By Wife alone.

Leases made by a wife without the concurrence of her husband and not in pursuance of an express power, were at common law absolutely void, and could not be confirmed (*t*), and a lessee taking a

(*l*) The act of 1870 appears to have allowed independent demises of unsettled land under the term "property," in ss. 1, 7, and 8.

(*m*) *Wiscot's case*, 2 Co. R. 61 b; Bac. Abr. tit. *Leases* (C. 1); *Toler* v. *Slater*, L. R., 3 Q. B. 42; 37 L. J., Q. B. 33.

(*n*) *Henstead's case*, 5 Co. R. 10; Co. Lit. 55 b; *Greenwood* v. *Tyber*, Cro. Jac. 563; *Doe* d. *Collins* v. *Weller*, 7 T. R. 478; 4 R. R. 496; *Parry* v. *Hindle*, 2 Taunt. 180; 2 Wms. Saund. 180, note (9).

(*o*) *Toler* v. *Slater*, L. R., 3 Q. B. 42; 37 L. J., Q. B. 33.

(*p*) *Howe* v. *Scarrott*, 4 H. & N. 723; 28 L. J., Ex. 325; *Hill* v. *Saunders*, 2 Bing. 112; *S. C.* (in error), 4 B. & C. 529.

(*q*) *Walsal* v. *Heath*, Cro. Eliz. 656; *Greenwood* v. *Tyber*, Cro. Jac. 564; Dyer, 91 b, 146 b; 2 Wms. Saund. 180 a, n.

(*r*) *Bateman* v. *Allen*, Cro. Eliz. 438; 2 Co. R. 61 b.

(*s*) *Jordan* v. *Wykes*, Cro. Jac. 332; *Smallman* v. *Agborow*, Id. 417; 3 Bulst. 272; *Browning and Beeston's case*, Plowd. 65.

(*t*) *Goodright* d. *Carter* v. *Straphan*, Cowp. 201; Lofft, 763.

lease from an unmarried woman became bound, after the marriage, to pay the rent to the husband (*u*). But a wife might, before marriage, in exercise of an express power, grant valid leases without the concurrence of her husband.

Before Marriage.

As to the wife's leaseholds, at common law a husband might dispose of all his wife's interest therein by demise: so he might dispose of the interest in a term which they had jointly (*x*). He might also dispose of part of his wife's interest: thus he might demise for a part of the term rendering rent, and the rent would go to his executor or administrator, though his wife survived (*y*), notwithstanding the reversion survives to the wife (*z*); but as to the residue of the term, whereof the husband made no disposition in his lifetime, the wife, if she survived, was entitled to it: because as to that, the law was left to take effect, as it would have done for the whole, if he had not prevented it by such his disposition of part (*a*). If the husband died before the wife, he could not bequeath her chattels real by will (*b*), but if he survived her they became his own absolute property (*c*). If the husband, having an interest in his wife's real estate, during their joint lives created a term, out of that interest, the reversion was in him only, and not in his wife also (*d*).

Lease by Husband of Wife's Leaseholds.

The husband might demise his wife's leaseholds, and thereby confer an immediate interest and possession, or he might underlet for a term to commence even after his death (*e*): and it was good though the wife survived (*f*).

Statute Law prior to Act of 1882.

The Fines and Recoveries Abolition Act (3 & 4 Will. 4, c. 74, ss. 77—78) allowed leases to be made by wives with their husbands' concurrence, by deeds acknowledged by the wives in manner directed by that act, and the Settled Estates Act, 1877, 40 & 41 Vict. c. 18, replacing a similar provision of the Settled Estates Act, 1856, allowed a husband seised in right of his wife of any settled estates or entitled to unsettled estates as tenant by the curtesy or in right of a wife seised in fee, without any application to the court to demise such lands for not more than 21 years subject to the restrictions and exceptions in that act mentioned.

Lease by Married Woman under Settled Land Act, 1882.

We have already seen (*g*) the provisions, empowering tenants for life to make leases, which are contained in the important Settled Land Act, 1882. Special provision for the case of a married woman who is a tenant

(*u*) *Tracy* v. *Dalton*, Cro. Jac. 617.
(*x*) Com. Dig. tit. *Baron and Feme* (E. 2).
(*y*) Id.; Co. Lit. 46 b, 351 a; 1 Roll. 343, l. 15; *Blaxton* v. *Heath*, Poph. 145.
(*z*) *Sym's case*, Cro. Eliz. 33.
(*a*) Bac. Abr. tit. *Baron and Feme* (C. 2); *Sym's case*, Cro. Eliz. 33.
(*b*) Plowd. 418.
(*c*) Co. Lit. 300 a, 351 a, n. (1).
(*d*) *Harcourt* v. *Wyman*, 3 Exch. 817.
(*e*) *Herbin* v. *Chard*, Poph. 96; *Grute* v. *Locroft*, Cro. Eliz. 287.
(*f*) *Grute* v. *Locroft*, Cro. Eliz. 287; Bac. Abr. tit. *Baron and Feme* (C. 2); 1 Roll. Abr. 344; *Herbin* v. *Chard*, Poph. 98.
(*g*) Ante, sect. 4.

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for life is made by s. 61 of that act, the effect of which is that if the married woman be entitled for her separate use or under the Married Women's Property Act, 1882, she may exercise the powers of the act without her husband, but if otherwise, then she and her husband together may exercise those powers, and that a restraint on anticipation in the settlement shall not prevent the exercise of that power.

Saving for Marriage Settlement in Married Women's Property Act, 1882.

It is provided expressly by s. 13 of the Married Women's Property Act, that nothing in that act shall interfere with any marriage settlement made or to be made respecting the property of any married woman; but the effect of the 61st section of the Settled Land Act, 1882, appears to be to allow a husband and wife to demise without the intervention of the trustees of their marriage settlement, although the settlement may expressly provide for such intervention.

Married Woman Executrix.

As to lease by married woman executrix, see p. 54.

### SECT. 24.—*By Lunatics and their Committees.*

By Idiots and Lunatics.

Leases made by idiots, or persons non compotes mentis, are primâ facie binding, but may be avoided (*h*). Generally speaking, a contract made by a lunatic is binding on him, unless it be proved that the other party knew of his insanity and took some unfair advantage of it (*i*). A lease made during a lucid interval cannot be impeached on the ground of previous or subsequent insanity (*k*).

By Committees of Lunatics.

The consolidating Lunacy Act, 1890, 53 & 54 Vict. c. 5, by s. 120 enacts that the judge in lunacy may authorise the committee of a lunatic to

> "grant leases [including in this term underleases, see s. 341] of any property of the lunatic for building, agricultural, or other purposes:
>
> "grant leases of minerals forming part of the lunatic's property, whether the same have been already worked or not, and either with or without the surface or other land:
>
> "Surrender any lease and accept a new lease:
>
> "Accept a surrender of any lease and grant a new lease:
>
> "Execute any power of leasing vested in a lunatic having a limited estate only in the property over which the power extends:
>
> "Perform any contract relating to the property of the lunatic entered into by the lunatic before his lunacy:
>
> "Surrender, assign or otherwise dispose of with or without consideration any onerous property belonging to the lunatic."

(*h*) Co. Lit. 247 a; *Beverley's case*, 4 Co. R. 123; *Yates* v. *Boen*, 2 Stra. 1104.

(*i*) *Brown* v. *Joddrell*, 1 Moo. & M. 105; *Molton* v. *Camroux*, 2 Exch. 487; 4 Exch. 17; *Beavan* v. *M'Donnell*, 9 Exch. 309; 10 Exch. 184; 23 L. J., Ex. 94, 326; *Elliott* v. *Ince*, 7 De G., M. & G. 475.

(*k*) 1 Dow, Parl. Cas. 177; Fry, ss. 161, 162.

By s. 121 a renewed lease is to be to the same use as the surrendered lease was. By s. 122 the power under the act extends to property of which the lunatic is tenant in tail, every lease under the act binds the issue of the lunatic and all persons entitled in remainder, &c., and "every person to whom from time to time the reversion expectant upon the lease belongs upon the death of the lunatic shall have the same rights and remedies against the lessee, his executors, administrators, and assigns, as the lunatic or his committee would have had."

Extent of Leasing Power.

By sub-s. 2 of s. 122, "leases under the act" may be for such number of lives or such term of years, at such rent and royalties, and subject to such reservations, covenants and conditions as the judge approves."

Rent, Term and Covenants.

It seems to be the practice in every case, first to obtain the approval of a master in lunacy to the proposed lease, and then an order of the Lords Justices confirming the master's report, and directing the lease, as settled and approved of by the master, to be executed by the committee, upon the lessee executing a counterpart. In *Wynne, In re* (*l*), however, eighteen months' possession under an agreement for a lease with the agent of the committee was held sufficient to entitle the tenant to specific performance, although the sanction of the master in lunacy had not been applied for.

*Wynne, In re*

Where the committee of a lunatic tenant for life petitioned the Court for power to grant a repairing lease for 99 years, it was held that new trustees (there not being any trustees of the will under which the property was held) ought to be appointed and served with notice of the petition (*m*).

Lunatic Tenant for Life.

The ordinary form of execution would seem to be the execution by the lunatic by his committees, but an execution by the committees themselves is sufficient, if the lunatic be made a party to the lease (*n*).

Mode of Execution.

By s. 6 of 15 & 16 Vict. c. 48, receivers of the estates of lunatics might be directed by order to make repairs and improvements of or upon the land of lunatics, *or make allowance out of the lunatic's income to the tenant executing the same.* This enactment is repealed by the Lunacy Act, 1890, and sections 117 and 118, which appear to be substituted for it, do not seem to contemplate any execution of repairs by a tenant otherwise than in pursuance of his contract of tenancy.

Repairs and Allowances.

(*l*) *Wynne, In re*, L. R., 7 Ch. 229 ; 26 L. T. 406 ; 20 W. R. 348.
(*m*) *Re Taylor*, 49 L. T. 420.
(*n*) *Lawrie* v. *Lees*, L. R., 7 App. Cas. 19, affirming the decision of the Court of Appeal, and reversing that of Hall, V.-C., 14 Ch. D. 249 ; 49 L. J., Ch. 636 ; 42 L. T. 485 ; 28 W. R. 779.

CH. I. SEC. 25.
*Leases by Persons under Duress or Intoxicated.*

## SECT. 25.—*By Persons under Duress or Intoxicated.*

By Persons under Duress.

All deeds, bonds or grants made by persons under duress are voidable by the parties themselves that make them, or others that have their estates, &c. Duress of imprisonment is defined to be where one is manifestly imprisoned or restrained of his liberty contrary to law, until he executes a bond or deed to another (*o*). The imprisonment must be illegal, otherwise there is no duress (*p*). Duress of goods (especially under a distress) is not sufficient (*q*).

By Persons in a State of Intoxication.

Intoxication is a good defence in an action on a deed, lease or grant, or an agreement, provided the party was in such a state of intoxication as not to know what he was doing (*r*). But the contract is voidable only and not void, and therefore may be ratified when the party becomes sober (*s*). If through the contrivance and management of the party obtaining the deed the grantor is thrown into intoxication for the purpose of prevailing on him to execute the deed, relief may be administered, on the ground of fraud (*t*), by the Chancery Division of the High Court (*u*).

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## SECT. 26.—*By Convicts.*

Felons.

At common law, on a conviction for felony, real estate became forfeited to the crown, but not without attainder (*x*). Under a demise, therefore, by a felon after attainder, the lessee had a good title against all but the crown and the lord of whom the land was held (*y*): and the crown was said to be entitled to hold during the felon's life (*z*). The crown's right of entry might be exercised or enforced without any inquisition being taken or office being found, or actual re-entry (*a*). An assignment by a felon just before trial without consideration or value, was void as against the crown (*b*). But a bonâ fide assignment made before the day of trial (even after the commission day), in consideration of a pre-existent debt or other good consideration, was valid (*c*).

(*o*) *Knight and Norton's Case*, 3 Leon. 239.
(*p*) 2 Inst. 482; 11 Q. B. 117.
(*q*) *Skeate* v. *Beale*, 11 A. & E. 983; *Gulliver* v. *Cozens*, 1 C. B. 788; *Kearns* v. *Durell*, 6 C. B. 596; 6 D. & L. 257.
(*r*) *Gore* v. *Gibson*, 13 M. & W. 623; *Pitt* v. *Smith*, 3 Camp. 34; 13 R. R. 741; *Butler* v. *Mulvihill*, 1 Bligh, 137.
(*s*) *Matthews* v. *Baxter*, L. R., 8 Ex. 132; 42 L. J., Ex. 73.
(*t*) *Nagle* v. *Baylor*, 3 Dru. & W. 60; *Say* v. *Barwick*, 1 V. & B. 195; *Butler* v. *Mulvihill*, 1 Bligh, 127.
(*u*) Judicature Act, 1873, s. 34, sub-s. 3.
(*x*) Cole Ejec. 573.
(*y*) *Doe* d. *Evans* or *Griffiths* v. *Pritchard*, 5 B. & Ad. 765; Cole Ejec. 573.
(*z*) Chamb. L. & T. 46.
(*a*) 22 & 23 Vict. c. 21, s. 25.
(*b*) *Morewood* v. *Wilks*, 6 C. & P. 144; *Shaw* v. *Bran*, 1 Stark. R. 319; 18 R. R. 772; *In re Saunders*, 4 Giff. 179; 32 L. J., Ch. 224.
(*c*) *Perkins* v. *Bradley*, 1 Hare, 219; *Whitaker* v. *Wisbey*, 12 C. B. 44; *Chowne* v. *Baylis*, 31 Beav. 351.

The property of persons who have been convicted of treason or felony is now entirely regulated by an act passed on the 4th July, 1870 (33 & 34 Vict. c. 23), by which forfeiture to the crown is abolished. By sect. 1 of this act "no confession, verdict, inquest, conviction or judgment of or for any treason or felony or felo de se, shall cause any attainder or corruption of blood, or any forfeiture or escheat." By sect. 9 the crown may commit the custody and management of the property of any convict, *i.e.* "any person against whom judgment of death or penal servitude shall have been pronounced or recorded upon any charge of treason or felony" (*d*), to an administrator, upon whose appointment "all the real and personal property, including choses in action, to which the convict was at the time of his conviction, or shall afterwards while he shall continue subject to the operation of the act, become or be entitled, shall vest in such administrator for all the estate and interest of such convict therein" (sect. 10). By sect. 8 the convict is disabled to sue or alienate property, and by sect. 12 "the administrator shall have absolute power to let, mortgage, sell, convey and transfer any part of such property as to him shall seem fit." By sect. 18 the property reverts to the convict or his representatives on the completion of his sentence, pardon or death. By sect. 21 an interim curator may, if there be no administrator, be appointed by justices; and by sect. 24 such interim curator may bring and defend actions, and may "receive and give legal discharges for all rents," &c. Property acquired by a convict "during the time which he shall be lawfully at large under licence" is, by sect. 30, exempted from the operation of the act.

Regulation of Felon's Property under 33 & 34 Vict. c. 23.

Outlaws.

A lease made by an outlaw before an inquisition taken will prevent the title of the crown, if it be made bonâ fide and upon good consideration, but not if it be in trust for the outlaw only (*e*). The grant of a person outlawed in a personal action was good against all but the crown (*f*); but outlawry in civil proceedings, which had long been obsolete, was abolished by the Civil Procedure Acts Repeal Act, 1879 (42 & 43 Vict. c. 59). The Act of 1870, above mentioned (see sect. 1), does not affect "the law of forfeiture consequent upon outlawry in criminal proceedings."

(*d*) Sect. 6. Persons not comprised within this definition are exempted from forfeiture by the act, but are otherwise unaffected by its provisions relating to the administration of property.

(*e*) *Att.-Gen.* v. *Freeman*, Hardr. 101; *Hammond's case*, Id. 176; 2 Roll. Abr. 808, pl. 7; *King* d. *Poe* v. *Bull*, Ridg. Lap. & Scho. 94.

(*f*) Shep. Touch. 232.

CH. I. SEC. 27.

*Leases by Trustees of Bankrupts.*

### SECT. 27.—*By Trustees of Bankrupts.*

A trustee of a bankrupt seised in fee may demise to the same extent as the bankrupt could. A trustee of a bankrupt lessee, if he do not disclaim the lease, and if the lease contain no clause of forfeiture on bankruptcy of the lessee, has a similar power (*g*).

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### SECT. 28.—*By Executors and Administrators.*

A lease is personal property.

A lease for a term of years, however long, is personal property in the hands of the lessee by the law of England, and as such vests in the executor. In Scotland, however, it is otherwise. By the law of Scotland a lease vests in the heir of the lessee at his death (*h*).

Vesting of Reversion in Executors, by Land Transfer Act, 1897.

At common law all real estate vested in the heir-at-law, co-heiresses, or devisees, as the case might be. But the Land Transfer Act, 1897, 60 & 61 Vict. c. 65, in the case of death after the commencement of that act on 1st January, 1898, vests the real estate of the deceased (unless it be copyhold) in his executors or administrators, who hold it in trust for the person as heir-at-law or devisee beneficially entitled thereto, to whom they may convey it at any time after the death, and may be ordered "by the court if it thinks fit" to convey it within one year after the death.

Lease by Executor.

Executors and administrators may dispose absolutely of terms of years vested in them in right of their testators or intestates, or may lease the same for any fewer number of years; and the rents reserved on such leases are assets in their hands, and go in a course of administration (*i*), but this is an exceptional mode of dealing with the assets, and those who take a title in that way must take it subject to the question whether it was the best mode of administering the assets (*k*). Executors should take care not to enter into any informal agreement for a lease which cannot be enforced: otherwise they may perhaps be charged with any loss, as arising from a wilful default (*l*).

Option of Purchase cannot be given.

Executors and administrators, it being their duty to realize within a reasonable time, may not grant a sub-lease with option of purchase within a fixed time. If they do, the next of kin can prevent the option being exercised. This was held by the Court of Appeal in the very clear but hard case of *Oceanic Steam Navigation Co.* v. *Sutherbury* (*m*), in which an administrator possessed of a term of

(*g*) See Ch. VII., Sect. 8, post.
(*h*) See *Bain* v. *Brand*, L. R., 1 App. Ca. 762.
(*i*) Bac. Abr. tit. *Leases* (I. 7).
(*k*) Per Jessel, M.R., in *Oceanic, &c., Co.* v. *Sutherbury*, 16 Ch. D. at p. 243.
(*l*) *Conolly* v. *Conolly*, 17 Ir. Ch. R. 208, M. R.
(*m*) 16 Ch. D. 236; 50 L. J., Ch. 308; 43 L. T. 743; 29 W. R. 236.

75 years granted a sub-lease for 21 years, with option of purchase within the first 7 years, although the whole transaction was for the benefit of the estate, and the sub-lessees had expended large sums in building in reliance on their supposed power to purchase.

Lease before probate.

An executor may demise before probate, because his appointment, estate, and power are derived from the will, of which the probate is merely evidence (*n*); but an administrator cannot make a lease until he has obtained letters of administration (*o*).

Lease by one of several.

A lease by one of several executors is as efficacious as their joint demise (*p*), although it purport to be the grant of all (*q*); and the same rule applies to administrators (*r*). It seems that if three executors demise to one of them at a fixed rent, such rent may be distrained for (*s*).

Assent to specific Bequest of Lease by Executors.

Previous to a party taking a lease from an executor, he should ascertain whether the property has been specifically bequeathed by the will; and if so, whether the executor has assented to such bequest, for if so his right to grant the lease is gone, and the legal interest in the property is vested in the legatee; and consequently, as the executor has nothing to grant, the lease will be void, and the legatee may maintain ejectment (*t*). It is well settled, however, that assent to a bequest for life of a lease is an assent to the bequest over (*u*).

ssent of Executor to specific Bequest to himself.

If a lease be specifically bequeathed to an executor for his own use, his assent to the bequest is still necessary, and if his acts are referable to his character of executor, they are no evidence of assent (*x*), which must be shown by some act referable to his character of beneficial owner, as by a disposition of the lease in his own will (*y*). Where a party possessed of a term as administrator makes a lease and appoints an executor and dies, his executor is entitled to the rent, and not the administrator de bonis non of the intestate (*z*).

Leases by an Executrix who is a Married Woman.

The husband of a woman who is an executrix has at common law a joint interest with her in all the effects of the deceased; and is enabled to assume the whole administration, and to act in it to all purposes without her consent; but the wife cannot do any act as

(*n*) *Roe* d. *Bendall* v. *Summerset*, 2 W. Blac. 692; Roll. Abr. tit. *Executors* (A.).

(*o*) *Wankford* v. *Wankford*, 1 Salk. 301; *Hudson* v. *Hudson*, 1 Atk. 461.

(*p*) *Pannel* v. *Fenn*, Cro. Eliz. 347; *Doe* d. *Hayes* v. *Sturges*, 7 Taunt. 217; 17 R. R. 491.

(*q*) *Simpson* v. *Gutteridge*, 1 Madd. 616; 16 R. R. 276.

(*r*) *Jacomb* v. *Harwood*, 2 Ves. Sen. 265.

(*s*) *Cowper* v. *Fletcher*, 6 B. & S. 464; 34 L. J., Q. B. 187.

(*t*) *Paramour* v. *Yardley*, Plowd. 539; *Young* v. *Holmes*, 1 Str. 70; *Doe* d. *Lord Say and Sele* v. *Guy*, 3 East, 120; 6 R. R. 563; *Johnson* v. *Warwick*, 17 C. B. 516; *Fenton* v. *Clegg*, 9 Exch. 680; *Doe* d. *Sturgess* v. *Tachell*, 3 B. & Ad. 675.

(*u*) *Stevenson* v. *Mayor of Liverpool*, L. R., 10 Q. B. at p. 84.

(*x*) *Doe* d. *Hayes* v. *Sturges*, 7 Taunt. 717; 17 R. R. 491.

(*y*) *Fenton* v. *Clegg*, 9 Exch. 680.

(*z*) *Drew* v. *Bayly*, 2 Lev. 100; *Norton* v. *Harvey*, 1 Ventr. 259.

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executrix or administratrix without her husband's concurrence. A demise by her alone, therefore, cannot at common law be supported; and in all leases made in respect of such executorship and administration, the husband must be the demising party (*a*). By the 18th section of the Married Women's Property Act, 1882, a married woman "who is an executrix or administratrix, alone or jointly with any other person, of the estate of any deceased person, or trustees, alone or jointly, of property subject to any trust, may sue and be sued without her husband, as if she were a feme sole." This section gives no express power to demise alone, and could not, it is conceived, be construed as giving such a power impliedly. The 24th section enacts that "a husband shall not be subject to any liabilities by reason of any breach of trust or devastavit committed by any married woman being a trustee or executrix or administratrix either before or after her marriage unless he has acted or intermeddled in the trust or administration." The result seems to be that if the husband demises as at common law he thereby "acts or intermeddles" and forfeits the indemnity of sect. 24. Therefore, unless the words of sect. 1, sub-sect. 1, which enable the married woman to dispose of any real or personal property as her separate property, can be taken to extend to property held by her as executrix, and so give her power to demise it, the act appears to give no additional powers of leasing to a married woman executrix.

Married Woman Executrix.

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## SECT. 29.—*By Mortgagors and Mortgagees.*

### (a) *Generally.*

Leases granted by a mortgagor *before* the mortgage are valid as against the mortgagee, who is only an assignee of the reversion and its incidents (*b*). The tenants under such leases may safely continue to pay their rents to the mortgagor until they receive notice of the mortgage, and are requested to pay their rent to the mortgagee (*c*).

Leases *before* the Mortgage.

Before the Judicature Act, the mortgagor having assigned his reversion by the mortgage, could not eject the tenant for a forfeiture (*d*); but by sect. 25, sub-sect. 5, of the Judicature Act, 1873:—

Ejectment by Mortgagor.

"A mortgagor entitled for the time being to the possession or the receipt of the rents and profits of any land, as to which no notice of his intention to take possession or to enter into the receipt of the rents and profits thereof shall have been given by the mortgagee, may sue for such possession, or for the recovery of such rents or profits, or to prevent

(*a*) Cham. on Leases, 35; *Arnold* v. *Bidgood*, Cro. Jac. 318; *Thrustout* v. *Levick* v. *Coppin*, 2 W. Blac. 801.

(*b*) *Rogers* v. *Humphreys*, 4 A. & E. 299, 313; Coote Ejec. 473.

(*c*) 4 ANN. c. 16, s. 10; *Cook* v. *Moylan*, 1 Exch. 67; 5 D. & L. 701; *Trent* v. *Hunt*, 9 Exch. 14.

(*d*) *Doe* d. *Marriott* v. *Edwards*, 5 B. & Ad. 1065.

or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person."

Upon giving notice of his mortgage, and requesting the rent to be paid to him, the mortgagee becomes entitled to all the arrears of rent which became due after his mortgage, and which then remain unpaid, and also to all subsequent rent (*e*).

Mortgagee entitled to Rent on notice of Mortgage. *Moss* v. *Gallimore*.

Where a mortgagor after execution of an agreement for a lease under which the tenant has entered, mortgages the premises, the mortgagee may maintain use and occupation for the enjoyment of them subsequently to the mortgage, and notice thereof (*f*). Where a mortgage was made after a letting from year to year, and subsequently the mortgagor, on making some improvements, agreed with the tenant for an increased rent; it was held that the mortgagee, after notice to the tenant of the mortgage, might recover, in an action for use and occupation, arrears of the improved rent due at the time of the notice as well as subsequent accruing rent (*g*). Where a mortgage was made after a letting, and it was subsequently arranged between the mortgagor, the mortgagee, and the tenant, that the latter should pay the interest to the mortgagee, and the remainder of his rent to the mortgagor; it was held that after this arrangement the tenant was not justified, after a mere notice so to do, in paying the whole rent to the mortgagee (*h*).

Leases *after* the Mortgage.

With regard to leases *after* a mortgage, the common law rule was, that neither mortgagor nor mortgagee could make a good lease alone; for the mortgagor's lease was bad in law as against the mortgagee, wherefore the mortgagee could evict the lessee as a trespasser (*i*); and the mortgagee's lease was bad in equity as against the mortgagor, wherefore the mortgagor could, by redeeming the mortgage, avoid the lease (*k*). As therefore, neither mortgagor nor mortgagee could make a valid lease, it became usual for them both to concur (*l*), and for mortgage deeds to contain special leasing powers by one or other, or both (*m*).

Common law rule that Mortgagor's lease is invalid as against Mortgagee.

Statutory Amendments.

Moreover two important statutes, so far as they apply, have validated the leases of mortgagors though made after the mortgage. These statutes are the Conveyancing Act, 1881, which applies to

(*e*) 4 Ann. c. 16, s. 10; *Moss* v. *Gallimore*, 1 Doug. 279; 1 Smith, L. C.; *Pope* v. *Briggs*, 9 B. & C. 245; *Rogers* v. *Humphreys*, 4 A. & E. 299, 313.

(*f*) *Rawson* v. *Eicke*, 7 A. & E. 451. See Form of Notice, post, Appendix C., Nos. 15, 16.

(*g*) *Burrowes* v. *Gradin*, 1 D. & L. 213.

(*h*) *Whitmore* v. *Walker*, 2 C. & K. 615.

(*i*) *Keech* v. *Hall*, 1 Doug. 21; 1 Sm. L. C.; *Thunder* d. *Weaver* v. *Belcher*, 3 East, 449.

(*k*) *Franklinski* v. *Ball*, 34 L. J., Ch. 153.

(*l*) See *Carpenter* v. *Parker*, 3 C. B., N. S. 206.

(*m*) See post, p. 160.

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all kinds of holdings, and the Tenants' Compensation Act, 1890, which applies to agricultural, &c. holdings only.

Partial validation of Mortgagor's Lease by Conveyancing Act.

The 18th section of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), has *with regard to leases made after the commencement of that Act* [1st of Jan. 1882], and *so far as a contrary intention is not expressed* by both parties in the mortgage deed, abolished the common law rule; has given to either mortgagor or mortgagee, if in possession, ample powers of leasing; and has rendered joint powers of leasing unnecessary for the future. See p. 160, *post.*

Partial validation of Mortgagor's Lease by Tenants' Compensation Act.

The Tenants' Compensation Act, 1890, 53 & 54 Vict. c. 57, has with regard to leases of land, allotments, or cottage gardens, also abolished the common law rule. By this Act where a person occupies land under a contract of tenancy with the mortgagor, whether made before or after the Act, which is not binding on the mortgagee, he is (1) against a mortgagee taking possession entitled to any compensation for crops, &c. which is or would be due to him from the mortgagor, and (2) if the tenancy be from year to year or for not more than 21 years before being deprived of possession otherwise than in accordance with the contract of tenancy, he is entitled to a six months' notice to quit. See more fully Ch. XX., sect. 7, as to compensation, and Ch. VIII., sect. 7, as to notice to quit, *post.*

Lease after mortgage before Conveyancing Act, or if Conveyancing Act excluded.

The 18th section of the Conveyancing Act being neither retrospective nor compulsory, the decisions applicable to mortgages before the act are still of very great importance, especially as it appears to have become usual for mortgagees to insist upon the exclusion of sub-s. (1) which confers the leasing power upon the mortgagor (*n*). These cases therefore must now be stated, so far as they affect the relation of landlord and tenant, the reader being referred to other works for the cases affecting the relations of mortgagor and mortgagee (*o*).

Leases by Estoppel.

If then the mortgage bear date before the act, or if the 18th section of the act be excluded, and there be no express leasing power reserved to the mortgagor, the result of a lease by the mortgagor alone is that the tenant will be thereby estopped (*p*) during his possession under the lease from disputing the mortgagor's right to demise (*q*), and apparently, upon the general principle that an estoppel binds both parties (*r*), the mortgagor landlord will also be liable by estoppel upon his covenant for quiet enjoyment upon his ejectment by the mortgagee (*s*).

(*n*) Hood and Challis on the Conveyancing Acts, p. 111.

(*o*) See Coote on Mortgages; Fisher on Mortgages.

(*p*) See *Webb* v. *Austin*, 7 M. & G. 701.

(*q*) *Alchorne* v. *Gomme*, 2 Bing. 54; *Morton* v. *Woods*, L. R., 3 Q. B. 658; 37 L. J., Q. B. 242; *Doe* d. *Leeming* v. *Skirrow*, 7 A. & E. 157.

(*r*) Co. Litt. 352 (a).

(*s*) *Hartcup* v. *Bell*, C. & E. 19, per Manisty, J., aff. both by Div. Court and C. A. (*ib.*). This is an exception to the general effect of the *qualified* covenant for quiet enjoyment: see Ch. XVII., Sect. 8 (b), post.

Mortgagee cannot distrain or sue for Rent, unless new Tenancy created.
*Rogers* v. *Humphreys.*

But although the mortgagee may treat the tenants of the mortgagor as trespassers in the case of a lease made after the mortgage, he cannot distrain or sue for rent, or for use and occupation (*t*), unless a new tenancy has been created as between him and the tenant in possession, by an attornment or otherwise (*u*). A mere notice of the mortgage, with a request to the tenant to pay his rent to the mortgagee (not assented to by the tenant), is insufficient to create between them the relation of landlord and tenant (*x*), and the mere fact of the tenant remaining in possession after such a notice is not evidence of an agreement that he shall become tenant to the mortgagee (*y*). If the notice be assented to and complied with by the tenant, he becomes tenant from year to year upon an agreement for a lease with the mortgagor, and can, by giving notice to quit, prevent the mortgagee from enforcing specific performance of the agreement (*z*). Where a tenant, after notice given to him of the mortgage, pays rent to the mortgagee under a distress, it does not constitute a tenancy by relation back, so as to entitle the mortgagee to distrain for a previous half-year's rent (*a*). But if the tenant expressly attorns as from a previous day at a fixed rent, all such rent, when in arrear, may be distrained for (*b*). Where a mortgagee gave notice of the mortgage to a tenant of the mortgagor, and required him to pay all rent due and to become due in respect of the premises, and the tenant acquiesced, it was held to be evidence from which a jury might infer a yearly tenancy, as between the mortgagee and the tenant (*c*).

The result of the cases seems to be that a bare notice by the mortgagee to a *subsequent* tenant of the mortgagor to pay him the rent (not assented to by the tenant) will not create any new tenancy; but that a notice acquiesced in by payment of rent or otherwise is evidence from which a jury may infer a new contract of tenancy from year to year as between the mortgagee and the tenant in possession (*d*). The mere receipt by the mortgagee from the mortgagor of interest due on the mortgage will not preclude the mortgagee from ejecting

(*t*) *Rogers* v. *Humphreys*, 4 A. & E. 299, 313; *Partington* v. *Woodcock*, 6 A. & E. 690; *Evans* v. *Elliott*, 9 A. & E. 342; *Turner* v. *Cameron's Coalbrook Steam Canal Co.*, 5 Exch. 932; *Lichfield* v. *Ready*, 5 Exch. 939.

(*u*) *Brown* v. *Storey*, 1 M. & G. 117, 126; *Roberts* v. *Hayward*, 3 C. & P. 432; *Doe* d. *Whitaker* v. *Hales*, 7 Bing. 322; *Doe* d. *Hughes* v. *Bucknell*, 8 C. & P. 566; *Doe* d. *Higginbotham* v. *Barton*, 11 A. & E. 307; *Doe* d. *Bowman* v. *Lewis*, 13 M. & W. 241.

(*x*) *Rogers* v. *Humphreys*, 4 A. & E. 299; *Partington* v. *Woodcock*, 6 A. & E. 690; *Evans* v. *Elliott*, 9 A. & E. 342; *Doe* d. *Higginbotham* v. *Barton*, 11 A. & E. 307; *Hickman* v. *Machin*, 4 H. & N. 716.

(*y*) *Towerson* v. *Jackson*, [1891] 2 Q. B. 381; 61 L. J., Q. B. 36; 65 L. T. 332; 40 W. R. 37, C. A.

(*z*) *Corbett* v. *Howden*, 25 Ch. D. 678; 54 L. J., Ch. 109; 50 L. T. 470; 32 W. R. 667, C. A.

(*a*) *Evans* v. *Elliott*, 9 A. & E. 342.

(*b*) *Gladman* v. *Plumer*, 15 L. J., Q. B. 80; 10 Jur. 109.

(*c*) *Brown* v. *Storey*, 1 M. & G. 117; *Hughes* v. *Bucknell*, 8 C. & P. 566.

(*d*) *Powseley* v. *Blackman*, Cro. Jac. 659; *Rogers* v. *Humphreys*, 4 A. & E. 299; *Doe* d. *Higginbotham* v. *Barton*, 11 A. & E. 307; *Hickman* v. *Machin*, 21 L. J., Ex. 310.

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the mortgagor's tenant (*e*). The fact of the mortgagee being allowed to see improvements made to the property by the lessee of the mortgagor, does not raise an implied tenancy between the mortgagee and the lessee, and is not a recognition of his holding (*f*). A mortgagee out of possession, who gives notice of the mortgage to the tenant who has become tenant since the mortgage, cannot maintain trespass for mesne profits against the tenant for the rents accrued due since the date of the mortgage, by mere entry upon the land after the notice, the doctrine of relation not applying to such a case (*g*).

Letting of furnished House by Mortgagor.

If the mortgagor of a house lets it furnished, and afterwards the tenant receives notice from the mortgagee to pay the rent to him, which he does, the mortgagor may still recover against the tenant for the use of the furniture, for either the rent may be apportioned, or a new agreement may be inferred to take the house of the mortgagee, and to pay the mortgagor for the use of the furniture (*h*).

Right of tenant of mortgagor to redeem.

A lessee under a mortgagor after mortgage has a right to redeem (*i*).

Where a mortgagor after mortgage demised part of the land, and then made a second mortgage, and the tenant paid rent to the second mortgagee, who demised another part of the land to a different tenant, and then notice was given to both tenants of the first mortgage, who accordingly paid their rents to the first mortgagee; it was held in ejectment by the second mortgagee, that the tenants might both show the prior mortgage and the notice (*k*). A. mortgaged to B., and afterwards leased to the defendant. The plaintiff bought the legal estate from B., and also the equitable estate from a party who derived it from A., which party also joined in the conveyance of the legal estate; it was held, that the plaintiff, although he had received rent from the defendant, was not bound by the mortgagor's lease to him, but might recover in ejectment after a notice to quit, or sue him for use and occupation after the payment and receipt of rent (*l*). Where a person who had bought premises which had not been conveyed to him, let his son into possession as tenant at will, paying no rent, afterwards had the property conveyed to him, and then mortgaged it; it was held, that if the mortgage had any operation on the tenancy at will, there was no new tenancy between the son and the mortgagee, so as to prevent the operation of the Statute of Limitations (*m*). Where a mortgagor gave an authority to the mortgagee to

(*e*) *Doe* d. *Rogers* v. *Cadwallader*, 2 B. & Ad. 473.

(*f*) *Doe* d. *Parry* v. *Hughes*, 11 Jur. 698.

(*g*) *Lichfield* v. *Ready*, 5 Exch. 939.

(*h*) *Salmon* v. *Matthews*, 8 M. & W. 827.

(*i*) *Turn* v. *Turner*, 59 L. T. 743; 37 W. R. 276—C. A., where the tenant had only an agreement for a lease; the principle seems to apply also to a tenant from year to year.

(*k*) *Doe* d. *Higginbotham* v. *Barton*, 11 A. & E. 307.

(*l*) *Doe* d. *Ld. Downe* v. *Thompson*, 9 Q. B. 1037.

(*m*) *Doe* d. *Goody* v. *Carter*, 9 Q. B. 863.

receive the rent of a tenant, under a demise subsequent to a mortgage, and the mortgagee received the rent for some time; after which the authority was countermanded, and the tenant refused to pay to either, and the mortgagor distrained, it was held that the relation of landlord and tenant was not created between the tenant and the mortgagee (*n*). A tenant holding under the mortgagor may show that the lease was made after the mortgage, and that he, the tenant, was compelled to pay the rent to the mortgagee, and such payment will operate as a discharge of the rent to the mortgagor, and may be proved under a special or common plea of payment (*o*). If a mortgagor sues for rent after notice given to the tenant of the mortgage, the tenant may, at his own expense, obtain relief under the Interpleader Rules of the Supreme Court (*p*).

Leases by Mortgagee.

The mortgagee, in the case of a mortgage to which the 18th section of the Conveyancing Act does not apply, cannot before foreclosure of the equity of redemption make a lease for years of property in mortgage which will bind the mortgagor, except to avoid an apparent loss and merely of necessity (*q*). If a mortgagee accepts a person as a tenant, to whom the mortgagor has granted a lease for years since the mortgage, that makes him only tenant from year to year to the mortgagee (*r*). Such new tenancy will be subject to the terms and conditions of the lease, so far as the same are applicable to and not inconsistent with a yearly tenancy (*s*). But payment of the rent will not relate back to the date or service of the notice of the mortgage, so as to make the new tenancy commence from that time (*t*). For the purpose of a notice to quit, the new tenancy will be deemed to have commenced from the same day in the year as the original term (*u*). Where a tenant attorns expressly as from a previous specified day, at a fixed rent, a distress may be made for the rent calculated from that day (*x*). When a new tenancy from year to year has been created as between the mortgagee and the tenant, the mortgagee is thenceforth the landlord, and may sue or distrain for the rent (*y*), or maintain an action for use and occupation (*z*). But he cannot maintain an ejectment against the tenant until the new tenancy

(*n*) *Wheeler* v. *Branscombe*, 5 Q. B. 373; *Wilton* v. *Dunn*, 17 Q. B. 294.

(*o*) *Johnson* v. *Jones*, 9 A. & E. 809; *Wauldlove* v. *Barnett*, 2 Bing. N. C. 538; 4 Dowl. 347; *Pope* v. *Biggs*, 9 B. & C. 245; *Whitmore* v. *Walker*, 2 C. & K. 615; *Underhay* v. *Read*, 20 Q. B. D. 209; 57 L. J., Q. B. 129; 36 W. R. 298; 58 L. T. 457—C. A.

(*p*) See R. S. C. 1883, Ord. LVII.; *Murdock* v. *Taylor*, 6 Bing. N. C. 293.

(*q*) *Hungerford* v. *Clay*, 9 Mod. 1; *Frankliuski* v. *Ball*, 34 L. J., Ch. 153.

(*r*) *Doe* d. *Hughes* v. *Bucknell*, 8 C. & P. 566; *Doe* d. *Prior* v. *Ongley*, 10 C. B. 25 (3rd point); *Carpenter* v. *Parker*, 3 C. B., N. S., 232, 235.

(*s*) *Doe* d. *Thomson* v. *Amey*, 12 A. & E. 476; *Doe* d. *Davenish* v. *Moffatt*, 15 Q. B. 257, 265; Cole Eject. 476.

(*t*) *Evans* v. *Elliott*, 9 A. & E. 342.

(*u*) *Doe* d. *Collins* v. *Weller*, 7 T. R. 478; 4 R. R. 496; Cole Ejec. 476.

(*x*) *Gladman* v. *Plumer*, 15 L. J., Q. B. 80; 10 Jur. 109.

(*y*) *Rogers* v. *Humphreys*, 4 A. & E. 299; *Brown* v. *Storey*, 1 M. & G. 117, 126.

(*z*) *Doe* d. *Ld. Downe* v. *Thompson*, 9 Q. B. 1037.

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has been determined by notice to quit, surrender, forfeiture, or otherwise (*a*), although afterwards he may (*b*).

Leases by Mortgagor and Mortgagee.

Where lands mortgaged before the Conveyancing Act are to be leased, the mortgagor and mortgagee ought to concur in granting the lease (*c*). A joint action of covenant is not maintainable against a mortgagor and a mortgagee on an implied covenant, if the latter has demised, and the former, who had merely an equitable interest, has confirmed the lease (*d*). A mortgagor and mortgagee for a term joined in a deed, by which the former leased and the latter confirmed the premises to a third party for the remainder of the term, at a rent reserved to the mortgagor, his executors, &c. The deed declared that nothing therein should abridge, defeat, alter, &c., the interest of the mortgagee in the premises, which was to remain a security for his principal and interest; the mortgagee was held entitled to the rent (*e*). A mortgagor agreed to sell premises held by a tenant under a lease granted by him after the mortgage, without the concurrence of the mortgagee, who, however, was willing to concur in the sale; it was held that the mortgagor was able to make a good title (*f*).

(b) *By Mortgagor and Mortgagee under Conveyancing Act.*

Conv. Act, 1881, s. 18.

The leasing powers, both of a mortgagor in possession and of a mortgagee in possession, *under a mortgage made on or after Jan.* 1*st*, 1882, are regulated in the following terms by sect. 18 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41):—

Lease by Mortgagor.

"(1.) A mortgagor (*g*) of land (*h*) while in possession shall, as against every incumbrancer (*i*), have, by virtue of this act, power to make, from time to time, any such lease of the mortgaged land, or any part thereof, as is in this section described and authorized.

Lease by Mortgagee.

"(2.) A mortgagee (*g*) of land (*h*) while in possession shall, as against all prior incumbrancers, if any, and as against the mortgagor, have, by

(*a*) Cole Ejec. 474, 477.

(*b*) *Doe* d. *Ld. Downe* v. *Thompson*, supra; *Pole* v. *Davis*, 1 F. & F. 284.

(*c*) Ante, p. 55.

(*d*) *Smith* v. *Pocklington*, 1 C. & J. 445.

(*e*) *Edwards* v. *Jones*, 1 Coll. 247.

(*f*) *Webb* v. *Austin*, 7 M. & G. 701; *Sturgeon* v. *Wingfield*, 15 H. & W. 224.

(*g*) By s. 2, sub-s. (vi.) of the act, "mortgage includes any charge on any property for securing money or money's worth, and mortgagor includes any person from time to time deriving title under the original mortgagor, or entitled to redeem a mortgage, according to his estate, interest, or right, in the mortgaged property; and mortgagee in possession is, for the purposes of this act, a mortgagee who, in right of the mortgage, has entered into, and is in possession of the mortgaged property."

(*h*) By s. 2, sub-s. (ii.) of the act, "land, unless a contrary intention appears, includes real and personal property, and any estate or interest in any property, real or personal, and any debt, and anything in action, and any other right or interest."

(*i*) By s. 2, sub-s. (vii.) of the act, "incumbrance includes a mortgage in fee, or for a less estate, and a trust for securing money and a lien, and a charge of a portion, annuity, or other capital or annual sum; and incumbrancer has a meaning corresponding with that of incumbrance and includes every person entitled to the benefit of an incumbrance, or to require payment or discharge thereof."

virtue of this act, power to make, from time to time, any such lease as aforesaid.

"(3.) The leases which this section authorizes are :—

(i.) An agricultural or occupation lease for any term not exceeding twenty-one years ; and

(ii.) A building lease for any term not exceeding ninety-nine years.

What Leases.

"(4.) Every person making a lease under this section may execute and do all assurances and things necessary or proper in that behalf.

"(5.) Every such lease shall be made to take effect in possession not later than twelve months after its date.

Rent.

"(6.) Every such lease shall reserve the best rent that can reasonably be obtained, regard being had to the circumstances of the case, but without any fine being taken.

"(7.) Every such lease shall contain a covenant by the lessee for payment of rent, and a condition of re-entry on the rent not being paid within a time therein specified, not exceeding thirty days.

Counterpart.

"(8.) A counterpart of every such lease shall be executed by the lessee, and delivered to the lessor, of which execution and delivery the execution of the lease by the lessor shall, in favour of the lessee, and all persons deriving title under him, be sufficient evidence.

Building Lease.

"(9.) Every such building lease shall be made in consideration of the lessee, or some person by whose direction the lease is granted, having erected, or agreeing to erect, within not more than five years from the date of the lease, buildings, new or additional, or having improved or repaired buildings, or agreeing to improve or repair buildings within that time, or having executed, or agreeing to execute, within that time, on the land leased, an improvement for or in connection with building purposes.

"(10.) In any such building lease, a peppercorn rent, or a nominal or other rent less than the rent ultimately payable, may be made payable for the first five years, or any less part of the term.

Delivery of Counterpart to Mortgagee.

"(11.) In case of a lease by the mortgagor, he shall, within one month after making the lease, deliver to the mortgagee, or, where there are more than one, to the mortgagee first in priority, a counterpart of the lease, duly executed by the lessee ; but the lessee shall not be concerned to see that this provision is complied with.

Specific Performance of Contract for Lease.

"(12.) A contract to make or accept a lease under this section may be enforced by or against every person on whom the lease, if granted, would be binding.

Application of Section.

"(13.) This section applies only if, and as far as a contrary intention is not expressed by the mortgagor and mortgagee in the mortgage deed, or otherwise in writing, and shall have effect, subject to the terms of the mortgage deed, or of any such writing, and to the provisions therein contained.

"(14.) Nothing in this act shall prevent the mortgage deed from reserving to or conferring on the mortgagor or the mortgagee, or both, any further or other powers of leasing, or having reference to leasing ; and any further or other powers so reserved or conferred shall be exercisable, as far as may be, as if they were conferred by this act, and with all the like incidents, effects, and consequences, unless a contrary intention is expressed in the mortgage deed.

"(15.) Nothing in this act shall be construed to enable a mortgagor or mortgagee to make a lease for any longer term or on any other con-

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ditions than such as could have been granted or imposed by the mortgagor, with the concurrence of all the incumbrancers, if this act had not been passed.

"(16.) This section applies only in case of a mortgage made after the commencement of this act; but the provisions thereof, or any of them, may, by agreement in writing made after the commencement of this act, between mortgagor and mortgagee, be applied to a mortgage made before the commencement of this act, so, nevertheless, that any such agreement shall not prejudicially affect any right or interest of any mortgagee not joining in or adopting the agreement.

Section not retrospective, but may be adopted retrospectively by agreement.

"(17.) The provisions of this section referring to a lease shall be construed to extend and apply, as far as circumstances admit, to any letting, and to an agreement, whether in writing or not, for leasing or letting."

Contract for Lease.

Mortgagee has benefit of covenants of lease by mortgagor after mortgage.

The effect of s. 18 of the Conveyancing Act taken with s. 10, which provides (see Chap. VII., sect. 4, *post*) that rent goes with the reversion, is that if a mortgagor demise after the mortgage by a lease in conformity with s. 18, but without the concurrence of the mortgagee, there is a relation created between the mortgagee and the lessee by virtue of which the mortgagee, after notice to pay rent to him and not to the mortgagor not complied with, may take advantage of the condition of re-entry for non-payment of rent, and eject the lessee (*k*).

Prevention of interference with easement.

A lease granted by a mortgagor in possession under the powers of this section binds the mortgagee and those claiming under him in such a way as to prevent the interference with any easement to which the lessee is entitled against the lessor and those claiming under him (*l*).

### SECT. 30.—*By Tenants by Elegit, &c.*

Their power to lease generally.

Leases by tenants under executions, as tenants by elegit, are conditional, and may be determined by payment or satisfaction of the debt and costs (*m*). Until so determined they remain as valid as any other demises (*n*). Where a fieri facias has issued against the property of a debtor, his term for years remains in him until the sheriff has actually assigned it; therefore until such assignment the purchaser of the term cannot make a valid lease of it (*o*). With respect to leases made by the debtor before the execution of a writ of elegit, the tenant by elegit (*i.e.*, the execution creditor) is a mere assignee of the reversion, and may, without any attornment, sue or distrain

(*k*) *Municipal Permanent Investment Building Society* v. *Smith*, 22 Q. B. D. 70; 58 L. J., Q. B. 61; 37 W. R. 42—C. A.

(*l*) *Wilson* v. *Queen's Club*. [1891] 3 Ch. 522; 60 L. J. Ch. 698; 65 L. T. 42; 40 W. R. 172, per Romer, J.

(*m*) *Price* v. *Varney*, 3 B. & C. 733; Cole Ejec. 566.

(*n*) But see *Doughty* v. *Stiles*, Rep. tempt. Finch, 115.

(*o*) *Playfair* v. *Musgrove*, 14 M. & W. 239; 3 D. & L. 72; *Doe* d. *Hughes* v. *Jones*, 9 M. & W. 372; 1 Dowl., N. S. 352; Cole Ejec. 569.

for the rent which becomes due after the filing of the writ and the inquisition thereon (*p*), provided the inquisition be valid, but not otherwise (*q*). He cannot eject a previous tenant until after his term expires or becomes forfeited, or is determined by notice to quit or otherwise (*r*).

## Sect. 31.—*By Receivers.*

Leases by Receivers in Chancery.

Receivers appointed by the High Court cannot demise without the authority and direction of the court (*s*). They are bound to obtain the best terms (*t*). A lease under seal granted by a receiver in a cause wherein A. B. is plaintiff and C. D. is defendant, for a term of fourteen years, and reserving rent to the receiver, and to any future receiver in the cause, would create a tenancy by estoppel as between him and the lessee, and give a right to distrain for rent (*u*).

Effect of Attornment to a Receiver.

An attornment to a receiver creates a tendency by estoppel between the tenant and the receiver, which the court applies to the purpose of collecting and securing the rents till a decree can be pronounced, taking care that the tenant shall be protected, both while the receiver continues to act, and when by the authority of the court he is withdrawn (*x*). It does not operate as an attornment to the parties interested so as to enable any of them to distrain, for thereby the object of the court in appointing the receiver would often be effectually defeated (*y*).

Appointment of Receiver pending action of ejectment by Landlord.

It may be mentioned here, that a receiver of rents from sub-tenants may be appointed pending an action by a landlord for recovery of land (*z*).

## Sect. 32.—*By Lords of Manors and Copyholders.*

By the Lord.

Every one having a lawful interest in a manor may make voluntary grants of copyhold escheated or come to his hands, as well as admittances, according to the custom of the manor, rendering the ancient rents and services, which bind him who has the inheritance (*a*). But voluntary grants of copyhold, by the lord, can only be made according to the custom of the manor (*b*). Where there is no custom

(*p*) *Ramsbottom* v. *Buckhurst*, 2 M. & S. 565 ; 15 R. R. 352 ; *Lloyd* v. *Davies*, 2 Exch. 103.

(*q*) *Arnold* v. *Ridge*, 13 C. B. 745.

(*r*) *Doe* d. *Da Costa* v. *Wharton*, 8 T. R. 2 ; Cole Ejec. 566.

(*s*) *Morris* v. *Elme*, 1 Ves. jun. 139. A receiver may be appointed by any Division of the High Court (Judicature Act, 1873, s. 24).

(*t*) *Wynne* v. *Ld. Newborough*, 1 Ves. jun. 164.

(*u*) *Dancer* v. *Hastings*, 4 Bing. 2 ; cited in *Morton* v. *Woods*, L. R., 3 Q. B. 658, 668.

(*x*) *Hughes* v. *Hughes*, 1 Ves. jun. 161 ; *Evans* v. *Mathias*, 7 E. & B. 602 ; 26 L. J., Q. B. 309 ; *Jolly* v. *Arbuthnot*, 4 De G. & J. 224 ; 28 L. J., Ch. 547 ; *Ames* v. *Birkenhead Docks Trustees*, 20 Beav. 332 ; 24 L. J., Ch. 540.

(*y*) *Evans* v. *Mathias*, 7 E. & B. 590 ; see *White* v. *Small*, 22 Beav. 72 ; 26 Id. 191 ; *Barton* v. *Rock*, 22 Beav. 81.

(*z*) *Gwatkin* v. *Bird*, 52 L. J., Q. B. 262.

(*a*) *Badger* v. *Forde*, 3 B. & A. 153.

(*b*) *Rex* v. *Welby*, 2 M. & S. 504.

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for that purpose the lord of a manor cannot make a new grant of copyhold (*c*). The ancient rent and services must be reserved; any alteration therein will make the grant void as against the lord's successor (*d*).

Leases of not more than one-twelfth of waste.

By the Inclosure Act, 1773, 13 Geo. 3, c. 81 (*e*), s. 15, lords of manors, with the consent of three-fourths of the commoners, may demise for not more than four years any part of the wastes and commons, not exceeding one-twelfth part, for the best rent that can be obtained by auction, the same to be applied in draining, fencing and improving the residue. So by custom the lord may have power to demise parcels of the waste (*f*), but a custom for the lord to grant leases of the waste, without restriction, is bad, as amounting to a power of destroying the right of common altogether (*g*). A copyhold, to which a right of common was annexed, having by the custom of the manor vested in the lord by forfeiture, and he having regranted it as a copyhold tenement with the appurtenances; it was held, that having always continued demisable whilst in the hands of the lord, it was a customary tenement, and as such, was entitled to the right of common (*h*).

By Copyholders.

Forfeiture, if lease without licence.

A copyholder cannot make a lease for more than one year without a licence or by special custom, without thereby incurring a forfeiture of his estate (*i*). In most manors a copyholder may demise for one year or less without any licence of the lord (*k*); but this is by custom of the manor (*l*). A lease for one year, and so from year to year during ten years, being in effect a lease for ten years, is a forfeiture; but otherwise of a lease for one year, with a covenant for the holding it for a longer time at the will of the lessor (*m*). A lease for one year and so from year to year for the life of the lessee, being a lease for two years at least, is not good (*n*). So if it be for a year except one day, and so on from year to year, excepting one day in every year; for it is a certain lease for two years excepting two days, which is a lease in effect for more than one year; and although there be the intermission of a day, yet this is a mere evasion and not material (*o*). So if a copyholder make three leases together, each to

(*c*) *Rex* v. *Hornchurch*, 2 B. & A. 189.

(*d*) *Doe* d. *Rayner* v. *Strickland*, 2 Q. B. 792.

(*e*) See Chitty's Statutes, tit. "Inclosure."

(*f*) *Ld. Northwick* v. *Stanway*, 3 Bos. & P. 346.

(*g*) *Badger* v. *Forde*, 3 B. & A. 153; *Arlett* v. *Ellis*, 7 B. & C. 346; but see *Lascelles* v. *Lord Onslow*, 36 L. T. 459.

(*h*) *Badger* v. *Forde*, supra.

(*i*) Scriven, 329, 330 (5th ed.); *Anon.*, Moor. 184; *East* v. *Harding*, Cro. Eliz. 498; Robbins's Settled Land Statutes, citing *Doe* v. *Bousfield*, 6 Q. B. 492.

(*k*) Scriven Cop. 329 (5th ed.); Cole Ejec. 627; *Frosel* v. *Welsh*, Cro. Jac. 403; *Matthews* v. *Whetton*, Cro. Car. 233; *Goodwin* v. *Longhurst*, Cro. Eliz. 535; *Erish* v. *Rives*, Id. 717.

(*l*) *Turner* v. *Hodges*, Hetley, 126; Lit. Rep. 233; Cole Ejec. 627.

(*m*) *Lady Montague's case*, Cro. Jac. 301; Cole Ejec. 615.

(*n*) *Luttrell* v. *Weston*, Cro. Jac. 308; Cole Ejec. 34, 442.

(*o*) *Lady Montague's case*, Cro. Jac. 301.

commence within two days after the expiration of the other, it is a mere evasion of the custom, and therefore not good (*p*). So a lease for more than one year, though intended only as a collateral security, is bad, if it amounts to a present demise (*q*). A lease for years without licence from the lord, is not good without a special custom, though the lease be made by parole, or be not in possession, but to commence in futuro; and such lease is a forfeiture if it be a good lease as between the parties (*r*).

Under Special Custom to lease.

By special custom, a copyholder may make leases for more than one year or for life, and a certain number of years after, without licence from the lord (*s*). A custom for copyholders in fee to lease for any number of years without licence, on condition of the term ceasing on the lessor's death, is a good custom (*t*). The powers granted by the Settled Estates Act (*u*), include powers to the lords of settled manors to give licences to their copyhold and customary tenants to grant leases of lands held by them of such manors, to the same extent, and for the same purposes, as leases may be granted of freehold hereditaments under the act (*x*). The granting of a licence is entirely in the discretion of the lord, and the court will not compel him to grant a licence, even where there is a custom to pay a certain sum for every year of the term (*y*).

Powers of Lord to grant Licences.

Under Licence from the Lord.

A copyholder having licence to demise, ought not to exceed the licence, otherwise the lease is bad (*z*); but he may lease for fewer years than his licence allows (*a*). If the lord licence his copyholder for life, to make a lease for three years, if he so long live, a lease for three years absolutely is good (*b*); because a lease by a copyholder for life determines by his death. If the lord licence upon condition, the condition is void: for he gives nothing, but only dispenses with the forfeiture (*c*). A tenant at will of a manor cannot grant a copyholder a licence to alien for years; and if a tenant for life of a manor grants a licence to alien for years, it determines at his death (*d*).

What Lease by a Copyholder is a Forfeiture.

A lease without licence, and contrary to the custom, in order to amount to a forfeiture, must be a complete demise; therefore, where a copyholder demised his copyhold for a year, and agreed to grant a further term of twenty-one years, provided he could obtain of his lord a licence for that purpose, the licence was held to be a condition

(*p*) *Matthews* v. *Whetton*, Cro. Car. 233.
(*q*) *Morris* v. *Twist*, 2 Mod. 79.
(*r*) Com. Dig. tit. *Copyhold* (K. 3).
(*s*) Scriven Cop. 330 (5th ed.).
(*t*) *Turner* v. *Hodges*, Hutt. 101.
(*u*) Ante, Ch. I., sect. 4.
(*x*) Settled Land Act, 1882, s. 14.
(*y*) *Reg.* v. *Hale*, 9 A. & E. 339.
(*z*) *Haddon* v. *Arrowsmith*, Owen, 73; Cro. Eliz. 461; *Jackson* v. *Neal*, Cro. Eliz. 394; Scriven Cop. 332 (5th ed.); Com. Dig. tit. *Copyhold* (K. 3); *Doe* d. *Robinson* v. *Bousfield*, 6 Q. B. 422; 1 C. & K. 558.
(*a*) *Isherwood* v. *Oldknow*, 3 M. & S. 382; *Easton* v. *Pratt*, 2 H. & C. 676; 33 L. J., Ex. 233.
(*b*) *Worledge* v. *Benbury*, Cro. Jac. 436; Scriven Cop. 332 (5th ed.).
(*c*) *Haddon* v. *Arrowsmith*, Cro. Eliz. 461; *Doe* d. *Wood* v. *Morris*, 2 Taunt. 52.
(*d*) Com. Dig. tit. *Copyhold* (C. 3); Scriven Cop. 331 (5th ed.).

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precedent, and therefore that no forfeiture was incurred (*e*). If the interest actually granted be within the period allowed by the custom of the manor, although the lessor covenants that the lessee shall enjoy the land for a longer period, no forfeiture is incurred; the distinction being between an interest actually granted and a matter which rests entirely in contract (*f*). No one can take advantage of the forfeiture, except the party who was lord at the time it occurred. The remainderman or reversioner, after the death of the lord without entry or seizure for the forfeiture, has no such right (*g*). The admittance of a copyholder after a forfeiture has been incurred, is a waiver of such forfeiture; and any act equally solemn will operate in the same manner. A waiver does not operate as a new grant, but the tenant is in by virtue of his old title (*h*). If a copyholder, after a lease by licence, forfeit his copyhold, the lord cannot avoid the lease (*i*).

Effect of Leases by Copyholders.

A lease by a copyholder not warranted by the custom, and without the licence of the lord, is good against the parties themselves and against every one but the lord (*k*): and as against the lord it is only a ground of forfeiture, which he may waive (*l*). If a copyholder make a lease by licence, the lessee may assign without licence, or make an underlease, for the lord by his licence has parted with his interest; so if the lessor after a lease by licence die without heir, the lessee shall have it for his term against the lord, for the licence is a confirmation of the lord (*m*).

Copyhold Act, 1894.

The 37th section of the Copyhold Act, 1894, 57 & 58 Vict. c. 46, which consolidates previous Copyhold Acts from 1841 to 1887, and deals with enfranchisement of copyhold and other matters affecting the relationship between lords and copyholders, contains a proviso in favour of an occupying tenant who properly pays on account of a rent-charge under that act any money which as between him and his landlord he is not liable to pay, the section enacting that he "shall be entitled to recover from the landlord the money paid, or to deduct it from the next rent payable."

(*e*) Bac. Abr. tit. *Leases* (1, 6); *Price* v. *Birch*, 4 M. & G. 1; 1 Dowl., N. S. 720; *Lenthall* v. *Thomas*, 2 Keb. 267; *Pester* v. *Cater*, 9 M. & W. 315.

(*f*) *Lady Montague's case*, Cro. Jac. 301; *Lenthall* v. *Thomas*, 2 Keb. 267; *Doe* d. *Coore* v. *Clare*, 2 T. R. 739; *Richards* v. *Ceeley*, 3 Keb. 638; Cole Ejec. 615.

(*g*) *Lady Montague's case*, supra; *Eastcourt* v. *Weeks*, 1 Salk. 186; *Margaret Podger's case*, 9 Co. R. 107 a; 1 Brownl. 181; 2 Id. 134, 153; Cole Ejec. 615.

(*h*) *Doe* d. *Tarrant* v. *Hellier*, 3 T. R. 171; 1 R. R. 680.

(*i*) Com. Dig. tit. *Copyhold* (C. 3); *Clarke* v. *Arden*, 16 C. B. 227.

(*k*) *Salisbury* d. *Cooke* v. *Hurd*, Cowp. 481; *Ashfield* v. *Ashfield*, Sir W. Jon. 157; *Doe* d. *Tressider* v. *Tressider*, 1 Q. B. 416; *Doe* d. *Robinson* v. *Bousfield*, 1 C. & K. 558; 6 Q. B. 492.

(*l*) *Doe* d. *Robinson* v. *Bousfield*, 6 Q. B. 492; 1 C. & K. 558.

(*m*) *Johnson* v. *Smart*, 1 Roll. Ab. 508, pl. 14.

## Sect. 33.—*By Agents and Bailiffs.*

Ch. I. Sec. 33. *Leases by Agents and Bailiffs.*

### (a) *Agents.*

Authority of Agents to execute Leases.

An agent having sufficient authority may bind his principal by leases and agreements for leases made for him and in his name and on his behalf (*n*). If the lease or agreement be under seal, the agent's authority to execute it must also be under seal (*o*). But if the lease or agreement be not under seal, the agent's authority need not be under seal, nor even in writing, notwithstanding the 4th section of the Statute of Frauds (*p*). The agent should not exceed his authority, otherwise the principal will not be bound, and the agent will incur a personal liability (*q*). The authority of the agent to sign the particular contract, or such a contract, must be proved, if disputed, in an action or suit against the principal (*r*).

Land Agent.

A steward or land agent has no authority as such to enter into contracts for leases (*s*); but a power to "manage and superintend estates" gives an authority to contract for the granting of customary leases according to the nature and locality of the property to be demised (*t*). From a direction of Blackburn, J., to a jury it seems that a farm bailiff with authority to let from year to year on the usual terms and to receive rents, has no implied authority to let on unusual terms, or to make such a special stipulation as that, a farmhouse being out of repair, an in-coming tenant should not be bound to repair, or leave in repair, and should be paid a full and fair compensation for any repairs which he should do, without the express authority of his principal (*u*).

Subsequent Ratification.

If an agent acts without sufficient authority, his acts may be subsequently adopted and ratified in writing by his principal (*x*), or even without any writing (*y*). Even where an agent executes a deed on behalf of his principal, but without sufficient authority, the latter may adopt and ratify the deed by re-delivering it, or by anything

(*n*) *Hamilton* v. *Earl Clanricarde*, 1 Bro. P. C. 341; *Ridgway* v. *Wharton*, 3 De G., M. & G. 677, 688; 6 H. L. Cas. 238.

(*o*) 3 Bac. Abr. 408; Com. Dig. tit. *Attorney* (C. 1), (C. 5); *Harrison* v. *Jackson*, 7 T. R. 207; *Horsley* v. *Rush*, Id. 209.

(*p*) 29 Car. 2, c. 3; *Coles* v. *Tricothick*, 9 Ves. 234, 250; 7 R. R. 167; *Clinan* v. *Cooke*, 1 Sch. & Lef. 22; 9 R. R. 3; *Clarke* v. *Fuller*, 16 C. B., N. S. 34; *Forster* v. *Rowland*, 7 H. & N. 103; *Heard* v. *Pilley*, L. R., 4 Ch. Ap. 548.

(*q*) *Hamilton* v. *Earl Clanricarde*, 5 Bro. P. C. 547; *Spedding* v. *Nevell*, L. R., 4 C. P. 212.

(*r*) *Bolre* v. *Sutton*, 3 Mer. 237; *Ridgway* v. *Wharton*, 3 De G., M. & G. 677, 686; 27 L. J., Ch. 46; 6 H. L. Cas. 238; *Firth* v. *Greenwood*, 1 Jur., N. S., 806; *Spedding* v. *Nevell*, L. R., 4 C. P. 212.

(*s*) *Collen* v. *Gardiner*, 21 Beav. 540, per Romilly, M.R.; *Mortal* v. *Lyons*, 8 Ir. Ch. 112; *Ridgway* v. *Wharton*, supra.

(*t*) *Peers* v. *Sneyd*, 17 Beav. 151.

(*u*) *Turner* v. *Hutchinson*, 2 F. & F. 185; in this case the agent had died.

(*x*) *Fitzmaurice* v. *Bayley*, 6 E. & B. 868; reversed in error on another point, 8 E. & B. 664; 9 H. L. Cas. 78.

(*y*) *Rodmell* v. *Eden*, 1 F. & F. 542; and see *Bolton Partners* v. *Lambert*, 41 Ch. D. 295—C. A., and post, Ch. IV., sect. 1 (b).

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tantamount to a re-delivery (*z*). An authority created by deed may be revoked without deed (*a*).

Agent should sign the Name of his Principal.

An agent, who has sufficient authority, whether by deed or otherwise, should execute any lease or agreement in the name of his principal, and not in his own name only (*b*). Thus, "A.B. (seal) by E. F., his attorney," to which may be added, "by power of attorney hereunto annexed *or* a copy whereof is hereunto annexed *or* hereupon indorsed." If the writing be not under seal, it should be signed thus,—"A. B. by E. F. his attorney," *or* "Per pro A. B., E. F., or to that effect" (*c*).

Form of Signature, &c.

Implied Warranty of Authority.

If an agent executes a lease or agreement professedly as attorney or agent for another, he thereby impliedly warrants and promises that he has sufficient authority from his principal to execute such contract on his behalf, and an action will lie against him personally or against his representatives, for the breach of such warranty or promise, if he really has no such authority (*d*).

If Agent executes in his own Name only, he will be personally liable.

If an agent executes a lease or agreement in his own name only, whether under seal (*e*), or not under seal (*f*), he will be personally liable as a principal, although in the body of the instrument he is described as agent for A. B., and is therein stated to make it for and on behalf of A. B.; because an agent may, if he please, contract a personal liability for and on behalf of his principal (*g*). Parol evidence would not be admissible to *exonerate the agent* from such personal liability, for that would contradict the writing (*h*). But it would be admissible *to charge the principal*, and to enable him to sue or be sued on the contract (*i*). To avoid such personal liability the agent should always *sign as agent*, and not with his own name only (*k*).

Parol Evidence not admissible to exonerate Agent.

How far agent can bind principal by promise of lease.

The question has been raised whether an agent having authority to let lands can bind his principal by a stipulation that if certain events happen a party shall have a lease (*l*). It seems that if the

(*z*) Shep. Touch. 57; *Tupper* v. *Foulkes*, 9 C. B., N. S. 797; 30 L. J., C. P. 214.

(*a*) *Rex* v. *Wait*, 11 Price, 508; *Manser* v. *Back*, 6 Hare, 443.

(*b*) *Combes's case*, 9 Co. R. 77 a; *White* v. *Cuyler*, 6 T. R. 177; 3 R. R. 147; *Wilks* v. *Back*, 2 East, 142; *Appleton* v. *Binks*, 5 East, 148; *Tanner* v. *Christian*, 4 E. & B. 591; *Parker* v. *Winlow*, 7 E. & B. 942, 947; *Cooke* v. *Wilson*, 1 C. B., N. S. 153; 26 L. J., C. P. 15; *Saxon* v. *Blake*, 29 Beav. 438; *M'Ardle* v. *Irish Iodine Manufacturing Co.*, 15 Ir. C. L. Rep. 146.

(*c*) *Alexander* v. *Sizer*, L. R., 4 Ex. 102.

(*d*) *Collen* v. *Wright*, 7 E. & B. 301; 8 Id. 647; 27 L. J., Q. B. 215; *Simons* v. *Patchett*, 7 E. & B. 568; *Pow* v. *Davis*, 1 B. & S. 220; 30 L. J., Q. B. 257; *Spedding* v. *Nevell*, L. R., 4 C. P. 212.

(*e*) *Appleton* v. *Binks*, 5 East, 148; 7 R. R. 672.

(*f*) *Tanner* v. *Christian*, 4 E. & B. 591; *Cooke* v. *Wilson*, 1 C. B., N. S. 153; 26 L. J., C. P. 15; *Parker* v. *Winlow*, 7 E. & B. 942, 947; *Saxon* v. *Blake*, 29 Beav. 438.

(*g*) *Norton* v. *Herron*, 1 C. & P. 648; By. & Moo. 229; *Tanner* v. *Christian*, 4 E. & B. 591; *Cooke* v. *Wilson*, 1 C. B., N. S. 153; 26 L. J., C. P. 15; *Parker* v. *Winlow*, 7 E. & B. 942, 947.

(*h*) *Higgins* v. *Senior*, 8 M. & W. 844; *Humble* v. *Hunter*, 12 Q. B. 310; *Jones* v. *Littledale*, 6 A. & E. 486; *Magee* v. *Atkinson*, 2 M. & W. 440; *Chadwick* v. *Maden*, 9 Hare, 191.

(*i*) *Higgins* v. *Senior*, supra; *Humfrey* v. *Dale*, 7 E. & B. 266; E., B. & E. 1004.

(*k*) *Green* v. *Kopke*, 18 C. B. 549; *Clay* v. *Southern*, 7 Exch. 717; 27 L. J., Ex. 202; *Parker* v. *Winlow*, 7 E. & B. 942; *Deelands* v. *Gregory*, 2 E. & E. 602; *Cooke* v. *Wilson*, 1 C. B., N. S. 153; *Alexander* v. *Sizer*, L. R., 4 Ex. 102.

(*l*) *Ramsden* v. *Dyson*, L. R., 6 H. L. 129.

principal knows that the party is dealing with his agent under the belief that all statements made by the agent were warranted by the principal, and so knowing, allows the party to expend money, a Court of Equity would not afterwards allow the principal to set up want of authority in the agent, but that this knowledge must be brought home to the principal (*m*).

Misrepresentation by Agent. *Cornfoot* v. *Fowke*.

With respect to misrepresentations by agents on the sale or letting of property, whereby a person is induced to enter into a disadvantageous contract, which otherwise he would not have entered into, it was held in *Cornfoot* v. *Fowke* (*n*) to be incorrect to say that the misrepresentation by the agent has the same effect as a misrepresentation by the principal. There the plaintiff put a furnished house into the hands of an agent to let at a stipulated rent. The plaintiff knew, but the agent did not know, that the adjoining house was a bawdy-house. That the defendant had been informed by the agent, in answer to an inquiry, that there was no objection to the house, was held not to be a defence to an action for not taking it. But it is conceived that *Cornfoot* v. *Fowke* would now be either overruled or explained away (*nn*).

If an agent make such representations fraudulently, the principal will be liable, although he did not instruct his agent to make any representations on the subject (*o*). So if the principal authorizes any such false representations, or knowingly employs an agent, ignorant of the particular defect or objection, in order that the latter may innocently, but inaccurately answer questions on the subject, it by no means follows that the party defrauded can repudiate and rescind the whole contract, by reason of the fraud practised upon him (*p*), although sometimes it may be done immediately after the fraud is discovered, provided the parties can be replaced *in statu quo*, but not otherwise (*p*). This can seldom if ever happen where an estate has passed, or possession has been taken.

Rescinding Contract for Fraud.

Trustee Agent.

A trustee, who is otherwise disqualified as such, may act as agent after renouncing his trust, and his conduct may be evidence of renunciation (*q*), though of course it is more prudent to renounce by deed.

House-Agent.

A house-agent letting a house for his employer seems to be liable if he neglects to make reasonable inquiries as to the solvency of the tenant. In a case where the house-agent introduced a tenant, and charged 5 per cent. commission, it was held to be a question for the

(*m*) See *Ramsden* v. *Dyson*, supra.

(*n*) *Cornfoot* v. *Fowke*, 6 M. & W. 358; Lord Abinger, C.B., diss.

(*nn*) See notes to *Pasley* v. *Freeman*, 2 Sm. L. C., 10th ed., p. 81; Evans on Principal and Agent, 2nd ed. at p. 476; Pollock on Contracts, 6th ed. at p. 552; Pollock on Torts, 5th ed. at p. 291; *Barwick* v. *English Joint Stock Bank*, L. R., 2 Ex. at p. 262, per Willes, J.

(*o*) See *Barwick* v. *English Joint Stock Bank*, L. R., 2 Ex. 259, Ex. Ch.

(*p*) *Blackburn* v. *Smith*, 2 Exch. 783; *Feret* v. *Hill*, 15 C. B. 207; *Clarke* v. *Dickson*, E., B. & E. 148.

(*q*) *Stacy* v. *Elph*, 4 My. & K. 195.

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jury, in an action brought by his employer in consequence of the tenant's insolvency, whether it was part of the house-agent's duty to make reasonable inquiries into the eligibility of the tenant. The court refused to set aside a verdict for the plaintiff, and expressed strong opinions as to the liability of the house-agent. "What does the house-agent receive his commission for," asked Wightman, J., "except for making inquiries as to the fitness of the tenant?" (*r*). It seems doubtful whether a house-agent has implied authority to let persons into possession; but slight evidence will be sufficient to prove that he had express authority (*s*).

Right to Commission where Property sold after being let through Agent.

The right to commission on a sale where property has been let through the agent, but the sale effected without him, is discussed by Lord Watson in a case in which the House of Lords reversed the decision of both courts below upon a question of fact (*t*).

Right of House-Agent to Commission where negotiations for Lease broken off by Principal.

No case, so far as the editor is aware, expressly decides what commission, if any, a house-agent finding a person ready to be tenant, but whom his principal without reason declines to accept, is entitled to claim. In *Pricket* v. *Badger* (*u*) it was held that an agent employed to sell a property at $1\frac{1}{2}$ per cent. commission, and who found a purchaser, who made a binding offer, was entitled, on his principal declining the offer, to sue on a *quantum meruit*, and it was said by Willes, J., to recover the whole of the agreed commission. The principle of this case would, it is conceived, apply to some extent to the case of a house-agent procuring a binding offer to accept a lease from a person to whom as tenant no reasonable objection could be taken.

It is believed, however, to be a common practice for house-agents to agree that "commission is only to be chargeable on a letting being carried out through their instrumentality," and if such an agreement (which is frequently expressed in a printed register, &c.) can be proved, no commission or even a *quantum meruit* would seem to be chargeable till an absolutely binding contract has been concluded.

Amount of House-Agent's Commission.

It may be useful to insert here the "Terms of Commission authorized by the Institute of Estate and House Agents." They are:—

FOR LETTING UNFURNISHED HOUSES, OR DISPOSING OF LEASES, OTHER THAN GROUND LEASES.

If let for three years or less, £5 per cent. on one year's rent; if for more than three years, £7½ per cent. on one year's rent, and (in either case) upon the premium or consideration £5 per cent. up to £1,000,

(*r*) *Heys* v. *Tindall*, 1 B. & S. 296; 30 L. J., Q. B. 362; 4 L. T. 403; 9 W. R. 664.

(*s*) *Slack* v. *Crewe*, 2 F. & F. 59.

(*t*) *Toulmin* v. *Millar*, 58 L. T. 96.

(*u*) *Prickett* v. *Badger*, 26 L. J., C. P. 33; 1 C. B., N. S. 296.

and £2½ per cent. on the residue, and the commission on any sum obtained for fixtures, furniture, or effects of any kind, of £5 per cent. up to £500, and £2½ per cent. on the residue.

For Letting Furnished Houses in Town or Country.

When let for a year or less period, £5 per cent. on the rental.

When let for more than a year, £5 per cent. on first year's rent, and £2½ per cent. on rent for remainder of term.

Where a property is let, and the tenant afterwards purchases, the commission for selling will then become chargeable, less the amount previously paid for letting.

For Valuations or Sale of Furniture, Fixtures, and Other Effects.

£5 per cent. up to £500, and £2½ per cent. on the residue.

The Commission may be lost by revocations of the instructions to let, but a *quantum meruit* may be recovered for expense and trouble incurred before the revocation (*x*).

House-Agent must be licensed for the letting of furnished house.

24 & 25 Vict. c. 21, s. 10.

By the Revenue (No. 1) Act, 1861, 24 & 25 Vict. c. 21, s. 10, every person who, as agent, shall for reward advertise for sale or for letting any *furnished* house or part of any furnished house, or by any public notice, or by any other ways or means, hold himself out to the public as an agent for selling or letting *furnished* houses, and who shall in any way negotiate for the selling or letting of any *furnished* house or part of any furnished house, is deemed to be a person exercising the business of a house-agent within the meaning of the act and the Schedule (B.) thereto (*y*), and must be licensed accordingly. The act does not apply to the letting of any house not exceeding the annual rent or value of twenty-five pounds; but it is provided also, that any storey or flat rated and let as a separate tenement shall be considered to be a house for the purposes of the act.

Penalty for acting as House-Agent without Licence.

By sect. 12, "every person who shall use or exercise the business, occupation or calling of a house-agent, without having a licence in force under this act so to do, shall forfeit the sum of twenty pounds."

From the wording of this section it would seem not to be applicable to an isolated letting (although for commission) by an unprofessional person.

(*x*) *Simpson* v. *Lamb*, 25 L. J., C. P. 113; 17 C. B. 603. In this case the instructions were to sell an advowson.

(*y*) Schedule B. is as follows:—"Licence to be taken out yearly by every person who shall use or exercise the business, occupation or calling of a house agent . . . 2*l.* 0*s.* 0*d.*"

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Saving for Land Agent, licensed Auctioneer, &c.

Sect. 13 provides, "that this act shall not extend to require any agent employed in the management of landed estates, or any attorney, solicitor, proctor, writer to the signet, agent or procurator admitted in any court of law, or any conveyancer who shall as such have taken out his annual certificate, or any auctioneer or appraiser, having in force a licence as such, to take out a licence under this act as a house-agent."

(b) *Bailiffs.*

Power of Bailiffs to grant Leases.

A bailiff of a manor cannot, by virtue of his office, make leases for years; for his business is only to collect the rents, gather the fines, look after the forfeitures, and such like: he has no estate or interest in the manor itself, and therefore cannot contract for any certain interest thereout: but the lord of the manor may give him a special power to make leases for years as he may do to any stranger: and then such leases, if they are pursuant to the power, and made in the name of the lord, will be as good as leases by the lord himself. A general bailiff of a manor may make leases *at will* without any special authority, because, having to collect and answer for the rents of the manor to his lord, if he could not let leases at will the lord might sustain great prejudice by absence, sickness, or other incapacity to make leases when any of the former leases were expired; and such leases at will are for the benefit of the lord, and can be in no way prejudicial to him, because he may determine his will when he thinks fit. Such, however, must be taken to be strict tenancies at will, and not from year to year (*z*).

(*z*) *Shopland* v. *Rydler*, Cro. Jac. 55; *Gybson* v. *Searls*, Cro. Jac. 84, 176.

# CHAPTER II.

## TO WHOM TERMS MAY BE GRANTED.


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### Sect. 1.—*Generally.*

General Rule.

Every person who is not rendered incompetent by some legal disability is capable of being a lessee.

### Sect. 2.—*To Ecclesiastical Persons.*

Spiritual Persons may not hold more than 80 Acres without Bishop's Licence.

By the Pluralities Act, 1838, 1 & 2 Vict. c. 106, s. 28, no spiritual person allowed to perform the duties of any ecclesiastical office may take to farm for occupation by himself by lease or otherwise more than eighty acres of land, without the permission in writing of the bishop of the diocese, on pain of forfeiting for every acre above eighty, the sum of forty shillings for each year of occupation.

A lease made contrary to the provisions is not void, but voidable merely on an information brought for holding a quantity of land above eighty acres.

### Sect. 3.—*To Trustees for Charitable Uses.*

The Mortmain and Charitable Uses Act.

Leases of land in England or Wales to trustees *for charitable uses* must (if not made for full and valuable consideration) be made according to the Mortmain and Charitable Uses Act, 1888 (*a*); that

(*a*) 51 & 52 Vict. c. 42, repealing and re-enacting with amendments 9 Geo. 2, c. 36; 9 Geo. 4, c. 85; 24 & 25 Vict. c. 9; 25 & 26 Vict. c. 17; 26 & 27 Vict. c. 106; 27 Vict. c. 13; 29 & 30 Vict. c. 57. As to power of such trustees to hold *any land* in mortmain, see Sect. 9, post.

CH. II. SEC. 3. *Leases to Charity Trustees.*

is, they must be by deed, sealed and delivered in the presence of two or more witnesses (*b*), twelve calendar months at least before the death of the grantor, and inrolled in the Central Office of the Supreme Court within six calendar months next after the execution thereof, and must be made to take effect in possession of the charitable uses intended immediately from the making thereof, and be without any power of revocation, reservation, condition, or provision whatsoever for the benefit of the grantor, or of any person claiming under him, other than and except such as are specially permitted by the above-mentioned Act. The main exceptions of the Act are that (1) a peppercorn rent, (2) mines, (3) any easement, may be reserved to the lessor, and also (4) that provisions may be made as to erection, &c., of buildings, (5) that a right of entry may be reserved, and (6) that "any stipulation of the like nature" may be made.

Colourable deed.

A deed which is merely colourable as to the consideration, and which is framed to evade the provisions of the Mortmain Acts, is fraudulent and void as against the grantor's heir (*c*). A man demised to his sister lands for twenty years at a peppercorn rent. Three months afterwards he granted the same lands to charitable uses, subject to the lease. Held that such grant was an evasion of the statute and void (*d*).

Exemptions from Mortmain and Charitable Uses Act.

The Act of 1888 does not, any more than did the old Mortmain Acts, extend to lands in Scotland or Ireland, nor to grants, &c., to the Universities of Oxford or Cambridge, or any colleges or houses of learning therein, or to the colleges of Eton, Winchester, or Westminster. Other exemptions are public parks (up to 20 acres), museums (up to 2 acres), schoolhouses for elementary schools (up to 1 acre), and land (up to 2 acres) for the promotion of education, art, literature, science or other like purposes, but in the case of this latter set of exemptions the lease must be made in good faith for full and valuable consideration.

When lands were already in mortmain, a lease thereof to charitable uses was held not to be within the repealed 9 Geo. 2, c. 36 (*e*).

## SECT. 4.—*To Infants.*

To Infants, when void or voidable.

Leases to infants are not absolutely void, but voidable by them upon attaining their majority. And it would seem that an infant who has taken possession under a lease which is disadvantageous to

(*b*) *Wickham* v. *Marquis of Bath*, 35 L. J., Ch. 5; L. R., 1 Eq. 17; 35 Beav. 59.
(*c*) *Doe* d. *Williams* v. *Lloyd*, 5 Bing. N. C. 741.
(*d*) *Wickham* v. *Marquis of Bath*, L. R., 1 Eq. 17; 35 Beav. 59; 35 L. J., Ch. 5.
(*e*) *Walker* v. *Richardson*, 2 M. & W. 882; *Att.-Gen.* v. *Glyn*, 12 Sim. 84; *Ashton* v. *Jones*, 28 Beav. 460.

him, is liable if he has not disclaimed on attaining his full age (*f*). Even during infancy he may be liable for the use and occupation of *necessary* lodgings or apartments suitable to his state and degree (*g*). Where an infant rented a house, and exercised his trade as a barber therein, it was held that it was properly left to the jury to decide whether it was as a necessary of life, or a mere incident to his trade (*h*). In the latter case, as an infant is incapable by law of trading, he would not be liable; in the former case he would (*i*).

Election to avoid—when made.

The election to avoid a lease must be made by the infant within a reasonable time after he attains his full age (*k*); and an acquiescence of four months after majority has been held to preclude an infant from afterwards disaffirming a lease (*l*). An acquiescence for so long a period would be evidence from which a jury might infer an affirmance of the lease.

If the infant lessee elect to annul a lease *under which he has occupied*, he cannot recover the premium paid for it, although subsequent events may effect a complete failure of the object for which the premium was paid (*l*). In such a case there would have been only a partial, not a total failure of consideration: if the failure be total the infant can recover (*m*).

Avoidance for misrepresentation of age.

If a lease be set aside at the instance of the lessor, on the ground that the lessee is an infant, and obtained the lease on the misrepresentation that he was of full age, the lessor cannot recover for use and occupation (*n*).

Infant jointly interested with another.

If a person jointly interested with an infant in a lease obtain a renewal to himself only, and the lease prove beneficial, he is held to have acted as trustee, and the infant may claim his share of the benefit; but if it do not prove beneficial, he must take it upon himself (*o*).

Renewal of Leases to Infants.

By virtue of the Infants' Property Act, 1830, 11 Geo. 4 & 1 Will. 4, c. 65, s. 12, leases to infants may, under the direction of the Chancery Division of the High Court (*p*), be surrendered and renewed. This act applies equally, whether the interest of the infant be legal or equitable (*q*).

(*f*) Bull, N. P. 177; *Ketsey's case*, Cro. Jac. 320; *Baylis* v. *Dyneley*, 3 M. & S. 477; *Holmes* v. *Blogg*, 8 Taunt. 35; 19 R. R. 445.

(*g*) *Hands* v. *Slaney*, 8 T. R. 578.

(*h*) *Lowe* v. *Griffiths*, 1 Scott, 458.

(*i*) See Smith L. & T. 70.

(*k*) See *North Western Rail. Co.* v. *McMichael*, 5 Ex. 128.

(*l*) *Holmes* v. *Blogg*, 8 Taunt. 35; 19 R. R. 445.

(*m*) *Corpe* v. *Overton*, 10 Bing. 252; and see *Everett* v. *Wilkins*, 29 L. T. 846.

(*n*) *Lempriere* v. *Lange*, 12 Ch. D. 675; 41 L. T. 378; 27 W. R. 879.

(*o*) *Ex parte Grace*, 1 B. & P. 376.

(*p*) Judicature Act, 1873, s. 34.

(*q*) *In re Griffiths*, L. R., 29 Ch. D. 248; 54 L. J., Ch. 742; 53 L. T. 262; 33 W. R. 728, per Pearson, J.

CH. II. SEC. 5.
*Leases to Married Women.*

## SECT. 5.—*To Married Women.*

Married Women may be Lessees.

At common law, a married woman may be a lessee, her husband's express assent to the lease not being necessary, as the estate vests until he signifies his dissent (*r*). She may, however, avoid it after his death (*s*). A married woman living separate from her husband may, at common law, by taking a lease, bind her separate estate for payment of the rent and performance of the covenants (*t*), and it is expressly provided by s. 1 of the Married Women's Property Act, 1893, 56 & 57 Vict. c. 63, repealing and re-enacting with amendments sub-ss. 3 and 4 of the Married Women's Property Act, 1882, 45 & 46 Vict. c. 75, that—

Every contract hereafter entered into by a married woman, otherwise than as agent—

(a) shall be deemed to be a contract entered into by her with respect to her separate property whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract;

(b) shall bind all separate property which she may at that time or thereafter be possessed of or entitled to; and

(c) shall also be enforceable by process of law against all property which she may thereafter while discovert be possessed of or entitled to.

Provided that nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract any separate property which at that time or thereafter she is restrained from anticipating.

Renewal of Leases to Married Women.

By the Infants' Property Act, 1830, 11 Geo. 4 & 1 Will. 4, c. 65, s. 12, leases to married women may, under the directions of the Chancery Division of the High Court (*u*), be surrendered and renewed.

## SECT. 6.—*To Lunatics.*

Liability of.

Idiots and lunatics may take leases for their benefit (*x*). Use and occupation cannot be maintained on a written agreement entered into by a lunatic to take a house which is unnecessary, if the lessor was aware of it, and took advantage of the lunatic's situation (*y*).

Renewal of Leases.

Committees of lunatics may, by the Lunacy Act, 1890, 53 & 54 Vict. c. 5, replacing 16 & 17 Vict. c. 70 (*z*), under the direction of the Judge in Lunacy, surrender leases and take new ones for the benefit of the lunatic.

(*r*) *Swaine* v. *Holman*, Hob. 204; Co. Lit. 3 a.
(*s*) Co. Lit. 3 a.
(*t*) *Gaston* v. *Frankum*, 2 De G. & Sm. 561; Fry, s. 157.
(*u*) Substituted for the Court of Chancery by the Judicature Act.
(*x*) Co. Lit. 2 b.
(*y*) *Dane* v. *Viscountess Kirkwall*, 8 C. & P. 679.
(*z*) Ante, Ch. I., Sect. 24.

### Sect. 7.—*To Convicts.*



Persons convicted of Treason or Felony.

The leaseholds of a convict come under the operation of the Forfeiture Act, 1870, 33 & 34 Vict. c. 23, passed to abolish forfeitures for treason or felony. At common law the leaseholds of persons attainted of treason or felony became forfeited, with their other property, to the crown (*a*). But by the 1st section of the Act of 1870, it is provided that no conviction for treason or felony, or felo de se, shall cause any forfeiture or escheat (*b*).

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### Sect. 8.—*To Aliens and Denizens.*

Naturalization Act, 1870.

The rights of aliens to hold property have been regulated by a series of statutes culminating in the Naturalization Act, 1870 (33 & 34 Vict. c. 14), which repealed ten previous statutes.

Of the repealed acts, it will be sufficient to refer shortly to two. By 32 Hen. 8, c. 16, s. 13 (*c*), *leases of dwelling-houses or shops* granted to any stranger artificer were made void. That act did not extend to assignments to aliens of leases previously granted to natural-born subjects (*d*). By 7 & 8 Vict. c. 66, s. 4, aliens were enabled to hold personal property of all kinds, *except chattels real* [*i.e.*, terms of years], as effectually as natural-born subjects; and by sect. 5 of the same act "every alien being the subject of a friendly state" was enabled to hold lands or houses for the purpose of residence or business for any term of years not exceeding twenty-one years.

Alien may take Lease in the same manner as natural-born Subject.

But all statutory restrictions appear to be done away with by the Naturalization Act, 1870 (33 & 34 Vict. c. 14), which enacts (sect. 2), that "real and personal property of every description may be taken, acquired, held and disposed of by an alien in the same manner in all respects as by a natural-born British subject;" provided that this section shall not confer any right on an alien to hold real property situate out of the United Kingdom, or to "any right or privilege as a British subject, except such rights and privileges in respect of property as are hereby expressly given to him," and "that this section shall not affect any estate or interest in real or personal property to which any person has or may become entitled, either mediately or immediately, in possession or expectancy, in pursuance of any disposition made before the passing of this act, or in pursuance of any devolution by law on the death of any person dying before the passing of this act."

(*a*) Co. Lit. 2 b.
(*b*) See further provisions of this act, ante, Chap. I., Sect. 25.
(*c*) Repealed, Stat. Law Rev. Act, 1863.
(*d*) *Wootten* v. *Steffenoni*, 12 M. & W. 129.

CH. II. SEC. 8. *Leases to Aliens.*

Alien Enemies.

Alien enemies cannot hold leases for the purpose of habitation or commerce, or for any other purpose (*e*), and this restriction does not appear to be taken away by the Act of 1870.

Denizens.

A denizen, *i.e.*, an alien born, who has obtained ex donatione regis letters-patent to make him an English subject (*f*), may be a lessee, like a natural-born subject (*g*), independently of the Naturalization Act.

## SECT. 9.—*To Corporations.*

Leases to Corporations.

A corporation aggregate may take any chattel, as a lease, &c., in its corporate capacity, which shall go in succession, because it is always in being (*h*). But regularly no chattel shall go in succession in case of a sole corporation; therefore, if a lease for years be made to a bishop and his successors, and the bishop die, it shall not go to his successors, but to his executors (*i*); by custom, however, it may, as in the instance of the Chamberlain of London (*k*).

Authority to hold land in mortmain.

No corporation, however, whether sole or aggregate (with some few exceptions), can take a lease unless it be authorized by licence from the Crown, or by some statute for the time being in force to hold land in mortmain, and land leased to a corporation without such authority becomes forfeited to the Crown from the date of the lease (*l*).

Leases by Corporations to their own Members.

One individual of a corporation aggregate cannot take a lease from the corporation (*m*). A corporation sole cannot make a lease to himself in his natural capacity (*m*); but there is no objection to such a lease being made in trust for the grantor. One member of a corporation aggregate cannot make a lease of corporate lands to another member; thus, a dean cannot make a lease to his chapter (*m*), nor vice versâ. But a lease may be made by the dean and chapter to one of the prebendaries, as a prebendary is not an integral part of the body politic (*m*). Where land was let to the churchwardens and overseers of the poor, jointly with the surveyors of the highways, and their successors, it was held that it was not within the Poor Relief Act, 1819, 59 Geo. 3, c. 12, s. 12, though let at a vestry meeting and for the purposes of the poor; and that therefore the parties were individually liable (*n*).

Canal Companies.

By 21 & 22 Vict. c. 75, s. 3, made perpetual by 23 & 24 Vict. c. 41, canal companies being also railway companies may not accept a lease of a canal or railway, except under the authority of a special act.

(*e*) See *Alcinous* v. *Negren*, 4 E. & B. 217.
(*f*) Co. Lit. 129 a; Cole Ejec. 576.
(*g*) 1 Blac. Com. 374; Bendl. 10, pl. 40; 32 Hen. 8, c. 16, s. 13.
(*h*) Bac. Abr. tit. *Corporations* (E. 4).
(*i*) Co. Lit. 46 b.
(*k*) 2 Bac. Abr. 14.
(*l*) Mortmain and Charitable Uses Act, 1888, 51 & 52 Vict. c. 42, ss. 1, 6 (exception of parks, schoolhouses, &c.), and 10.
(*m*) *Salter* v. *Grosvenor*, 8 Mod. 303.
(*n*) *Uthwatt* v. *Elkins*, 13 M. & W. 772.

## Sect. 10.—*To Parish Officers.*



Leases for Workhouses.

The Poor Relief Act, 1819, 59 Geo. 3, c. 12, ss. 8, 9, authorizes parishes to purchase or hire houses for the purposes of lodging the poor, and to build workhouses thereon : and to resell what may be no longer wanted. Such assurances, if made for value, are not charitable nor affected by the Statutes of Mortmain (*o*).

Guardians of unions may, by order of the Local Government Board and with consent of ratepayers, hire buildings for union workhouses, &c., pursuant to the Poor Law Amendment Act, 1834, 4 & 5 Will. 4, c. 76, s. 23.

Temporary Hirings without Seal.

By the Poor Law Amendment Act, 1867, 30 & 31 Vict. c. 106, s. 13, "guardians may, with the approval of the Poor Law Board [Local Government Board since the Local Government Act, 1871], hire or take on lease, temporarily, or for a term of years not exceeding five, any land or buildings for the purpose of the relief or employment of the poor and the use of the guardians or their officers, without any order of the said board under seal."

Leases of not more than Twenty Acres in the whole.

By the Poor Relief Act, 1819, 59 Geo. 3, c. 12, s. 12, churchwardens and overseers may, with the consent of the vestry, purchase, *or hire or take on lease* for and on account of the parish, any suitable portion or portions of land within or near to the parish, not exceeding twenty acres in the whole, and employ paupers to cultivate the same (*p*). By sect. 17, all such land is to be conveyed, demised and assured to them and their successors, and they are to take and hold the same "in the nature of a body corporate for and on behalf of the parish." Any such assurance should be made to them "and their successors," not to them, their heirs and assigns (*o*). Where land was let to the churchwardens and overseers of the poor, jointly with the surveyors of the highways, and their successors, it was held that it was not a case within the above act though let at a vestry meeting and for the purposes of the poor, and that therefore the parties were individually liable (*q*). A demise to churchwardens and overseers in their name of office would be good, and no acceptance thereof under any common seal need be alleged in pleading (*r*). They are not exactly a corporation, but only a quasi-corporate body of a peculiar kind (*s*).

Lease to Overseers—for Offices.

By the Parochial Offices Act, 1861, 24 & 25 Vict. c. 125, "the overseers of any parish in England, the population whereof shall exceed 4,000 persons according to the census, for the time being,

(*o*) *Burnaby* v. *Barsby*, 4 H. & N. 326 ; 28 L. J., Ex. 326.

(*p*) As to letting such land, see ante, Chap. I., Sect. 16.

(*q*) *Uthwatt* v. *Elkins*, 13 M. & W. 772.

(*r*) *Smith* v. *Adkins*, 8 M. & W. 362 ; 1 Dowl., N. S. 129.

(*s*) *Gouldsworth* v. *Knights*, 11 M. & W. 337.

CH. II. SEC. 10. *Leases to Parish Officers.*

with the consent of the vestry, called after due notice, and with the consent of the Poor Law Board [Local Government Board since the Local Government Board Act, 1871], signified by an order under their seal, may hire any room, or purchase or *take upon lease* or exchange any land or building, or sell land belonging to such parish, and invest the proceeds of such sale in the purchase of other land and building, or erect a suitable building on any land acquired as aforesaid, for the purpose of an office for the transaction of the business of the parish" (*t*).

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### SECT. 11.—*To Trustees of Friendly Societies.*

Leases under Friendly Societies Act.

The 47th section of the Friendly Societies Act, 1896, 59 & 60 Vict. c. 25, re-enacting s. 16 of the repealed Friendly Societies Act, 1875, 38 & 39 Vict. c. 60, is as follows :—

Friendly Societies Act, 1896, s. 47.

(1) A registered society or branch may (if the rules thereof so provide) hold, purchase, or take on lease in the names of the trustees of the society or branch, any land, and may sell, exchange, mortgage, lease, or build upon that land (with power to alter and pull down buildings and again rebuild) and a purchaser, assignee, mortgagee, or tenant shall not be bound to inquire as to the authority for any sale, exchange, mortgage, or lease by the trustees, and the receipt of the trustees shall be a discharge for all sums of money arising from or in connexion with the sale, exchange, mortgage, or lease.

(2) A branch of a registered society need not for the purposes of this section be separately registered.

(3) Nothing in this section shall authorise a benevolent society [*i.e.*, by sect. 8 (3) "a society for any benevolent or charitable purpose"] to hold land exceeding one acre in extent.

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### SECT. 12.—*To Trustees of Public Baths and Wash-houses.*

9 & 10 Vict. c. 74. Town Council may take Lease of Baths.

By the Baths and Wash-houses Act, 1846, 9 & 10 Vict. c. 74, after providing in what manner the act may be adopted by municipal corporations, or (with the approval of one of her Majesty's principal secretaries of state), by any parish in England not within any such incorporated borough, and for the appointment of commissioners for carrying that act into execution in any such parish ; sect. 27 enacts, "that the council of any such borough, and the commissioners, with the approval of the vestry of any such parish, may, if they shall think fit, contract for the purchase *or lease* of any baths and wash-houses already or hereafter to be built and provided in any such borough or parish, and appropriate the same to the purposes of this act, with such additions or alterations as they shall respectively deem

(*t*) The Act contains other clauses for carrying the above into effect.

necessary:" and the trustees of any such public baths and wash-houses, with such consent as therein mentioned, are authorized to sell and lease the same to the said council or commissioners (*u*).

In rural parishes the parish meeting has the exclusive power of adopting the act and its amending acts.

Adoption of Act by parish meeting in rural parish.

When a municipal corporation provides baths and wash-houses under the provisions of this act, the property becomes vested in the body corporate with all incidental liabilities, and not in the council (*x*).

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### Sect. 13.—*Of Land for Free Public Libraries, Museums, &c.*

Lease to Town Council and Local Board under Public Libraries Act.

By the adoptive Public Libraries Act, 1892, 55 & 56 Vict. c. 53, a consolidating Act, s. 11, the library authority of any library district, *i.e.*, the council of any borough or other urban district, the library commissioners of any metropolitan parish, and in rural parishes, by s. 7 of the Local Government Act, 1894, 56 & 57 Vict. c. 73, the parish council, or if there be no parish council, the parish meeting, may, for the purposes of that act, "*hire land*" and may "erect, take down, rebuild, alter, repair and extend buildings for such purposes, and fit up, furnish and supply the same respectively with all requisite furniture, fittings and conveniences." By sub-s. 4 of s. 12 the same authority "may let a house or building or any part thereof, or any land vested in them for the purposes of the act, which is not at the time of such letting required for those purposes, and shall apply the rents and profits thereof for the purposes of the act."

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### Sect. 14.—*To Ratepayers for Public Improvements.*

Lease to Ratepayers for Public Improvements. 23 & 24 Vict. c. 30.

By the adoptive Public Improvements Act, 1860, 23 & 24 Vict. c. 30, intituled "An Act to enable a Majority of Two-Thirds of the Ratepayers of any Parish or District, duly assembled, to rate their District in aid of Public Improvements for general benefit within their District" (sect. 1), "it shall be lawful for the ratepayers of any parish maintaining its own poor, the population of which, according to the last account from time to time taken thereof by the authority of parliament, exceeds five hundred persons, to purchase *or lease lands*, and to accept gifts and grants of land, for the purpose of forming any *public walk, exercise or playground*, and to levy rates for maintaining the same, and for the removal of any nuisances, or obstruction to the free use and enjoyment thereof, and *for improving any open walk or footpath*, or placing convenient *seats or shelters from rain*, and for other purposes of a similar nature." By sect. 2, the

(*u*) See Chitty's Statutes, tit. "*Baths.*"

(*x*) *Cowley* v. *Mayor, &c., of Sunderland*, 6 H. & N. 565.

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act may be adopted for any borough, or for any parish having a population of five hundred or upwards, in the same manner as the Baths and Wash-houses Act may be adopted in such borough or parish, and by sect. 7 of the Local Government Act, 1894, 56 & 57 Vict. c. 73, in rural parishes the parish meeting has the exclusive power of adopting the act, which is executed by the parish council, if there be one, but if not, by the parish meeting.

To Inhabitants of a Parish generally.

A lease cannot generally be made to the inhabitants of a parish or township, because they cannot take *as such*, not being a corporate body (*y*). But a grant from the crown to the inhabitants of a parish would in effect incorporate them, though for the purposes of such grant only (*z*).

## SECT. 15.—*To Trustees of Renewable Leaseholds.*

Renewal of Leases by Trustees.

The 19th section of the Trustee Act, 1893, 56 & 57 Vict. c. 53, re-enacting ss. 10—12 of the Trustee Act, 1888, 51 & 52 Vict. c. 59, which re-enacted 23 & 24 Vict. c. 145, s. 8 (an enactment repealed by s. 64 of the Settled Land Act, 1882), provides that—

A trustee of any leaseholds for lives or years which are renewable from time to time, either under any covenant or contract or by custom or usual practice, may, if he thinks fit, and shall, if thereto required by any person having any beneficial interest, present or future or contingent, in such leaseholds, use his best endeavours to obtain from time to time a renewed lease of the same hereditaments on the accustomed and reasonable terms, and for that purpose may from time to time make or concur in making such surrender of the lease for the time being subsisting, and do all such other acts as are requisite ; provided that, where by the terms of the settlement or will the person in possession for his life or other limited interest is entitled to enjoy the same without any obligation to renew or to contribute to the expense of renewal, this section shall not apply unless the consent in writing of such person is obtained to such renewal on the part of the trustee.

By sect. 11, money required for renewal of leases, &c., may be raised out of the trust funds.

A trustee, whose duty it was to renew leaseholds out of the rents, applied them to his own use :—Held, that the tenant for life, and not those in remainder, must bear the loss (*a*).

## SECT. 16.—*To Agents and Trustees.*

Leases to Agents.

With respect to agents and other persons whose duties are to protect their principals and to prevent the property from being let at an

(*y*) *Weekly* v. *Wildman*, 1 Ld. Raym. 405, 407 ; *Abbot* v. *Weekly*, 1 Lev. 176 ; *Lockwood* v. *Wood* (in error), 6 Q. B. 62 ; *Constable* v. *Nicholson*, 14 C. B., N. S. 230 ; 32 L. J., C. P. 240. But see *Vestry of Bermondsey* v. *Brown*, 14 W. R. 213.

(*z*) *Willingale* v. *Maitland*, L. R., 3 Eq. 103, 106 ; 36 L. J., Ch. 64.

(*a*) *Solley* v. *Wood*, 29 Beav. 482.

undervalue, Courts of Equity view with considerable jealousy contracts entered into for leases to them. It is incumbent on a person in the situation of an agent to show that the transaction is perfectly fair and reasonable, and that a just consideration has been given by him for a lease obtained from his principal (*b*). The same observation also applies to persons in the situation of debtor and creditor, solicitor and client, and mortgagor and mortgagee (*c*).

Lease to Trustee.

If a lease be made to a trustee, he is personally liable for the rent and covenants (*d*), and the lessor has no remedy at law against the cestui que trust in respect thereof. The trustee, however, where he holds leasehold property for a tenant for life and remaindermen, has a duty to the remaindermen to keep it free from risk of forfeiture, and is entitled to have the rent employed in so keeping it (*e*), and further, except in case of personal default, would seem to have a right to be indemnified out of the trust fund (*f*).

If there be personal default on the part of the trustee, he would seem to have no right to be indemnified.

A lease by a trustee to himself seems to stand on the same footing as a sale by trustee to himself; *i.e.*, it is a transaction of the greatest nicety, and one which the courts will watch with the greatest jealousy (*g*).

(*b*) *Ld. Kingsland* v. *Barnewell*, 4 Bro. P. C. 154; *Ld. Hardwicke* v. *Vernon*, 4 Ves. 411; 4 R. R. 244; *Lady Ormond* v. *Hutchinson*, 16 Ves. 94; *Grosvenor* v. *Sherratt*, 28 Beav. 659; post, Chap. IX., Sect. 4.

(*c*) *Gubbins* v. *Creed*, 2 Sch. & Lef. 214; *Webb* v. *Rorke*, Id. 661; Fisher, s. 873; post, Chap. IX., Sect. 4.

(*d*) *Walters* v. *Northern Coal Mining Co.*, 5 De G., M. & G. 629; 25 L. J., Ch. 633.

(*e*) *Fowler*, *In re*, 16 Ch. D. 723; 44 L. T. 99; 29 W. R. 891, per Fry, J.

(*f*) Lewin on Trusts, 7th ed., p. 217.

(*g*) See Lewin on Trusts, 7th ed., pp. 438—451; citing *Ex parte Hughes*, 6 Ves. 617; 6 R. R. 1; *Att.-Gen.* v. *Earl of Clarendon*, 17 Ves. 491.

# CHAPTER III.

## OF WHAT TERMS MAY BE GRANTED.


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### Sect. 1.—*Corporeal and Incorporeal Hereditaments.*

Leases of Corporeal Hereditaments.

Leases for life, or for years, or from year to year, may be made of anything corporeal or incorporeal which lies in livery or grant (*a*). Corporeal hereditaments consist wholly of substantial and permanent objects, as land, houses, &c., and were, before the Real Property Act, 1845, 8 & 9 Vict. c. 106, said to lie in livery; but, by sect. 2 of that act, "all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery."

Definition of Incorporeal Hereditaments.

An incorporeal hereditament is a right issuing out of a thing corporeal (whether real or personal), or concerning, or annexed to, or exercisable within the same (*b*). Incorporeal hereditaments are principally these: *viz.*, advowsons, tithes and tolls, commons and estovers, ways, offices, franchises, corrodies, and pensions, and annuities (*c*). They are:—

Demise of, by Deed only.

Generally speaking, capable of being demised; but such demise, even for less than three years, must be by deed, for they lie in grant and not in livery (*d*). But a right of way appurtenant to land will pass by a parol demise of the land (*e*), and so will a right to dig turf, or other easement, although not specially mentioned (*f*); so a market, with a right to take the tolls, may be demised without deed (*g*). Where there is a demise of premises, and an entire rent reserved, if any part of the premises cannot be legally demised, the whole is void (*h*).

(*a*) Shep. Touch. 268.
(*b*) Co. Lit. 19 b, 20 a.
(*c*) *Rex* v. *Alresford*, 1 T. R. 358; *Musgrave* v. *Cave*, Willes, 323; 1 Inst. 9.
(*d*) *Mayfield* v. *Robinson*, 7 Q. B. 486; *Wood* v. *Leadbitter*, 13 M. & W. 839.
(*e*) *Skull* v. *Glenister*, 16 C. B., N. S. 81; 32 L. J., C. P. 185.
(*f*) *Dobbyn* v. *Somers*, 13 Ir. Com. L. Rep., N. S. 293.
(*g*) *Bridgland* v. *Shapter*, 5 M. & W. 375.
(*h*) *Doe* d. *Griffith* v. *Lloyd*, 3 Esp. 78; 6 R. R. 813.

## Sect. 2.—*Advowsons.*



*Lease of Advowsons.*

Lease of Advowsons.

An advowson (advocatio) is the right of presentation to a church or ecclesiastical benefice. Although it has been said that an advowson cannot properly be the subject of a demise, on the ground that as no profit is permitted to accrue, no rent can be reserved, nor any services performed to the proprietor (*i*); yet this does not seem to be quite correct; for a lease may be made not only of lands, but of all other hereditaments (*k*), such as advowsons, tithes, offices not concerning the administration of justice, and the like (*l*); and the lessee of tithes, advowsons, or any incorporeal hereditaments, would be liable to an action for the rent agreed upon (*m*). An advowson is a tenement (*n*). Where a lessee for years of an advowson was presented to the benefice by the lessor, it was adjudged to be a surrender of his term (*o*).

## Sect. 3.—*Tithes and Tolls.*

5 Geo. 3, c. 17.

Leases of Tithes.

By 5 Geo. 3, c. 17, persons having any spiritual or ecclesiastical promotions are enabled to grant leases of tithes, tolls or other incorporeal inheritances, solely and without any lands or corporeal hereditaments, for one, two or three life or lives, or for any term not exceeding twenty-one years, which shall be "as good and effectual in law against such archbishop, bishop, masters and fellows, or other heads and members of colleges or halls, deans and chapters, precentors, prebendaries, masters and guardians of hospitals, and other persons so granting the same, and their successors and every of them, to all intents and purposes, as any lease or leases already made or to be made by any such archbishop, &c.," by virtue of the stat. 32 Hen. 8, c. 28, or any other statute then in being; and actions of debt may be brought by such lessors for rent in arrear, as in the case of any other landlord or lessor. Leases of tithes must be by instrument under seal, as incorporeal hereditaments only lie in grant (*p*). A parson may grant his tithes for years (*q*), so he may lease them for so long a term as he shall continue parson (*r*); and rent may be reserved on such lease (*s*); or the parson may demise them without any rent, if he pleases (*t*). Under the settlement of

(*i*) Com. Dig. tit. *Advowson* (C. 2).
(*k*) Bac. Abr. tit. *Leases* (A.).
(*l*) 2 Crnise, ss. 22, 24; *Bousher* v. *Morgan*, 2 Anstr. 404; *Cox* v. *Brain*, 3 Taunt. 95.
(*m*) 2 Woodd. 69; Rogg. Ecc. L. 17; Co. Lit. 119 b.
(*n*) *Kensey* v. *Langham*, Cas. temp. Talbot, 144; Co. Lit. 19, 20; 2 Blac. Com. 17; *Robinson* v. *Tongue*, 3 P. Wms. 461.
(*o*) *Gybson* v. *Searls*, Cro. Jac. 84, 176.
(*p*) *Gardiner* v. *Williamson*, 2 B. & Ad. 336.
(*q*) Shep. Touch. 241.
(*r*) *Brewer* v. *Hill*, 2 Anstr. 413; 3 R. R. 596.
(*s*) 5 Geo. 3, c. 17.
(*t*) *Walker* v. *Wakeman*, 1 Ventr. 294; 2 Lev. 150; 3 Keb. 597.

CH. III. SEC. 3. *Leases of Tithes and Tolls.*

an estate with a power to the tenant in possession to let all or any part of the premises, so as the usual rents be reserved, a lease of tithes which had never been let before was held void (*u*).

By the Tithe Commutation Act (6 & 7 Will. 4, c. 71), the lessees of tithes commuted to rent-charges may surrender and avoid their leases, on certain terms, as to compensation and apportionment of rent, to be settled by the commissioners. Until they do so, they continue liable to pay the rent reserved by their leases (*x*).

Leases of Tolls.

Tolls may be let or mortgaged (*y*); but the Turnpike Acts, which gave express power (see 3 Geo. 4, c. 126, s. 57) to trustees to let turnpike tolls, have been repealed in consequence of the general discontinuance of turnpike roads.

## SECT. 4.—*Commons and Estovers.*

Leases of Commons.

Rights of common may be demised by deed (*z*). With respect to commons, the Inclosure Act, 1773, 13 Geo. 3, c. 81, s. 15, empowers the lord of any manor, with the consent of three-fourths of the persons having right of common upon the wastes and commons within the manor, at any time to demise or lease, for any term or number of years not exceeding four years, any part of such waste and commons not exceeding a twelfth part thereof, for the best and most improved yearly rent that can by public auction be got for the same; and directs that the clear net-rent shall be applied to drain, fence and otherwise improve the residue of the waste and commons.

When the lord of the manor conveys away a part of the wastes to a third person, though the right of ownership of the soil changes hands, the right of common still subsists in the commoners as well over that part of the wastes that the lord has conveyed away, as over that part which he retains in his own hands (*a*). A common will not pass without express words (*b*).

Leases of Estovers.

Estovers may be leased; the grantee, therefore, of house-bote, or hay-bote, may let it to another (*c*). Estovers to be burned on land demised will not pass without express words (*d*).

(*u*) *Pomery* v. *Partington*, 3 T. R. 665; 1 R. R. 787.
(*x*) *Tasker* v. *Bullman*, 3 Exch. 351.
(*y*) *Olroyd* v. *Crampton*, 4 Bing. N. C. 24; *Shepherd* v. *Hodsman*, 18 Q. B. 316; *Markham* v. *Stanford*, 14 C. B., N. S. 376; Gunning on Tolls, 140.
(*z*) *Sury* v. *Brown*, Latch. 99.
(*a*) *Benson* v. *Chester*, 8 T. R. 396; 4 R. R. 708.
(*b*) *Clark* v. *Cogge*, Cro. Jac. 170, 190.
(*c*) Shep. Touch. 222; Bac. Abr. tit. *Leases* (A.).
(*d*) *Clark* v. *Cogge*, Cro. Jac. 170, 190.

## Sect. 5.—*Ways.*



Leases of Ways.

A right of way legally appurtenant to land is demisable with the land (*e*), and will pass with it without being expressly mentioned (*f*), even by a parol demise (*g*); so will a right to dig turf, or other pre-existing easement (*h*). But after a way or other easement has been extinguished by unity of ownership, it cannot be revived by a grant or lease of the dominant tenement containing general words, such as "rights, members, easements and appurtenances thereunto belonging or appertaining" (*i*). But it may pass by the words, "or therewith usually held, occupied or enjoyed" (*k*). And if it be a way of necessity it will pass with the principal subject-matter of the grant or demise, without any mention of ways or appurtenances (*l*). So will a watercourse or other *necessary* easement (*m*).

## Sect. 6.—*Franchises and Corrodies.*

Leases of Franchises

Franchises may be demised by deed (*n*), except indeed in some few particular cases (as where the franchise is a personal immunity, &c.); thus a fair or market, either with or without the right of taking toll, either there or at any other public places, as at bridges, wharfs, or the like, may be demised (*o*). A market, with a right to take the tolls, may be demised without deed (*p*). A franchise granted to one cannot be bestowed upon another to the prejudice of a former grant (*q*). Every fair is a market, but every market is not a fair (*r*). A market which is held on the wrong day (Saturday instead of Friday) is not a market "legally established" (*s*). The right to a market may be barred by the Statute of Limitations (*t*).

Leases of Corrodies.

A corrody is a right of sustenance, originating in the endowment of lands: in lieu of which, especially when due from ecclesiastical persons, a pension or sum of money was sometimes substituted; and these were chargeable on the person of the owner of the inheritance in respect thereof (*u*). A corrody was either certain or uncertain,

(*e*) *Osborne* v. *Wise*, 7 C. & P. 761.

(*f*) *Clark* v. *Cogge*, Cro. Jac. 170, 190; *Staple* v. *Heydon*, 6 Mod. 1, 3; *Howton* v. *Fearson*, 8 T. R. 50, 56; Bac. Ab., tit. *Offices* (H.).

(*g*) *Skull* v. *Glenister*, 16 C. B., N. S. 81; 32 L. J., C. P. 185.

(*h*) *Dobbyn* v. *Somers*, 13 Ir. Com. L. Rep., N. S. 293.

(*i*) *Barlow* v. *Rhodes*, 1 Cr. & M. 439, 448.

(*k*) *James* v. *Plant* (in error), 4 A. & E. 749; *Kooystra* v. *Lucas*, 5 B. & A. 830; *Bradshaw* v. *Eyre*, Cro. Eliz. 570.

(*l*) *Morris* v. *Edgington*, 3 Taunt. 24; 12 R. R. 579; *Davies* v. *Scar*, L. R., 7 Eq. 427.

(*m*) *Sury* v. *Pigot*, Popham, 166.

(*n*) *Somerset, Duke of* v. *Fogwell*, 5 B. & C. 875; 8 D. & R. 747; 5 L. J., K. B. 10; 29 R. R. 449.

(*o*) 2 Inst. 221, 406.

(*p*) *Bridgland* v. *Shapter*, 5 M. & W. 375.

(*q*) 2 Roll. Abr. 191.

(*r*) 2 Inst. 221, 406.

(*s*) *Benjamin* v. *Andrews*, 5 C. B., N. S. 299.

(*t*) *Holcroft* v. *Heel*, 1 Bos. & P. 400.

(*u*) 2 Blac. Com. 40.

CH. III. SEC. 6. *Leases of Franchises.*

and might not only be for life or years, but in fee. If one had a corrody for life, he might let it to another, or to the grantor himself (*x*).

## SECT. 7.—*Annuities.*

Leases of Annuities.

An annuity is an annual sum of money granted to another in fee for life, or years, which charges the person of a grantor only ; or it may be due by prescription, which always implies a grant. Such annuity may be demised by way of assignment (*y*). Rents may also be granted by way of lease (*z*).

## SECT. 8.—*Right of Sporting.*

Right of Sporting must be granted by Deed.

A demise of an incorporeal hereditament can only be valid by deed (*a*), unless it be granted with some corporeal hereditament as appurtenant thereto (*b*). The right of hunting, shooting, fishing, &c., is an interest in the realty, and a grant of it is a licence of a profit à prendre (*c*). Such rights can be granted or demised only by deed. But if the lessee has actually used, occupied and enjoyed such rights under a parol agreement, he must pay for such enjoyment, and may be sued in an action for use and occupation (*d*). A corporation aggregate may maintain an action for use and occupation of tolls, although they did not grant them by any instrument under their common seal (*e*).

## SECT. 9.—*Chattels.*

Leases of Chattels.

Goods and chattels may be let for years, though the terms "landlord" and "tenant" are inapplicable to such letting, and the interest of the lessee therein differs from the interest which he has in lands. If a man lease for years a stock of live cattle such lease is good, and the lessee has the use and profits of them during the term ; but he cannot destroy, kill, sell or give them away without, it seems, being liable to an action of trespass (*f*). The lessor, however, has not

(*x*) Bac. Abr. tit. *Leases* (A.) ; *R.* v. *Nicholson*, 12 East, 330 ; *Peter* v. *Kendal*, 6 B. & C. 703; 5 L. J., K. B. 282 ; 30 R. R. 504 ; *Beere* v. *Windebanke*, Sid. 80.

(*y*) Co. Lit. 144 b ; Com. Dig. tit. *Annuity* (A. 1).

(*z*) Bac. Abr. tit. *Leases ; Thomas* v. *Fredericks*, 10 Q. B. 775 ; Co. Lit. 144 b ; Com. Dig. tit. *Annuity* (A. 1), (E.).

(*a*) *Duke of Somerset* v. *Fogwell*, 5 B. & C. 875, 882, 886, and ante (*n*) ; *Bird* v. *Higginson*, 2 A. & E. 696 ; 6 A. & E. 824.

(*b*) See post, Chap. XVIII., Sect. 6, "Game."

(*c*) *Ewart* v. *Graham*, 7 H. L. Cas. 331 ; 29 L. J., Ex. 88.

(*d*) *Thomas* v. *Fredericks*, 10 Q. B. 775 ; *Holford* v. *Pritchard*, 3 Exch. 793 ; post, Chap. XIV.

(*e*) *Mayor, &c., of Carmarthen* v. *Lewis*, 6 C. & P. 608 ; *Drury Lane Theatre Co.* v. *Chapman*, 1 C. & K. 14.

(*f*) Lit. s. 71 ; *Doe* d. *Griffith* v. *Lloyd*, 3 Esp. 78 ; 6 R. R. 813.

any reversion in them, as in the case of lands, to grant over to another either during the term or after, till the lessee has re-delivered them to him; for the lessor has only a possibility of property in case they all outlive the term; for if any of them die during the term, the lessor cannot have them replaced after the term; and during the term he has nothing to do with them, and consequently of such as die the property vests absolutely in the lessee. So, whether they live or die, yet all the young ones coming of them, as lambs, calves, &c., belong absolutely to the lessee as profits arising and severed from the principal, since otherwise the lessee would pay his rent for nothing; and therefore this differs from a lease of dead goods and chattels, for there, if anything be added for the repairing, mending or improving thereof, the lessor shall have the improvements and additions, together with the principal, after the lease ended, because they cannot be severed without destroying or spoiling the principal (*g*).

Leases of Furniture.

A mixed payment of rent for land and goods is held to issue out of the land alone, and the rent may be distrained for (*h*).

(*g*) Bac. Abr. tit. *Leases* (A.); *Collins* v. *Harding*, Cro. Eliz. 606.

(*h*) *Newman* v. *Anderton*, 2 B. & P. 224; *Selby* v. *Greaves*, L. R., 3 C. P. 594.

# CHAPTER IV.

## THE AGREEMENT FOR A LEASE.


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### SECT. 1.—*An Agreement for Lease must be in Writing.*

WE shall see presently (*a*) that, by the combined operation of the Statute of Frauds and the Real Property Act, 1845, 8 & 9 Vict. c. 106, s. 3, a lease for more than three years is void unless made by deed, and that leases for three years or less may be made by parol. But although a lease for three years may be made by parol, an agreement for a lease for however short a term must, in order to be sued upon as such, be in writing signed by the party to be sued.

Stat. Frauds, s. 4.

For by the 4th section of the Statute of Frauds, 29 Car. 2, c. 3, it is enacted that—

No action on unwritten Contract for Lease.

No action shall be brought whereby to charge any person . . . upon any contract or (*b*) sale of lands, tenements, or hereditaments, or any interest in or concerning them, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person by him lawfully authorized (*c*).

Agent.

(*a*) Post, Chap. V.

(*b*) So printed in the 2nd edition of the Statutes Revised and all other editions of the statutes, but "or" would seem to have been originally misprinted for "for."

The section also protects, similarly, executors, guarantors, and promisors of marriage.

(*c*) Not saying "by writing," as in sects. 1, 3.

An agreement for a lease is a contract for an interest in lands within the meaning of sect. 4, and has always been so treated both at law (*d*) and in equity (*e*). We shall see presently, however, that effect has been frequently given both at law and in equity to parol agreements. At law a party entering as a tenant, and evidencing his intention to continue such, has always been treated as a tenant from year to year upon the terms of the agreement; while in equity a "part performance" by the one party has frequently entitled him to a specific performance by the other.

Agreement for Lease equivalent to Lease, if specific performance would be decreed. *Walsh* v. *Lonsdale*.

It was said by Jessel, M.R., in *Walsh* v. *Lonsdale* (*f*), that the effect of the Judicature Acts (see Judicature Act, 1873, s. 25, sub-s. 7) is that a tenant holding under an agreement for a lease of which specific performance would be granted is not a tenant from year to year only, but a tenant holding under the lease itself. In this case the defendant agreed to grant and the plaintiff to accept a lease at a fixed rent payable in advance, and for this rent in advance, after entry by the plaintiff and part payment of rent, the defendant distrained, and the Court granted an injunction restraining the distress upon the terms that the rent should be paid into Court. It is to be observed that the plaintiff having entered and paid rent would, even at law as a tenant from year to year, have been liable to distress (*g*), and that if the dictum of Jessel, M.R., be correct, the Real Property Act, 1845, 8 & 9 Vict. c. 106, whereby leases for more than three years must be by deed, is rendered practically inoperative. The dictum has been twice approved of (*h*); and appears to have been recognized as sound by the Court of Appeal in *Coatsworth* v. *Johnson* (*i*). In that case the plaintiff entered a farm under an agreement for a lease, and did not pay any rent. On account of his failure to perform the terms of the intended lease, the defendant treated and ejected him as tenant at will. The plaintiff sued in trespass, but it having been found as a fact that the terms of the intended lease had been broken, Huddleston, B., and subsequently the Court of Appeal, gave judgment for the defendant on the ground that the agreement was not one of which specific performance would be granted. But the rule of *Walsh* v. *Lonsdale* has been held not to apply to a case in which the action is brought

County Court jurisdiction.

(*d*) See especially *Edge* v. *Strafford*, 1 Tyr. 295; 1 Cr. & J. 391.

(*e*) Story Eq., vol. I, s. 754. It may be doubted whether the word "action" in the 4th section of the Statute of Frauds included "suit;" but, however this may be, courts of equity, even before the statute, would not execute a parol agreement, not in part performed, and it is said by Story (ubi supra) to be obvious that courts of equity are bound as much as courts of law by the provisions of the statute.

(*f*) *Walsh* v. *Lonsdale*, 21 Ch. D. 9; 52 L. J., Ch. 2; 40 L. T. 858; 31 W. R. 109—C. A.

(*g*) See *Knight* v. *Bennett*, 11 Moore, 222, and Chap. XI., Sect. 2, post.

(*h*) By Field, J., in *In re Maughan*, 14 Q. B. D. at p. 958, and by Chitty, J., in *Allhusen* v. *Brooking*, 26 Ch. D. at p. 565.

(*i*) *Coatsworth* v. *Johnson*, 55 L. J., Q. B. 220; 54 L. T. 520—C. A. See also *Crump* v. *Temple*, 7 T. L. R. 120.

CH. IV. SEC. 1. *Agreement for Lease must be in Writing.*

in a county court upon an agreement for a lease which the county court itself could not decree specific performance of on the ground of the premises agreed to be demised exceeding 500*l.* in value (*k*).

*Walsh* v. *Lonsdale* can now be overruled by the House of Lords alone, and it can hardly be expected that that House would overrule it.

Uselessness of agreement for lease in most cases.

However this may be, it is suggested that an agreement for a lease may well be dispensed with in most cases, and that it would be better for both parties that a tenant should be let into possession upon an actual lease. The agreement has no advantage in saving any stamp duty (*l*), but some short binding contract may sometimes be required for the reason that each party wishes to bind the other in a shorter time than would be occupied by the negotiations as to the terms of a lease. In such cases it would frequently suffice that the intending tenant should either enter on an express contract of tenancy from year to year only, leaving the terms of the lease to be settled by after negotiations, or should pay a small deposit in return for the privilege of more prolonged negotiations.

What is an Interest in Land.

The words "any interest in land," in the 4th section of the Statute of Frauds, are very wide, and include an interest however small for a term however short, provided that the tenant is to have exclusive possession. An early decision to this effect in which the statute was held to apply to a contract to let lodgings (*m*), was emphatically affirmed by the leading case of *Edge* v. *Strafford* (*n*), where the defendant had agreed by parol to take the ready-furnished lodgings of the plaintiff for two or three years, and the Court held that no action could be maintained for breach of the agreement. But where the contract was for board and lodging at a boarding-house, but in no specific rooms, it was held that although the contract was unwritten, an action lay for the breach (*o*); and the two cases are clearly distinguishable on the ground that exclusive possession was bargained for in one but not in the other.

Lodgings.

*Edge* v. *Strafford.*

Agreement for Agreement.

An agreement to enter into an agreement for a lease is a good contract in law, and damages are recoverable for refusing to enter into it (*p*). This was held by the Court of Appeal in a case where the defendant agreed with the plaintiff (whose term was about to expire) to agree with his landlord for a lease at a specified rent for such term and subject to such conditions as the landlord should approve, the plaintiff to surrender his own lease upon the lease agreed for being granted.

(*k*) *Foster* v. *Reeves*, [1892] 2 Q. B. 255; 61 L. J., Q. B. 763; 67 L. T. 537; 40 W. R. 695—C. A.

(*l*) See post, Sect. 2.

(*m*) *Inman* v. *Stamp*, 1 Stark. 12; 18 R. R. 740.

(*n*) *Edge* v. *Strafford*, 1 Tyr. 295; 1 Cr. & J. 391.

(*o*) *Wright* v. *Stavert*, 2 E. & E. 721; 29 L. J., Q. B. 161.

(*p*) *Foster* v. *Wheeler*, 38 Ch. D. 130; 57 L. J., Ch. 871; 59 L. T. 15; 37 W. R. 40—C. A., affirming Kekewich, J., 36 W. R. 267.

A contract to procure a lease must also be in writing, although it is entered into by a person who has no interest in the lease himself (*q*).

Contract to procure Lease.

If the agreement be to let and do something else for the intending tenant, it must be in writing, unless the two parts of it are severable. Thus, in *Mechelen* v. *Wallace* (*r*), the tenant promised to become such in consideration that the landlord would send in more furniture. The landlord did not send in the furniture, but the tenant failed to recover, on the ground that the agreement to send in furniture was an inseparable part of the contract for the lease. Similarly, where the plaintiff agreed to let a house to the defendant, and to sell him the furniture and fixtures, it was held that this was a contract which must be in writing (*s*).

"Collateral" Agreement.

*Angell* v. *Duke*.

But in *Angell* v. *Duke* (*t*), the Court held that an agreement that the landlord should do repairs and send in furniture was collateral to the main agreement to let, so as not to require to be in writing within the statute, although the tenant ultimately failed to recover upon it on the ground that parol evidence is inadmissible to vary a written agreement (*u*).

"Collateral" Agreement to pay Rent till Lease executed.

*Adams* v. *Hagger*.

In *Adams* v. *Hagger*, the plaintiff agreed to grant to the defendant a lease at a certain rent for 99 years of a piece of land so soon as the defendant should have erected a house upon it, and the defendant undertook until the execution of the lease to "hold the said piece of land and other the premises at the rent and subject to the conditions to be contained" in the lease. It was held by the Court of Appeal that the defendant was liable to pay the rent, although he had not entered upon or taken possession of the piece of land (*x*).

An agreement after lease granted that the landlord shall enlarge the premises, and the tenant pay a percentage on the landlord's outlay, is not within the statute (*y*), and therefore need not be in writing. This was held in two cases (*y*) where the landlord having executed improvements recovered the consideration money by action at law, and the principle of such cases would seem to apply to an action for specific performance.

Contract itself need not be in Writing.

The 4th section of the Statute of Frauds does not absolutely require the contract itself to be in writing, but allows the alternative of some written "memorandum or note thereof" properly signed; and the memorandum or note need not be prepared at the time,

(*q*) *Horsey* v. *Graham*, L. R., 5 C. P. 191; 39 L. J., C. P. 58; 23 L. T. 495. In this case the contract was to procure the assignment of a lease, but the principle is the same.

(*r*) *Mechelen* v. *Wallace*, 7 A. & E. 49 (decided on demurrer).

(*s*) *Vaughan* v. *Hancock*, 3 C. B. 766.

(*t*) *Angell* v. *Duke*, L. R., 10 Q. B. 174; 44 L. J., Q. B. 78; 32 L. T. 25. And see *Morgan* v. *Griffith*, L. R., 6 Ex. 70; 40 L. J., Ex. 46; 23 L. T. 783; 19 W. R. 957; *Erskine* v. *Adeane*, L. R., 8 Ch. 756; 42 L. J., Ch. 849; 29 L. T. 234; 21 W. R. 802; *Burtsall* v. *Bianchi*, 65 L. T. 678.

(*u*) *Angell* v. *Duke*, 32 L. T. 320.

(*x*) *Adams* v. *Hagger*, 4 Q. B. D. 480; 27 W. R. 402—C. A.

(*y*) *Holz* v. *Roebuck*, 7 Taunt. 157; *Donellan* v. *Read*, 3 B. & Ad. 899; see also *Lambert* v. *Norris*, 2 M. & W. 333.

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nor be intended as a contract, or even as evidence thereof. A letter written by the defendant to the plaintiff, which mentions all the material terms of the contract, may be sufficient, although the defendant thereby attempts to deny or repudiate his liability (*z*). A correspondence between the defendant and his own agent, which mentions all the material terms of the contract, may be sufficient (*a*), and an authority was held sufficient where an offer was declined with an added consent (communicated to the intending tenant) to enter into the contract "*if*" the intending tenant "is very urgent" (*b*). A letter to a third person, mentioning all the material terms of the agreement, may be sufficient (*c*); but if any material terms of the contract be unsettled and disputed, the writing will not be sufficient (*d*). The bare entry of a steward in the lord's contract book with his tenants is not an evidence of itself that there is an agreement for a lease between the landlord and tenant (*e*).

### (a) *What the Agreement for a Lease must state.*

Writing must state all material Terms, *e.g.* Names.

The agreement, or the memorandum or note thereof (as the case may be), *must state all the material terms of the contract* (*f*), ex. gr.: 1. The name of the lessor or his agent (*g*); and 2. The name of the lessee or his agent (*h*): but in each of these cases such a description of the contracting parties that there cannot be any fair dispute as to their identity is as good as naming them. Such (*i*) seems to be the effect of the numerous cases (*k*) in which a contract for the *sale* of land describing but not naming the vendor, has been held good; and, as a lease is a sale pro tanto, these cases would seem to be equally applicable to an agreement for a lease.

Description of "Tenant" and signature.

Where the agreement was that Thomas Stokell should let a brickfield for an annual rent of 150*l.* a year, "the tenant" to pay a royalty of sixpence per thousand for all bricks made after 70,000, and the

(*z*) *Bailey* v. *Sweeting*, 9 C. B., N. S. 843; *Wilkinson* v. *Evans*, L. R., 1 C. P. 407; 35 L. J., C. P. 224 (these cases were under sect. 17); *Jackson* v. *Oglander*, 2 H. & M. 465; 13 W. R. 936.

(*a*) *Gibson* v. *Holland*, 35 L. J., C. P. 5.

(*b*) *Wood* v. *Aylward*, 58 L. T. 662—C. A., reversing Kekewich, J.

(*c*) *Welford* v. *Beazely*, 3 Atk. 503; *Child* v. *Comber*, 3 Swans. 423, n.; *Seagood* v. *Meale*, Prec. Ch. 560; *Barkworth* v. *Young*, 4 Drew. 1, 13.

(*d*) *Forster* v. *Rowland*, 7 H. & N. 103; 30 L. J., Ex. 396.

(*e*) *Charlewood* v. *Duke of Bedford*, 1 Atk. 497.

(*f*) *Clarke*, app., *Fuller*, resp. (agreement insufficient), 16 C. B., N. S. 24; 12 W. R. 671; *Ogilvie* v. *Foljambe* (agreement sufficient), 3 Mer. 53; 17 R. R. 13. See Fry on Specific Performance, s. 486.

(*g*) *Warner* v. *Willington*, 3 Drew. 523; 25 L. J., Ch. 652; *Williams* v. *Jordan*, 6 Ch. D. 517; 26 W. R. 230.

(*h*) *Williams* v. *Lake*, 2 E. & E. 349; 29 L. J., Q. B. 1; *Skelton* v. *Cole*, 1 De Gex & J. 587.

(*i*) See *Potter* v. *Duffield*, L. R., 18 Eq. 4; 43 L. J., Ch. 472; 22 W. R. 585, per Jessel, M.R., in which "vendor" was held to be not of itself sufficient.

(*k*) See *Rossiter* v. *Miller*, 3 App. Cas. 1124; 48 L. J., Ch. 10; 39 L. T. 173; 26 W. R. 855; ("proprietors" held sufficient description of vendors); *Catling* v. *King*, 5 Ch. D. 660; 46 L. J., Ch. 384; 36 L. T. 526; 25 W. R. 550—C. A.; *Commins* v. *Scott*, L. R., 20 Eq. 11; 44 L. J., Ch. 536; 32 L. T. 420; 23 W. R. 498; *Sale* v. *Lambert*, L. R., 18 Eq. 1; 43 L. J., Ch. 740. In *Thomas* v. *Brown*, 1 Q. B. D. 714, the point also arose, but was not decided.

agreement was signed "H. Niven, T. W. Stokell," it was held to be binding on Niven on the ground that he could not have signed it in any other capacity than that of tenant (*l*).

Writing must state description of the Property.

3. The writing must state the name or other description of the property to be demised (*m*); but the property need not be so described as to identify it; parol evidence being always admissible upon the question of "parcel or no parcel" (*n*). "Mr. Ogilvie's house," may be sufficient (*o*). "The property in Cable Street," coupled with parol evidence of identity, may be sufficient (*p*), and so may "the mill property, including cottages in *Esher* village" (*q*), and "the lease and everything" for 60*l.*, coupled with parol evidence to show what lease was intended, and with a previous memorandum showing what "everything" meant (*r*). "Two seams of coal, known as the two-feet coal and the three-feet coal, lying under lands hereafter to be defined as the Bank End Estate," has been held sufficient, the latter words being construed to refer only to the boundaries of the estate, and not to the seams of coal agreed to be demised (*s*). But where the agreement was indefinite as to the area over which the ironstone was to be worked, the court (for that and other reasons) refused a specific performance (*t*). An agreement by an incumbent to demise his glebe, containing about 437 acres, "except thirty-seven acres thereof" (which were not specified), was held sufficient, as the lessor, it was said, might elect which thirty-seven acres should be excepted (*u*). A description of the property by reference to preceding deeds, wherein it is described, is sufficient (*x*).

Difference in Quantity.

A mere difference in quantity has never been held a bar to specific performance; the Court of Chancery always drew a distinction between the essential and non-essential terms of a contract, and allowed the incapacity to perform it in non-essential terms, to be made the subject of compensation. In *McKenzie* v. *Hesketh* (*y*), for instance, the plaintiff offered to take a lease of a farm of the defendant at a rent of 500*l.* per annum, specifying in his tender the closes which he wished to take, with acreage, amounting to 249 acres. The defendant's agent desired to let only 214 acres with his farm,

*McKenzie* v. *Hesketh.*

(*l*) *Stokell* v. *Niven*, 61 L. T. 18.

(*m*) *Stewart* v. *Alliston*, 1 Mer. 33; 15 R. R. 81; *Ogilvie* v. *Foljambe*, 3 Mer. 53; 17 R. R. 13; *Kennedy* v. *Lee*, 3 Mer. 441, 451; 17 R. R. 110; *Daniels* v. *Davison*, 16 Ves. 249; 10 R. R. 171; *Price* v. *Griffith*, 1 De Gex, M. & G. 80; *Haywood* v. *Cope*, 25 Beav. 140.

(*n*) *Bleakley* v. *Smith*, 11 Sim. 150; *Owen* v. *Thomas*, 3 Myl. & K. 353; *Price* v. *Griffith*, 1 De Gex, M. & G. 80.

(*o*) *Ogilvie* v. *Foljambe*, 3 Mer. 61; 17 R. R. 13.

(*p*) *Bleakley* v. *Smith*, 11 Sim. 150.

(*q*) *McMurray* v. *Spicer*, L. R., 5 Eq. 527; 37 L. J., Ch. 505.

(*r*) *Horsey* v. *Graham*, L. R., 5 C. P. 191; 39 L. J., C. P. 58; 21 L. T. 539.

(*s*) *Haywood* v. *Cope*, 25 Beav. 140; but see *Lancaster* v. *De Trafford*, 31 L. J., Ch. 554; 8 Jur., N. S. 873.

(*t*) *Lancaster* v. *De Trafford*, supra.

(*u*) *Jenkins* v. *Green*, 27 Beav. 437; 28 L. J., Ch. 817.

(*x*) *Owen* v. *Thomas*, 3 Myl. & K. 353.

(*y*) *McKenzie* v. *Hesketh*, 7 Ch. D. 675; 47 L. J., Ch. 231; 38 L. T. 171.

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but he accepted the plaintiff's offer without looking at the acreage, although he had in fact let one of the closes to another person. Another tender had been made by a former tenant for the same farm, as comprising 235 acres, and the defendant's agent admitted that he thought that the plaintiff had tendered for the same quantity as such former tender. The plaintiff sued for specific performance, but was willing to take a lease of 214 acres at a proportionately reduced rent, and Fry, J., held that the defendant was bound to grant a lease of 214 acres, at a rent reduced from 500*l.* in the proportion of 214 to 235 (*z*).

Defective Title.

If a party having title to a part only agrees to let a whole property, he will be decreed to let that part to which he has title, with an abatement of rent (*a*).

Writing must state the Term to be granted.

Commencement.

The writing must state the term to be granted (*b*), and particularly the time from which the term is to commence (*c*); but it will be sufficient if such time can be inferred, as, for instance, if a day be fixed for the payment of a first rent (*d*), or if it is connected with a prior writing by which a day is fixed (*e*), or even if a date orally agreed on at the time of the agreement be specifically agreed on in writing afterwards (*f*). It seems, too, that the court will execute an agreement to grant a lease for three lives unnamed (*g*).

Agreement not to disturb Tenant.

An agreement by a lessee to grant a sublease (not describing it as a *sub*lease) to an intending tenant at any period he might feel disposed, "and not to molest, disturb, or raise the rent" of the intending tenant after he had laid out money on the premises, was held, by the Court of Appeal, to entitle the intending tenant to a sublease for the residue of the term of the lessee, if the intending tenant should so long live (*h*); but it has been held, also, that a somewhat similar agreement is merely personal between the parties, and does not bind a subsequent purchaser of the landlord's interest, with or without notice (*i*).

(*z*) *McKenzie* v. *Hesketh*, 7 Ch. D. 675; 47 L. J., Ch. 231; 38 L. T. 171.

(*a*) *Barrow* v. *Scammell*, 19 Ch. D. 175; 51 L. J., Ch. 296; 45 L. T. 606; 30 W. R. 310.

(*b*) *Bayley, Bart.* v. *Fitzmaurice* (in error), 8 E. & B. 664; 9 H. L. Cas. 78; *Clinan* v. *Cooke*, 1 Sch. & Lef. 22; 9 R. R. 3; *Hughes* v. *Parker*, 8 M. & W. 244; 1 Dowl., N. S. 80; *Clarke*, app., *Fuller*, resp., 16 C. B., N. S. 24; *Baumann* v. *James*, L. R., 3 Ch. 508; *Dolling* v. *Evans*, 36 L. J., Ch. 474; 15 W. R. 394.

(*c*) *Marshall* v. *Berridge*, 19 Ch. D. 233 (C. A.); 30 W. R. 93, affirming *Blore* v. *Sutton*, 3 Mer. 237; 17 R. R. 74; and overruling *Jaques* v. *Millar*, 6 Ch. D. 153; *Lander and Bayley's Contract, In re*, [1892] 3 Ch. 41; 61 L. J., Ch. 707; 67 L. T. 521, per Chitty, J.

(*d*) See *Wesley* v. *Walker*, 38 L. T. 284; per Fry, J.

(*e*) See *Wood* v. *Aylward*, 58 L. T. 662 and p. 94, ante.—C. A.

(*f*) *White* v. *Hay*, 72 L. T. 281, per Romer, J.

(*g*) *Fitzgerald* v. *Vicars*, 2 Dru. & W. 298; Dart V. & P. 1147 (6th ed.).

(*h*) *Kusel* v. *Watson*, 11 Ch. D. 129; 48 L. J., Ch. 413; 27 W. R. 714, C. A. Compare *Wood* v. *Davis*, 6 L. R. Ir. 50, post, Chap. V., Sect. 6. "Construing this agreement," observed Bramwell, L.J., "is mere guess work."

(*i*) *Roberts* v. *Tregaskis*, 38 L. T. 176, decided shortly before, but not cited in *Kusel* v. *Watson*, from which, however, it seems to be distinguishable.

The writing must also state the premium or fine (if any) agreed to be paid (*k*), and the rent to be paid (*l*), and should also, though this is not absolutely essential, state whether the rent is to be paid quarterly (*m*), half-yearly or otherwise. If there be no stipulation on that point, it will be payable only at the end of each year of the term (*n*).

Rent.

Any special or unusual covenants or stipulations actually agreed on should be stated (*o*), and accurately expressed (*p*). If the tenant agrees to improve the premises, the particulars of what he is to do (being a material part of the contract) must be sufficiently specified, so that a proper covenant may be inserted in the lease; otherwise the contract will be too uncertain to be specifically enforced (*q*). An agreement, however, for the tenant to do certain specified works and "other works" upon the property, estimated at from 150*l*. to 200*l*., was held not too uncertain to prevent a decree for specific performance, inasmuch as the specified works would cost nearly that sum (*r*). Vagueness in the language of an agreement may sometimes be cured by evidence of the surrounding circumstances, and of the subsequent conduct of the parties (*s*). Sometimes an "&c." will not render the contract too uncertain to be specifically enforced (*t*); but if the construction of the agreement depends on the meaning of an "&c.," the court can make no decree (*u*).

Special Covenants.

"Et cetera."

It seems that the common and usual covenants and provisoes need not be mentioned (*x*). They are implied as part of the contract, and may be added at chambers.

An agreement, note or memorandum, which is defective in some or one of the above particulars stated to be essential, may sometimes be perfected by a prior (*y*) or subsequent letter or other writing, on the part of the party to be charged (*z*), which sufficiently is

Defects in the Writing supplied by a subsequent Writing.

(*k*) *Martin* v. *Pycroft*, 2 De Gex, M. & G. 785; *Wood* v. *Scarth*, 2 K. & J. 33; *Clifford* v. *Turrell*, 1 You. & Coll. C. C. 138; *Blagden* v. *Bradbear*, 12 Ves. 466; 8 R. R. 354; *Elmore* v. *Kingscote*, 5 B. & C. 583; 29 R. R. 341.

(*l*) *Woolam* v. *Hearn*, 7 Ves. 211; *Gregory* v. *Mighell*, 18 Ves. 328; 11 R. R. 207 (agreement for fair annual rent to be settled by arbitration, held sufficient); *Powell* v. *Lovegrove*, 8 De Gex, M. & G. 357.

(*m*) *Pilling* v. *Armitage*, 12 Ves. 78; 8 R. R. 295.

(*n*) *Coomber* v. *Howard*, 1 C. B. 440; *Collett* v. *Curling*, 10 Q. B. 785; *Giraud* v. *Richmond*, 2 C. B. 835.

(*o*) Fry, ss. 349, 350; *Brodie* v. *St. Paul*, 1 Ves. jun. 326.

(*p*) *Doe* d. *Marquis of Bute* v. *Guest, Bart.*, 15 M. & W. 160; *Doe* d. *Marquis of Bute* v. *Thompson*, 13 M. & W. 494.

(*q*) *Gardner* v. *Fooks*, 15 W. R. 888, M.R.

(*r*) *Baumann* v. *James*, L. R., 3 Ch. Ap. 508; 18 L. T. 424.

(*s*) *Oxford* v. *Provand*, L. R., 2 P. C. C. 135; *Coupland* v. *Arrowsmith*, 18 L. T. 755.

(*t*) *Parker* v. *Taswell*, 2 De G. & J. 559; 27 L. J., Ch. 812; *Cooper* v. *Hood*, 26 Beav. 299; *Powell* v. *Lovegrove*, 8 De Gex, M. & G. 357.

(*u*) *Price* v. *Griffith*, 1 De Gex, M. & G. 80; and see *Tatham* v. *Platt*, 9 Hare, 660; *Stuart* v. *London and North Western R. Co.*, 1 De Gex, M. & G. 721.

(*x*) *Church* v. *Brown*, 15 Ves. at p. 265; 10 R. R. 74. See further as to "Usual Covenants," Sect. 7, post.

(*y*) *Baumann* v. *James*, L. R., 3 Ch. 508; 18 L. T. 424; here the acceptance was "at rent and terms agreed upon."

(*z*) *Cave* v. *Hastings*, 7 Q. B. D. 125; 50 L. J., Q. B. 575; *Studds* v. *Watson*, 28 Ch. D. 305; 54 L. J., Ch. 626; 52 L. T. 129; 33 W. R. 118.

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referred to or refers to it, and supplies the defect (*a*). But where the plaintiff in a suit for specific performance put in two letters of the defendant, the first showing all the terms of the proposed agreement for a lease, but omitting the date at which the occupation was to commence, and the second referring to the first as applying to a term to begin from "Michaelmas next," but adding several terms to which the plaintiff did not assent, the court refused specific performance, although there was undisputed evidence that a complete verbal agreement had been made on the terms of the first letter, with the additional term of "Michaelmas next," and James, L.J., observed that the court "had gone quite far enough in enforcing specific performance upon the evidence of letters when one party is bound and the other not" (*b*). Generally speaking, parol evidence is inadmissible to connect two writings which do not of themselves sufficiently refer to each other (*c*); but sometimes it may be admitted to negative the existence of any other writings on the subject, from which their relation to each other may be inferred (*d*).

Supply of defects by subsequent writing.

Writings making up the Memorandum must be signed by party to be charged.

The signature of the party to be charged must appear in the writings which make up the memorandum required by the 4th section of the Statute of Frauds; a supply of any of the essentials by the other party, though apparently acquiesced in by the party to be charged, is not sufficient. This is apparent from the words of the section, and is borne out by *Williams* v. *Jordan* (*e*), in which an offer addressed "Sir," which was signed by the intending lessees and witnessed by the intended lessor's agent, was held insufficient, although such agent informed the intending lessees in writing that their offer was "accepted by the owner of the property," thus concluding a contract at common law, though not a contract within the statute.

Effect of supplementary Writing which denies the contract.

A letter supplying such an essential term as an intending lessor's name but declining to complete, has been held sufficiently to supplement a memorandum which it formerly withdrew (*f*), but this case has been doubted.

Effect of subsequent Alterations by parol.

Where there is a sufficient writing to satisfy the statute, but some of the terms of it are *altered afterwards by parol*, a specific

(*a*) *Warner* v. *Willington*, 3 Drew. 523; 25 L. J., Ch. 662; *Ridgway* v. *Wharton*, 6 H. L. Cas. 238; 3 De Gex, M. & G. 677; 27 L. J., Ch. 46; *Dobell* v. *Hutchinson*, 3 A. & E. 355; *Kennedy* v. *Lee*, 3 Meriv. 441; 17 R. R. 110.

(*b*) *Nesham* v *Selby*, 41 L. J., Ch. 551; L. R., 7 Ch. 406.

(*c*) *Skelton* v. *Cole*, 1 De Gex & J. 587; *Clinan* v. *Cooke*, 1 Sch. & Lef. 22; 9 R. R. 3.

(*d*) *Baumann* v. *James*, L. R., 3 Ch. 508; 16 W. R. 877.

(*e*) *Williams* v. *Jordan*, 6 Ch. D. 517; 46 L. J., Ch. 681; 26 W. R. 230. The letter was handed to the agent for delivery to the plaintiff, and it is presumed, not enclosed in an addressed envelope. Quære, if it had been enclosed in an envelope addressed to the intended lessor by name, would that have been sufficient? It is conceived not, inasmuch as parol evidence would have been necessary to prove the fact of enclosure.

(*f*) See also *Goodman* v *Griffiths*, 1 H. & N. 574.

performance of the agreement as altered will not be decreed (*g*). The reason is, that contracts within the 4th section of the Statute of Frauds must be wholly proved by writing (*h*). To allow such a contract to be proved partly by writing and partly by oral testimony, would let in all the mischiefs which it was the object of the statute to exclude (*i*). But if the new terms were merely intended to modify the original agreement, and were inoperative for that purpose, it seems that a specific performance of the original agreement may be decreed (*k*). Where a plaintiff alleges a written agreement, with the parol variation in favour of the defendant, and offers to perform the agreement with the variation, the court will enforce specific performance, although the defendant insists on the statute (*l*). In such case the court will decree specific performance with the variations, if the defendant elect to take advantage of them; or otherwise of the original agreement (*m*). It is to be observed, that the Statute of Frauds does not say in distinct terms that all contracts or agreements concerning the sale of lands shall be in writing; all that it enacts is, that no action shall be brought unless they are in writing; and as there is no clause in the act which requires the dissolution of such contracts to be in writing, a written contract concerning the sale of lands may be wholly rescinded by a new agreement not in writing, so as to prevent either party from recovering on the contract which was in writing, though it cannot be partly rescinded by a new contract not in writing (*n*).

### (b) *How Agreements may be signed.*

An agreement for a lease must, by virtue of the 4th section of the Statute of Frauds above referred to, be signed *by the party to be charged therewith*, or his agent thereunto lawfully authorized. It need not be signed by both parties (*o*). The signature may be in almost any part of the writing (*p*): provided it is so placed as to govern and authenticate every material and operative part of the instrument; but not where it applies only to the particular part

Signature.

(*g*) *Jordan* v. *Sawking*, 1 Ves. jun. 402; 3 Bro. C. C. 388; *Price* v. *Salusbury*, 32 Beav. 446; 32 L. J., Ch. 441; affirmed Dom. Proc., 14 L. T. 110.

(*h*) *Foquet* v. *Moor*, 7 Exch. 1870; *Goss* v. *Lord Nugent*, 5 B. & Adol. 58; *Harvey* v. *Grabham*, 5 A. & E. 61; *Stowell* v. *Robinson*, 3 Bing. N. C. 928.

(*i*) *Stead* v. *Dawber*, 10 A. & E. 57.

(*k*) *Price* v. *Dyer*, 17 Ves. 356; 11 R. R. 102; *O'Connor* v. *Spaight*, 1 Sch. & Lef. 305; *Marshall* v. *Lynn*, 6 M. & W. 109; *Moore* v. *Campbell*, 10 Exch. 323; *Noble* v. *Ward*, L. R., 1 Ex. 117; 35 L. J., Ex. 81; but see *Clarke* v. *Moore*, 1 Jon. & Lat. 723—729; Fry, ss. 1010, 1013.

(*l*) *Martin* v. *Pycroft*, 2 De Gex, M. & G. 785; Dart V. & P. 1148 (6th ed.).

(*m*) *Robinson* v. *Page*, 3 Russ. 114; 27 R. R. 26; Dart V. & P. 1212 (6th ed.).

(*n*) *Goss* v. *Lord Nugent*, 5 B. & Adol. 64.

(*o*) *Boys* v. *Ayerst*, 6 Madd. 323; *Seton* v. *Slade*, 7 Ves. 265; 6 R. R. 124; *Laythorp* v. *Bryant*, 2 Bing. N. C. 735.

(*p*) Fry, s. 498; *Propert* v. *Parker*, 1 Russ. & Myl. 625; *Bleakley* v. *Smith*, 11 Sim. 150.

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where it is introduced (*q*). A signature in pencil (*r*), or by initials (*s*), or by print (*t*), seems to be sufficient, and so does the signature of a marksman (*u*).

Signature by Agent.

A signature by an agent, thereunto "lawfully authorized," is sufficient, by the very terms of the 4th section of the Statute of Frauds, and such authority need not be in writing (*x*). But the authority of the agent to sign such contract must be proved, if disputed (*y*). Such authority is revoked by the death of the principal, although the agent does not know of the death (*z*).

Ratification.

Proof of a subsequent ratification will be sufficient evidence of a prior authority (*a*), and an oral revocation of any such authority may be proved (*b*): unless the agent was appointed by *deed;* and perhaps even then (*c*). It has been held too that if between the acceptance of an offer by an agent unauthorized to accept it, and the ratification of such acceptance by the principal, the offeror withdraw his offer, the withdrawal is bad, by reason of the rule *omnis ratihibitio retrotrahitur et mandato æquiparatur,* and the offeror will be held bound by the contract concluded by the offer (*d*) and unauthorized acceptance and ordered specifically to perform it.

Specific performance by agent personally.

An agent who contracts in his own name may sometimes be compelled specifically to perform the contract (*e*).

## SECT. 2.—*The Stamping of the Agreement for a Lease.*

Agreement for Lease not more than 35 Years must be stamped as Lease.

It is material to observe that the consolidating Stamp Act, 1891, 54 & 55 Vict. c. 39, by s. 75, which exactly re-enacts s. 96 of Stamp Act, 1870, also a consolidating act, imposes the same stamp upon an agreement for a lease as it imposes upon a lease itself (except in the case where the term exceeds 35 years), and imposes upon a lease made in conformity with an agreement duly stamped, the duty of sixpence only (*f*).

(*q*) *Caton* v. *Caton*, L. R., 2 H. L. Cas. 127; 36 L. J., Ch. 886.
(*r*) *Lucas* v. *James*, 7 Hare, 410.
(*s*) *Selby* v. *Selby*, 3 Mer. 2; 17 R. R. 1.
(*t*) *Schneider* v. *Norris*, 2 M. & S. 286; 15 R. R. 250.
(*u*) See *Baker* v. *Dening*, 8 A. & E. 94.
(*x*) *Coles* v. *Trecothick*, 9 Ves. 234, 250; 7 R. R. 167; *Clinan* v. *Cooke*, 1 Sch. & Lef. 22; 9 R. R. 3; *Dyas* v. *Cruise*, 2 Jon. & Lat. 461; *Heard* v. *Pilley*, L. R., 4 Ch. 548.
(*y*) *Blore* v. *Sutton*, 3 Mer. 237; 17 R. R. 74; *Ridgway* v. *Wharton*, 3 De Gex, M. & G. 677; 27 L. J., Ch. 46; 6 H. L. Cas. 238; *Forster* v. *Rowland*, 7 H. & N. 103; 30 L. J., Ex. 396; *Baines* v. *Ewing*, 35 L. J., Ex. 194.
(*z*) *Carr* v. *Levingston*, 35 Beav. 41.
(*a*) Fry, s. 509 (4); *Maclean* v. *Dunn*, 4 Bing. 722; *Ridgway* v. *Wharton*, 6 H. L. Cas. 238, 296; *Bayley, Bart.* v. *Fitzmaurice*, 8 E. & B. 664; 9 H. L. Cas. 78.
(*b*) *Manser* v. *Back*, 6 Hare, 443; *Venning* v. *Bray*, 2 B. & S. 502; 31 L. J., Q. B. 181.
(*c*) *Venning* v. *Bray*, supra.
(*d*) *Bolton Partners* v. *Lambert*, 41 Ch. D. 295; 58 L. J., Ch. 425; 60 L. T. 687; 37 W. R. 434—C. A., questioned in Additional Note A. of 3rd ed. of Fry on Specific Performance, but never judicially doubted. The case was one of contract to sell, but its principle is equally applicable to that of a contract to let.
(*e*) *Saxon* v. *Blake*, 29 Beav. 438.
(*f*) See post, Appendix A. The law,

Penalty for not stamping agreement for Lease.

The 15th section of the Stamp Act, 1891, re-enacting the 18th section of the Customs and Inland Revenue Act, 1888, 51 & 52 Vict. c. 8 (treated hereafter (*g*)), imposes the penalty of ten pounds, to which the intending lessee is liable, for not duly stamping *a lease* executed after the 16th of May, 1888, and the 75th section of the same act imposes upon an ordinary agreement for a lease, as above mentioned, the same stamp as that imposed on the lease agreed for. It is conceived, however, that the special penalty of ten pounds which is imposed on the lessee eo nomine by the 15th section is recoverable from a lessee only, and that a party who merely agrees to become lessee is not subject thereto.

Effect of Oral acceptance of written proposal.

It seems that a written proposal accepted orally need not be stamped as an agreement (*h*). But it is otherwise with respect to a document signed by one party only, but intended either as a contract, or as evidence of a contract, and not as a mere proposal (*i*). When an oral proposal is accepted in writing, such acceptance must be stamped as an agreement (*k*).

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## Sect. 3.—*Remedies for Breach of Agreement.*

Lease or Agreement.

Questions have frequently arisen whether a particular instrument is to be construed as an actual lease or as an agreement for a lease. A few of the numerous cases upon the subject will be noticed presently (*l*). The general result of them may be taken to be that the intention of the parties, as expressed in the instrument, is to be looked to, and that where a document cannot by law operate as a lease, the leaning of the courts is to construe it, if possible, as an agreement (*m*).

Two Remedies for Breach of Agreement for Lease.

There are two remedies for breach of a *valid* contract or agreement for a lease, either of which, but not both, may generally be adopted by the intended landlord, or by the intended tenant, as the case may require, viz. :—1. An action to recover damages for the breach (*n*). 2. An action to compel a specific performance of the agreement.

before 1870, 23 Vict. c. 15, by which agreements for leases were first stamped as leases (being under 13 & 14 Vict. c. 97, subject to the common agreement stamp only), excepted leases for not more than *seven* years from a similar provision.

(*g*) Post, Chap. V., Sect. 13.

(*h*) *Drant* v. *Brown*, 3 B. & C. 665; *Laing* v. *Smith*, 3 F. & F. 97.

(*i*) *Chanter* v. *Dickinson*, 5 M. & G. 253; 2 Dowl., N. S. 838; *Hegarty* v. *Milne*, 14 C. B. 627.

(*k*) *Atherstone* v. *Bostock*, 2 M. & G. 511; *Chanter* v. *Dickinson*, supra; *Hegarty* v. *Milne*, supra.

(*l*) Chap. V., Sect. 4, post. And see them discussed in Davidson on Conveyancing, vol. v., pt. 1, pp. 1—16.

(*m*) *Tidey* v. *Mollett*, 16 C. B., N. S. 298.

(*n*) By Landlord, &c.—*Bond* v. *Rosling*, 1 B. & S. 371; 30 L. J., Q. B. 227; *Foster* v. *Rowland*, 7 H. & N. 103; 30 L. J., Ex. 396; *Collins* v. *Willmott*, 13 W. R. 204; *De Medina* v. *Norman*, 9 M. & W. 820; 2 D. & L. 239; *Souter* v. *Drake*, 5 B. & Adol. 992; *Kintrea* v. *Preston*, 1 H. & N. 357; 25 L. J., Ex. 287; *Cocking* v. *Ward*, 1 C. B. 858. By Tenant, &c. —*Rollason* v. *Leon*, 7 H. & N. 73; 31 L. J., Ex. 96; *Hayward* v. *Parke*, 16 C. B. 295; *Jinks* v. *Edwards*, 11 Exch. 775; *Hall* v. *Betty*, 4 M. & G. 410.

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An intended tenant may, in an action for damages, recover back any premium paid by him (*o*). Even where the agreement is oral, money expended by an intending tenant in pursuance of it, ex. gr. money laid out upon alteration of the premises agreed to be demised, is recoverable as upon a failure of consideration (*p*).

Breach by Lease to other Party. *Ford* v. *Tiley.*

If the intending landlord disables himself from granting the lease agreed upon by making an actual and inconsistent lease to another party before the day arrives for the granting of the lease agreed upon, he may be sued at once by the intending tenant for a breach of contract in making the actual lease (*q*).

Insufficiency of Title.

At common law the intending lessor, by agreeing to grant a lease, impliedly contracted that he had title to grant the lease, and if he had not, he was liable to an action at the suit of the intended lessee (*r*), although the intended lessee, by a contract for sale of the agreement, was bound by no implied condition that the intended lessor had title (*s*). By the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 2, it is enacted that "under a contract to grant or assign a term of years, whether derived or to be derived out of a freehold or leasehold estate, the intended lessee or assign shall not be entitled to call for the title to the freehold, &c.;" and by the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), "on a contract to grant a lease for a term of years, to be derived out of a leasehold interest, with a leasehold reversion, the intended lessee shall not have the right to call for the title to the leasehold reversion." These enactments do away with the common law rule, the first applying to the case where the intended landlord is a freeholder, and the second to the case where he is a leaseholder.

Intended Lessee may not call for Title. V. & P. Act, 1874.

Defences to Action for Breach.

It is a good defence to an action for breach of an agreement to let premises that the intending tenant intended to use them for a purpose forbidden by law, ex. gr. for the delivery of lectures in contravention of the Blasphemy Act (*t*).

In what Court Action for Damages.

The action for damages may be brought in any division of the High Court, but if it be tried before a judge with a jury, the trial will be had before a judge of the Queen's Bench Division (*u*). If the plaintiff claim 50*l.* or less as damages, the action may be brought in the County Court (*x*).

(*o*) *Wright* v. *Colls*, 8 C. B. 150; 19 L. J., C. P. 60.

(*p*) *Pulbrook* v. *Lawes*, 1 Q. B. D. 284; 45 L. J., Q. B. 17; 34 L. T. 95; see also *Worthington* v. *Warrington*, 8 C. B. 134; *Robinson* v. *Harman*, 1 Ex. 850.

(*q*) *Ford* v. *Tiley*, 6 B. & C. 325; 5 L. J. K. B. 169; 30 R. R. 339; see, too, *Frost* v. *Knight*, L. R., 7 Ex. 111.

(*r*) *Stranks* v. *St. John*, L. R., 2 C. P. 376; 36 L. J., C. P. 111; 16 L. T. 283; 15 W. R. 678.

(*s*) *Kintrea* v. *Preston*, 1 H. & N. 357; 25 L. J., Ex. 287.

(*t*) *Cowan* v. *Milbourn*, L. R., 2 Ex. 230; 36 L. J., Ex. 124.

(*u*) Judicature Act, 1873, ss. 29, 37; *Warner* v. *Murdock*, 4 Ch. D. (C. A.) 750.

(*x*) County Courts Act, 1888, 51 & 52 Vict. c. 43, s. 56.

## Sect. 4.—*The Action for Specific Performance.*

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In what Court Action for Specific Performance.

Actions for the specific performance of contracts for leases are by sect. 34 of the Judicature Act, 1873, assigned to the Chancery Division of the High Court. If a defendant claim specific performance by way of counter-claim in an action brought in a division other than the Chancery Division, the action will probably be transferred to that division (*y*). If the value of the property agreed to be demised do not exceed 500*l*., the action for specific performance may be brought in the County Court (*z*).

County Court.

Combination of Damages with Specific Performance.

21 & 22 Vict. c. 27, s. 2.

Damages may be awarded either in addition to or in substitution for specific performance. For by the Judicature Act, s. 24, sub-s. 7, the High Court has power to grant, and "shall grant," either absolutely or on conditions, "all such remedies whatsoever as any of the parties" to a cause may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward. Prior to this act, it had been enacted by 21 & 22 Vict. c. 27, s. 2 (Lord Cairns' Act), that "in all cases in which the Court of Chancery had jurisdiction to entertain an application for an injunction against a breach of any covenant, contract or agreement, or against the commission or continuance of any wrongful act or for the specific performance of any covenant, contract or agreement, it should be lawful for the same court, if it should think fit (*a*), to award damages to the party injured, either in addition to, or in substitution for, such injunction or specific performance (*b*). Under this act it was held that a court of equity could give damages only where it could decree specific performance or grant an injunction (*c*), and that when the plaintiff failed to establish any covenant, contract or agreement, of which specific performance could be directed, the court had no jurisdiction to grant relief in damages (*d*), but the terms of s. 24, sub-s. 7 of the Judicature Act appear to be more comprehensive; and it is apprehended that in a simple case the Queen's Bench Division would grant specific performance (*e*).

(*y*) R. S. C., Order LI. And see Id. App. C., Forms of Pleading, No. 24; *Hillman* v. *Mayhew*, 1 Ex. D. 132; 45 L. J., Ex. 334; 34 L. T. 256; 24 W. R. 435.

(*z*) County Courts Act, 1888, s. 67, sub-s. 4, re-enacting s. 9 of the County Courts Act, 1867 (30 & 31 Vict. c. 142), which act expressly included an agreement for a lease, held in *Wilcox* v. *Marshall*, L. R., 3 Eq. 270, to be impliedly included by the County Courts Act, 1865, amongst the matters in which an equitable jurisdiction was given to county courts.

(*a*) See *Durell* v. *Pritchard*, L. R., 1 Ch. 244; 35 L. J., Ch. 223.

(*b*) This act is repealed by the Statute Law Revision and Civil Procedure Act, 1883, 46 & 47 Vict. c. 49, but the jurisdiction thereunder is still in force either by virtue of the Judicature Act or s. 5 of the act itself. Per *Baggallay*, L.J., in *Sayers* v. *Collyer*, 54 L. J., Ch. 1.

(*c*) *Ferguson* v. *Wilson*, L. R., 2 Ch. 77; 15 W. R. 80.

(*d*) *Lewers* v. *Earl of Shaftesbury*, L. R., 2 Eq. 270; but in *Howe* v. *Hunt*, 31 Beav. 420; 32 L. J., Ch. 36, an order to assess damages had been made, where specific performance could not be granted.

(*e*) See *Mostyn* v. *West Mostyn, &c., Co.*, 1 C. P. D. 145; *Gathercole* v. *Smith*, 7 Q. B. D. 626.

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*Specific Performance of Agreement for Lease.*

Combination of Damages with Specific Performance.

Where A. agreed to grant a lease to B. (who was to enter at once and expend money on improvements), with a proviso that if he failed within three months to grant a valid lease he would repay to B. the amount of his outlay, and from and after such failure B. should be at liberty to quit, and the agreement should cease, except as to B.'s right to payment, and A. was unable to grant a lease for want of title: it was held, that B. had a lien on A.'s interest in the premises for his outlay and costs of suit (*f*). Where the defendant could not obtain his lessor's consent to an underlease, except upon payment of a reasonable and extra rent, specific performance was decreed, with damages to be assessed against him in the event of his not obtaining such consent (*g*). And where a tenant for life agreed to grant a lease for three lives, but had only power to grant one for his own life, he was decreed to perform his agreement specifically pro tanto, with compensation for the difference in value between the term as granted and the term as agreed (*h*). In one case the court have decreed specific performance of an agreement to take a lease, but refused to order a specific performance of certain building stipulations, and instead thereof directed an inquiry as to the damages (*i*). But the rule seems to have been that the court would not, in addition to a decree for specific performance, award damages for the mere non-performance of a contract, unless special damages were proved (*k*). Even before 21 & 22 Vict. c. 27, the court would in some cases award damages for want of a literal performance of one term of a contract of which specific performance was decreed (*l*). Thus it would award compensation for the deterioration of the estate pending the contract; and in so doing it in truth gave damages to the purchaser for the loss which he sustained by the contract not having been literally performed (*m*).

Ground of Decree for Specific Performance.

Where a contract in writing respecting real property, in conformity with the Statute of Frauds, was entered into between competent parties, and was moreover in its nature and circumstances unobjectionable, it was as much of course for a court of equity to decree a specific performance as it was for a court of common law to give damages for the breach of such a contract (*n*). The original and sole

(*f*) *Middleton* v. *Magnay*, 2 H. & M. 233; 12 W. R. 706; *Hindley* v. *Emery*, L. R., 1 Eq. 52; 35 L. J., Ch. 6; *Turner* v. *Marriott*, L. R., 3 Eq. 744.

(*g*) *Hilton* v. *Tipper*, 18 L. T. 626; 16 W. R. 888.

(*h*) *Leslie* v. *Cromelin*, 2 Ir. Eq. R. 134.

(*i*) *Kay* v. *Johnson*, 2 H. & M. 118.

(*k*) *Chinnock* v. *Marchioness of Ely*, 2 H. & M. 221; 34 L. J., Ch. 399.

(*l*) *Aubin* v. *Holt*, 2 K. & J. 66, 70; *Peacock* v. *Penson*, 11 Beav. 355; *Helling* v. *Lumley*, 3 De Gex & J. 493; *Phelps* v. *Prothero*, 7 De Gex, M. & G. 722.

(*m*) *Phelps* v. *Prothero*, supra. See also *Jaques* v. *Millar*, 6 Ch. D. 153; 47 L. J., Ch. 544; 37 L. T. 151; 25 W. R. 846, in which the intending tenant recovered damages for loss of profits on trade meant, to the knowledge of the intending landlord, to be carried on upon the premises.

(*n*) *Hall* v. *Warren*, 9 Ves. 608; 7 R. R. 306.

foundation of the jurisdiction to decree the specific performance of contracts was simply this: that an award of damages at law would not give a party the compensation to which he is entitled, that is, would not put him in a situation as beneficial to him as if the agreement were specifically performed (*o*).

Of Tenancy from Year to Year, &c., refused.

The jurisdiction of the court to grant specific performance is a purely discretionary one. It seems that no decree will be made for the specific performance of an agreement for a tenancy from year to year, the remedy in damages being deemed sufficient (*p*); nor where the agreed term has expired or will expire before a decree can be obtained (*q*); nor where the lease is to be granted upon certain specified buildings being erected within a limited time, which has nearly elapsed, and the buildings have not been begun (*r*).

Instrument void as Lease, but good as Agreement. *Parker* v. *Taswell.*

A writing purporting to be a lease for more than three years, which is void at law as a lease because not by deed (*s*), may be good in equity as an agreement for a lease, and enforced by a decree for a specific performance, with costs (*t*). And although such contract is *void at law as a lease*, it may nevertheless be valid, even at law, as an agreement for a lease, and also with respect to any express stipulations therein contained so as to support an action for breaches of such stipulations (*u*). And the law would probably be the same with respect to any stipulations to be necessarily implied from the terms of the contract; but no action can be maintained for not giving possession at the time appointed for the commencement of the term, because possession under a lease for a certain number of years (exceeding three years) was agreed for, and not a possession as tenant from year to year upon the terms of the intended lease so far as they are applicable to and not inconsistent with a yearly tenancy (*x*).

What Complainant should consider before commencing Action.

Before commencing an action for the specific performance (*y*) of an agreement to grant, or to take a lease, the complainant should consider: 1. Whether the contract is so complete and unobjectionable in every respect, that a court of equity will enforce it by a decree for

(*o*) Id. 645; *Harnett* v. *Yeilding*, 1 Sch. & Lef. 553; 9 R. R. 98.

(*p*) *Clayton* v. *Illingworth*, 10 Hare, 451; *Mortal* v. *Lyons*, 8 Ir. Ch. R. 112; Fry, s. 46.

(*q*) *Nesbit* v. *Meyer*, 1 Swans. 226; *Walters* v. *Northern Coal Mining Co.*, 5 De Gex, M. & G. 629; 25 L. J., Ch. 633; *De Brassac* v. *Martyn*, 11 W. R. 1020; Fry, ss. 899—902.

(*r*) *Asylum for Female Orphans* v. *Waterlow*, 16 W. R. 1102, M.R.

(*s*) See Chap. V., Sect. 2, post.

(*t*) *Parker* v. *Taswell*, 2 De Gex & J. 557; 27 L. J., Ch. 812.

(*u*) *Bond* v. *Rosling*, 1 B. & S. 371; 30 L. J., Q. B. 227; *Rollason* v. *Leon*, 7 H. & N. 73; 31 L. J., Ex. 96; *Tidey* v. *Mollett*, 16 C. B., N. S. 298; 33 L. J., C. P. 235; *Hayne* v. *Cummings*, 16 C. B., N. S. 421; *Hunt* v. *Harris*, 19 C. B., N. S. 13; 34 L. J., C. P. 249.

(*x*) *Drury* v. *Macnamara*, 5 E. & B. 612; *Pitman* v. *Woodbury*, 3 Exch. 4; *Swatman* v. *Ambler*, 8 Exch. 72; 22 L. J., Ex. 81; *Jinks* v. *Edwards*, 11 Exch. 775; *Tress* v. *Savage*, 4 E. & B. 36.

(*y*) The law and practice in actions for specific performance not only with respect to agreements for leases, but generally, is ably stated in *Fry* on Specific Performance (A.D. 1892, 3rd ed., by the Author when Lord Justice Fry, and his son, Mr. E. P. Fry); and *Dart* on Vendors and Purchasers, Chap. XVIII. (6th ed., A.D. 1888), to each of which works frequent reference will be made.

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specific performance; 2. Whether the proposed evidence is sufficient; 3. Whether any and what notice should be given, or demand made, or draft lease tendered or other act done (*z*) by the complainant before the commencement of the action; 4. Who should be plaintiff or plaintiffs, and who should be made defendant or defendants; 5. On whom the costs of each party will probably fall; 6. Whether any other and what remedy is preferable.

An action for specific performance cannot be maintained after the plaintiff has recovered damages for non-performance of the contract (*a*); but he may apply for alternative remedies in the same action.

Time, whether Essence of Contract.

Time is not generally considered as of the essence of the contract (*b*). "A court of equity will indeed relieve against, and enforce, specific performance, notwithstanding a failure to keep the dates assigned by the contract, either for completion, or for steps towards completion, if it can do justice between the parties, and if there is nothing in the express stipulations between the parties, the nature of the property or the surrounding circumstances, which would make it inequitable to interfere with and modify the legal right. This is what is meant, and all that is meant, where it is said, that in equity time is not the essence of the contract" (*c*).

Sublease.

An underlease with compensation will not be decreed where the defendant has contracted for a lease (*d*).

### (a) *Oral Agreement with part Performance.*

Oral Agreement with part Performance.

Although a mere *oral* agreement for a lease cannot be sued upon as such, an action for a specific performance can be maintained if the terms of such agreement be distinctly proved or admitted, and there has been a sufficient part performance of the contract to take it out of the operation of the Statute of Frauds (*e*). The principle upon which courts of equity exercise their jurisdiction in decreeing specific performance of a parol agreement accompanied by part performance, is the *fraud* and injustice which would result from allowing one party to refuse to perform his part, after part performance by the other upon the faith of the contract (*f*).

(*z*) *Aubin* v. *Holt*, 2 Kay & J. 66, 70; 25 L. J., Ch. 36; *Faulkner* v. *Llewellyn*, 31 L. J., Ch. 549; *Lancaster* v. *De Trafford*, 31 L. J., Ch. 554; *Forrer* v. *Nash*, 35 Beav. 167; 14 W. R. 8. Sometimes the concurrence (in a lease) of a third person having an equitable interest in the property may be necessary: *Reeves* v. *Gill*, 1 Beav. 375.

(*a*) *Sainter* v. *Ferguson*, 1 Mac. & Gor. 286; Fry, s. 94; Dart V. & P. 1217.

(*b*) Dart V. & P. Chap. X.; Fry, s. 1057; *Davis* v. *Hone*, 2 Sch. & Lef. 341, 347; 9 R. R. 89; *Cartan* v. *Bury*, 10 Ir. Ch. R. 387; *Webb* v. *Hughes*, L. R., 10 Eq. 281; Malins, V.-C.

(*c*) *Tilley* v. *Thomas*, L. R., 3 Ch. 61, 67; *Roberts* v. *Berry*, 3 De Gex, M. & G. 284.

(*d*) *Madeley* v. *Booth*, 2 De G. & Sm. 718; *Darlington* v. *Hamilton*, 1 Kay, 557, 558.

(*e*) Fry, ss. 555—614; *Price* v. *Salusbury, Bart.*, 32 Beav. 446; 32 L. J., Ch. 441; affirmed Dom. Proc., 14 L. T., N. S. 110.

(*f*) *Buckmaster* v. *Harrop*, 7 Ves. 341; 6 R. R. 132; 9 R. R. 212; *Munday* v.

In equity the acts of part performance must be such as are referable to the contract as alleged, and consistent with it (*g*); and such as cannot be referred to any other title than the alleged agreement, nor be considered done with any other view or design than to perform it (*h*). Therefore the mere possession by the tenant is not sufficient, because that may be referred to his character as tenant, under the implied tenancy created by entry (*i*). So the expenditure by the tenant of moneys on the farm in the ordinary course of husbandry, is no part performance of an agreement for a lease, but attributable to his implied tenancy (*k*). But possession and special expenditure by the tenant, provided that it be such that would be likely to take place only in the pursuance of such a contract as that alleged, and it be with the privity of the other party, is an act of part performance: as where the tenant enters and builds, or causes expensive alterations to be made (*l*).

What Acts of Part Performance are or are not sufficient.

An outlay by a sub-lessee, made with the knowledge and approval of the party agreeing to grant the lease, has been held to be as much part performance as if it had been the outlay of the tenant himself (*m*). The laying out of considerable sums of money by a person who enters under an agreement for a long term, is rationally to be referred to such agreement, rather than to the mere tenancy at will to be implied from such entry (*n*). After such expenses have been incurred on the faith of a lease agreed to be granted, it would be fraudulent and inequitable for the landlord to refuse to grant such lease (*o*); but this cannot be said of the ordinary expenditure of a tenant. Where a tenant under a term alleged the rebuilding of a party-wall, which was in a ruinous state during his term, as part performance of an agreement by his landlord to grant a renewed term: it was held, that the act was equivocal, as it might have been done by him as

Outlay by Sub-lessee.

*Joliffe*, 5 Myl. & Cr. 177; *Gregory* v. *Wilson*, 2 Hare, 690; Fry, s. 562; *Wilson* v. *West Hartlepool R. Co.*, 34 L. J., Ch. 241; 13 W. R. 361, L.JJ.; *Caton* v. *Caton*, L. R., 1 Ch. 137, 148.

(*g*) Fry, s. 559; *Tomkinson* v. *Straight*, 17 C. B. 697; *Faulkner* v. *Llewellyn*, 31 L. J., Ch. 549; 11 W. R. 1055; 12 W. R. 193; *Powell* v. *Lovegrove*, 8 De Gex, M. & G. 357; *Price* v. *Salusbury*, 32 Beav. 446; 32 L. J., Ch. 441; affirmed, Dom. Proc., 14 L. T. 110; *Nunn* v. *Fabian*, L. R., 1 Ch. Ap. 35, 40; 35 L. J., Ch. 140.

(*h*) See *Maddison* v. *Alderson*, 8 App. Cas. 473; 52 L. J., Q. B. 737; 49 L. T. 303; 31 W. R. 820.

(*i*) *Wills* v. *Stradling*, 3 Ves. 378; 4 R. R. 26; *Morphett* v. *Jones*, 1 Swans. 181; *Faulkner* v. *Llewellyn*, 31 L. J., Ch. 549; 12 W. R. 193; 5 Vin. Abr. 323, pl. 41; but see *Pain* v. *Coombs*, 3 Sm. & Giff. 449; 1 De Gex & J. 24; 3 Jur., N. S. 307, 847; *Miller* v. *Finlay*, 5 L. T. 510.

(*k*) *Brennan* v. *Bolton*, 2 Dru. & W. 349; Fry, s. 561.

(*l*) *Wills* v. *Stradling*, 3 Ves. 378; 4 R. R. 26; *Stockley* v. *Stockley*, 1 V. & B. 23; 12 R. R. 184; *Toole* v. *Medlicott*, 1 Ball & B. 393; *Sutherland* v. *Briggs*, 1 Hare, 26; *Mundy* v. *Joliffe*, 5 Myl. & Cr. 167; *Surcome* v. *Pinniger*, 3 De Gex, M. & G. 571; and see *Farrell* v. *Davenport*, 8 Jur., N. S. 862, 1043.

(*m*) *Williams* v. *Evans*, L. R., 19 Eq. 547; 44 L. J., Ch. 319.

(*n*) Fry, s. 585; *Farrell* v. *Davenport*, 3 Giff. 363; 8 Jur., N. S. 862. 1043.

(*o*) *Frame* v. *Dawson*, 14 Ves. 386; 9 R. R. 304; *Lindsay* v. *Lyneh*, 2 Sch. & Lef. 1; see *Williams* v. *Evans*, 32 L. T. 360.

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well in respect of his title under the old term, as under the alleged agreement for a renewed term (*p*).

Payment of increased Rent. *Nunn* v. *Fabian.*

In *Nunn* v. *Fabian*, a landlord having verbally agreed with his tenant to grant him a lease for twenty-one years at an increased rent, with the option of purchasing the freehold, died before the execution of the lease. Before his death the tenant had paid one quarter's rent at the increased rate. It was held, that this constituted a sufficient part performance of the agreement to take the case out of the Statute of Frauds, and specific performance was decreed (*q*).

Continuance of possession taken before parol contract.

Continuance of possession taken before the parol contract may, if unequivocally referable to the contract, constitute part performance. This was held by Kekewich, J., in a case where the terms of the oral contract had been put into a draft lease embodying with a very slight exception the expressed intention of both parties, where the intending tenant was let into possession the day before the draft lease was read to the intending landlord by the intending tenant's solicitor who had prepared it, where the intending tenant had executed a counterpart, but the intending landlord had not executed the lease, and where rent had been regularly paid in accordance with the draft lease (*r*).

New Lease, &c.

Where an agreement in writing for a three years' tenancy reserved to the tenant the option of requiring a twenty-one years' lease at the expiration of the prior term, V.-C. *Wigram* appears to have considered that the tenant's verbal notice of an intention to take the new lease, accompanied by retention of possession, was binding upon him (*s*). The possession of a tenant after the expiration of his lease, under an agreement for a renewed lease, has been held a sufficient part performance (*t*), and so has the possession of a stranger under an express or implied agreement for a lease (*u*). It has also been held, that the giving up a business, coupled with possession, was part performance, although the tenant agreed to pay nothing but ground rent, rates and taxes (*x*).

Terms must be certain.

But the court will not decree a specific performance, although possession has been taken, unless the terms of the contract are clearly proved (*y*); nor if any of the terms are uncertain (*z*); although vagueness of language in a contract may sometimes be cured by

(*p*) *Frame* v. *Dawson*, and *Lindsay* v. *Lynch*, supra.

(*q*) *Nunn* v. *Fabian*, L. R., 1 Ch. 35; 35 L. J., Ch. 140. Compare this with *Re National Savings Bank Association, Ex parte Brady*, 15 W. R. 753.

(*r*) *Hodson* v. *Heuland*, [1896] 2 Ch. 428; 65 L. J., Ch. 754; 74 L. T. 811; 44 W. R. 684, per Kekewich, J.

(*s*) *Beatson* v. *Nicholson*, 6 Jur. 620.

(*t*) *Dowell* v. *Dew*, 1 You. & Coll. C. C. 345; Dart V. & P. 1136—1137.

(*u*) Fry, s. 578; *Gregory* v. *Mighell*, 18 Ves. 328; 11 R. R. 207; *Pain* v. *Coombs*, 3 Sm. & Gif. 449; 1 De Gex & J. 34, 46; 3 Jur., N. S. 307, 847.

(*x*) *Coles* v. *Pilkington*, L. R., 19 Eq. 174; 31 L. T. 422.

(*y*) *Mortal* v. *Lyons*, 8 Ir. Ch. R. 112.

(*z*) *Reynolds* v. *Waring*, 1 You. 346; *Price* v. *Assheton*, 1 Y. & C. 441.

evidence of surrounding circumstances, and of the subsequent conduct of the parties (*a*). The doctrine of part performance of a parol agreement is not to be extended by the court, and it is inapplicable in a case where a trustee has a power to lease at the request in writing of a married woman, which has not been made (*b*).

Execution of Repairs. *Shillibeer* v. *Jarvis.*

In *Shillibeer* v. *Jarvis*, after an offer had been made by a plaintiff to take a lease of a farm from the defendant, a draft was prepared by the defendant's solicitors, and approved of by the plaintiff with some alterations, and was afterwards altered by the defendant himself, and left by him with his solicitors, for the purpose of its being ascertained whether the plaintiff would agree to the alterations. On their submitting it to him he agreed to the alterations, but no agreement was signed. A part of the terms was, that the plaintiff should execute certain repairs before the lease was granted. The plaintiff was put into possession by the direction of the defendant's solicitors, and executed some repairs. It was held, that although the plaintiff might have been let into possession without authority from the defendant, there was a concluded agreement for a lease on the part of the defendant, and a sufficient part performance to take the case out of the Statute of Frauds, and specific performance was decreed (*c*). Where the plaintiff and the defendant agreed that when a certain house belonging to the plaintiff should be completed and finished fit for habitation, the plaintiff would grant to the defendant a lease of such house for twenty-one years, and the defendant took possession before the house was completed, and occupied it for a year; but refused to pay rent or execute the lease until the house should be completed and finished fit for habitation: whereupon the plaintiff filed a bill for specific performance, and moved that the defendant might be ordered to pay the year's rent into court; the motion was refused with costs (*d*).

Oral Agreement must be definite.

Of course the oral agreement, of which the part performance is relied on, must be of such a nature, *i.e.* so definite and unobjectionable, that if it had been in writing, and duly signed, the court would have decreed specific performance of it (*e*).

### (b) *There must be a complete Contract.*

There must be a *complete* Contract.

Whether the contract be proved by one or more writings (*f*), or by parol evidence, coupled with sufficient acts of part performance (*g*),

(*a*) *Oxford* v. *Provand*, L. R., 2 P. C. C. 135; *Coupland* v. *Arrowsmith*, 18 L. T. 755.
(*b*) *Phillips* v. *Edwards*, 33 Beav. 440.
(*c*) *Shillibeer* v. *Jarvis*, 8 De Gex, M. & G. 79.
(*d*) *Faulkner* v. *Llewellyn*, 31 L. J., Ch. 549; 11 W. R. 1055; 12 W. R. 193; and see *Modlen* v. *Snowball*, 29 Beav. 641; 31 L. J., Ch. 44; 4 De Gex, F. & J. 143.
(*e*) Fry, ss. 572—573; *Thynne* v. *Ld. Glengall*, 2 H. L. Cas. 158.
(*f*) Ante, p. 97.
(*g*) Ante, p. 106.

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there must, in each case, be a *complete contract* (*h*). An escrow or writing, delivered subject to a condition which has not been performed, is not sufficient (*i*). A mere proposal to offer or take a lease does not, before acceptance thereof, constitute a complete contract. The acceptance, to be operative, must be unequivocal, unconditional, and without variance of any sort between it and the proposal (*k*), and communicated to the other party within a reasonable time (*l*). The proposal or offer may be revoked at any time before such acceptance (*m*); but not afterwards (*n*). Unless the proposal or offer be accepted without unreasonable delay a revocation thereof may be implied; for, in the absence of any special stipulation to the contrary, it is always subject to an implied condition that it be accepted within a reasonable time, what time is reasonable being a question of fact (*o*). An unaccepted offer does not bind the land, nor the trustees of the person making the offer, on his becoming a bankrupt (*p*). So long as a proposal or offer is an existing one, *i.e.* until it has been accepted or revoked, expressly or by implication, the other party may, by accepting it purely and simply, without any addition or other alteration whatever, make it an agreement (*q*); nor is an acceptance by *writing* necessary (*r*), unless, indeed, by the terms of the proposal, an agreement or contract *in writing* is to be made (*s*).

Escrow.

Unaccepted Proposal.

What Acceptance is sufficient.

Revocation of Proposal.

Effect of Acceptance.

Counter-Proposal.

An acceptance of a proposal or offer, subject to any new term or other variation, amounts only to a counter-proposal, which must be accepted purely and simply before there will be any complete agreement (*t*). Where the proposal or offer is agreed to, but a different day is named for possession to be given, that is not sufficient as an acceptance (*u*). The acceptance of a proposal for a lease, adding, "We hope to give you possession at half-quarter day," has been held sufficient, the latter words having no legal operation (*x*). But

(*h*) *Jackson* v. *Oglander*, 2 H. & M. 465; 13 W. R. 936; *Lewers* v. *Earl Shaftesbury*, L. R., 2 Eq. 270; 16 L. T. 135; *Bankart* v. *Tennant*, 39 L. J., Ch. 809; 23 L. T. 137. And see generally, Chitty on Contracts, 13th ed., Ch. II., sect. 1.

(*i*) *Wheate* v. *Hall*, 17 Ves. 80; *Pym* v. *Campbell*, 6 E. & B. 370; *Gudgen* v. *Bessett*, Id. 986; *Millership* v. *Brooks*, 5 H. & N. 797; 27 L. J., Ex. 369.

(*k*) Fry, ss. 269—316; *Warner* v. *Willington*, 3 Drew. 523; 25 L. J., Ch. 662; (sending of draft lease held not sufficient); *Foster* v. *Rowland*, 7 H. & N. 103; 30 L. J., Ex. 396.

(*l*) See *Brogden* v. *Metropolitan R. Co.*, 2 App. Cas. 692.

(*m*) *Warner* v. *Willington*, 3 Drew. 523; 25 L. J., Ch. 662; *Jackson* v. *Oglander*, 2 H. & M. 465; 13 W. R. 936; *Rammens* v. *Robbins*, 11 Jur., N. S. 631; 13 W. R. 979, L.JJ.

(*n*) See *Baines* v. *Woodfall*, 6 C. B., N. S. 657; *Cowley* v. *Watts*, 17 Jur. 72, M.R.

(*o*) *Williams* v. *Williams*, 17 Beav. 213.

(*p*) *Meynell* v. *Surtees*, 2 Sm. & Giff. 101; 1 Jur., N. S. 737.

(*q*) *Baumann* v. *James*, L. R., 3 Ch. 508; 16 W. R. 877.

(*r*) See *Reuss* v. *Picksley*, L. R., 1 Ex. 342; Fry, s. 292. The acceptor however cannot himself be sued on the parol acceptance: Fry, s. 294.

(*s*) See *London Dock Co.* v. *Sinnott*, 8 E. & B. 347; 27 L. J., Q. B. 347.

(*t*) See *Honeyman* v. *Marryatt*, 21 Beav. 14; 26 L. J., Ch. 619; 6 H. L. Cas. 112.

(*u*) *Routledge* v. *Grant*, 4 Bing. 653.

(*x*) *Clive* v. *Beaumont*, 1 De Gex & S. 397; see also *Johnson* v. *King*, 2 Bing. 270.

there is no complete contract if terms be offered for a lease and accepted for a sub-lease (*y*), or if a particular covenant, such as not to assign without licence, be not agreed to (*z*), or if even the questions as to the costs of the counterpart, and by whom it should be engrossed, are left open (*a*).

After a counter-proposal the party making it cannot accept the first proposal, so as thereby to make it binding as an agreement. Therefore, where the owner of a farm offered to sell it to A. for 1,000*l.*; upon which A. wrote offering 950*l.*, which was refused, and then A. signified his acceptance of the original offer: it was held, that there was no contract between the parties, and a specific performance was refused (*b*). It not unfrequently happens that when a proposal or offer is made a correspondence takes place upon the subject, and it is sometimes difficult to say whether the result of such correspondence, the construction of which is for the court, not for a jury, shows a complete contract or merely a series of unaccepted proposals and counter-proposals (*c*). Letters will not constitute an agreement which the court will specifically perform, unless the answer is a simple acceptance, without the introduction of a new term (*d*).

After a Counter-Proposal the original Offer cannot be accepted.

Correspondence after a Proposal.

A written proposal or offer *signed by the defendant* and accepted orally by the plaintiff, is sufficient to satisfy the statute (*e*). But a written proposal or offer signed by the plaintiff must be *assented to in writing by the defendant* to bind him and to satisfy the statute (*f*). The acceptance of a proposal by a corporation must generally be under their common seal, or pursuant to the express provisions of some act of parliament, before there will be any contract (*g*).

Signed Proposal, binding after Oral Acceptance.

A written proposal or offer, which is accepted orally, need not be stamped as an agreement (*h*).

Stamp.

### (c) *Agreement subject to preparation of Formal Contract.*

There is, of course, no binding agreement when the writing appears only to be terms agreed on *as a basis* for an agreement, and not the agreement itself (*i*); or where it provides that any of the terms are to

If Terms agreed on subject to further Negotiations, there is no Contract.

(*y*) *Holland* v. *Eyre*, 2 Sim. & Stu. 194.

(*z*) *Lucas* v. *James*, 7 Hare, 410.

(*a*) *Forster* v. *Rowland*, 7 H. & N. 103; 30 L. J., Ex. 396. Compare this with *Shillibeer* v. *Jarvis*, 8 De Gex, M. & G. 79, ante, p. 109; and see *Jackson* v. *Oglander*, 2 H. & M. 465; 13 W. R. 936, where the lease had been settled on both sides and engrossed pursuant to an oral agreement: —held, no sufficient contract.

(*b*) *Hyde* v. *Wrench*, 3 Beav. 334.

(*c*) See *Honeyman* v. *Marryatt*, 21 Beav. 14; 26 L. J., Ch. 619; 6 H. L. Cas. 112; *Ridgway* v. *Wharton*, 6 H. L. Cas. 238; 27 L. J., Ch. 46; *Beaumann* v. *James*, L. R., 3 Ch. 508; 16 W. R. 877.

(*d*) *Wright* v. *St. George*, 12 Ir. Ch. R. 226.

(*e*) *Reuss* v. *Picksley*, L. R., 1 Ex. 342; 4 H. & C. 588; 14 W. R. 924.

(*f*) *Felthouse* v. *Bindley*, 11 C. B., N. S. 869.

(*g*) *London Docks Co.* v. *Sinnott*, 8 E. & B. 347; 27 L. J., Q. B. 347; *Haigh* v. *North Brierly Union*, 1 E., B. & E. 873, 883; 28 L. J., Q. B. 62; *Copper Miners of England Co.* v. *Fox*, 16 Q. B. 229.

(*h*) *Drant* v. *Brown*, 3 B. & C. 665.

(*i*) *Frost* v. *Moulton*, 21 Beav. 496.

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be afterwards settled (*k*); or where it is expressed to be "subject to the preparation and approval of a formal contract" (*l*); or subject to a contract to be settled between the plaintiff's solicitors and the defendant (*m*); or subject to the terms of the draft lease being "reasonable in the estimation" of the defendant (*n*); or where there appears any design of further negotiation (*o*). The court will refuse to act where it only rests reasonably doubtful whether what passed was only treaty, let the progress towards the confines of agreement be more or less (*p*). But the mere fact that the parties have expressly stipulated that there shall afterwards be a formal agreement prepared does not by itself show that they continue merely in negotiation (*q*). Therefore correspondence about the taking of a house was held to constitute a sufficient agreement, though the agent of the lessor accepted the offer thus:—"These terms I have submitted to Mrs. S., and I am authorized to say they are accepted, and that her solicitor will draw up a proper agreement for signature, which I will forward to you" (*r*), and an acceptance by a party merely expressed to be subject to the approval of his solicitor will it seems bind him (*s*). Thus, where the defendant offered to take a lease of a number of houses from the plaintiff, by a letter ending, "such lease to be approved in the customary way by my solicitors," and the plaintiff accepted the offer, but the defendant's solicitor refused to approve or to complete, Wright, J., decreed specific performance with a reference to chambers to approve the form of lease, holding that the meaning of the provision was that the defendant's solicitors were to see that nothing irregular or unusual was inserted in the lease (*t*). The question in cases of this sort is, whether the writing was intended to operate as a binding contract until a more formal one should be signed (*u*), and there appears to be no distinction in this respect between a contract for a sale and a contract for a lease.

(*k*) *Wood* v. *Midgley*, 5 De Gex, M. & G. 41; *Honeyman* v. *Marryatt*, 21 Beav. 14; 26 L. J., Ch. 619; 6 H. L. Cas. 112.

(*l*) *Winn* v. *Bull*, 7 Ch. D. 29; 47 L. J., Ch. 139; 26 W. R. 230; *Bonnewell* v. *Jenkins*, 8 Ch. D. 70. And see generally, Chitty on Contracts, 13th ed., Ch. II., sect. 1, citing *Hussey* v. *Horne-Payne*, 4 App. Cas. 311, and many other cases.

(*m*) *Harvey* v. *Barnard's Inn*, 50 L. J., Ch. 750; 45 L. T. 280, per Fry, J.

(*n*) *Wilcox* v. *Redhead*, 49 L. J., Ch. 539; 28 W. R. 795, per Hall, V.-C.

(*o*) *Tawney* v. *Crowther*, 3 Bro. C. C. 318; *Stratford* v. *Bosworth*, 2 V. & B. 341.

(*p*) *Huddlestone* v. *Briscoe*, 11 Ves. 592; *Jackson* v. *Oglander*, 2 H. & M. 465; 13 W. R. 936; Fry, s. 343.

(*q*) *Rossiter* v. *Miller*, 3 App. Cas. at p. 1151.

(*r*) *Skinner* v. *M'Dowall*, 2 De Gex & S. 265.

(*s*) *Eadie* v. *Atkinson*, 52 L. J., Ch. 80; 47 L. T. 543; 31 W. R. 320, per Pearson, J.

(*t*) *Chipperfield* v. *Carter*, 72 L. T. 487, applying the observations of Lord Cairns in *Hussey* v. *Horne-Payne*, 4 App. Cas. 311.

(*u*) *Ridgway* v. *Wharton*, 6 H. L. Cas. 238; 27 L. J., Ch. 46.

## Sect. 5.—*Considerations in Refusal or Grant of Judgment for Specific Performance.*



The agreement must not only be complete as a contract (*x*), and proved by a writing or writings sufficient to satisfy the Statute of Frauds (*y*), or by parol evidence, coupled with sufficient part performance to take it out of the statute (*z*); but it must also be of so definite and specific a nature (*a*), and unobjectionable in other respects, that the court will decree a performance of it. Therefore a court of equity will not decree the specific performance of a contract for the purchase of a lease, where, from pending and threatened litigation, it is impossible to ascertain to whom the ground rent is payable, and the purchaser may be involved in immediate litigation (*b*). In *Tildesley* v. *Clarkson* (*c*), the court declined to compel the defendant to take a lease of a new house, which the plaintiff had contracted to "finish and deliver," on the ground that upon a competent survey the house had been found defective, and finished in such a manner that it was likely to subject the defendant, under the covenant to repair, to an unusually large annual outlay to maintain it (*c*); and where an agreement for a lease of mineral property did not clearly define the mineral area to be comprised in the lease, the court refused, at the instance of the proposed lessee, to decree specific performance of the agreement (*d*).

The Agreement must be definite and unobjectionable in certain respects.

The court will not decree specific performance of a contract for a lease of premises, where one of the stipulations of the contract is, that the lessee shall engage the personal services of the lessors in the business to be carried on upon the premises (*e*).

Engagement of personal services.

But an agreement for a lease "for seven, fourteen or ——— years," was held to entitle the tenant to a lease for fourteen years, determinable at the tenant's, and not the landlord's, option, at the end of seven years, and that notwithstanding that the landlord had given his agent, who entered into the agreement, no authority to grant a lease with such option (*f*).

Lease determinable at end of 7 years.

The discretion of the court is exercised according to fixed and settled rules, and mere inadequacy of consideration, unless it be so gross as to amount to evidence of fraud, is not a ground for exercising such discretion by refusing a specific performance (*g*). Thus, where

Inadequacy of Consideration.

(*x*) Ante, p. 94.
(*y*) Ante, p. 97.
(*z*) Ante, p. 106.
(*a*) *Bernard* v. *Meara*, 12 Ir. Ch. R. 389.
(*b*) *Pegler* v. *White*, 33 Beav. 403; 33 L. J., Ch. 569.
(*c*) *Tildesley* v. *Clarkson*, 30 Beav. 419; 31 L. J., Ch. 362, per Romilly, M.R.
(*d*) *Lancaster* v. *De Trafford*, 31 L. J., Ch. 554; 8 Jur., N. S. 873; and see *Davis* v. *Shepherd*, L. R., 1 Ch. 410.
(*e*) *Ogden* v. *Fossick*, 32 L. J., Ch. 73.
(*f*) *Powell* v. *Smith*, L. R., 14 Eq. 85; 41 L. J., Ch. 734. The tenant had entered and spent money on the farm.
(*g*) *Haywood* v. *Cope*, 25 Beav. 141, 151; *Callaghan* v. *Callaghan*, 8 Cl. & Fin. 374; Fry, Part III., Chap. VII.

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the defendant agreed to purchase leasehold property at a valuation to be made by A. B., who made a very high and apparently exorbitant valuation, viz. at thirty years' purchase for a mere leasehold, but there did not appear to be any "fraud, mistake, or miscarriage," the court decreed a specific performance with costs (*h*).

Misrepresentations and Deceit.

If the plaintiff induced the defendant to enter into a disadvantageous contract by misrepresentations and deceit, his action for specific performance will be dismissed with costs (*i*). But the mere existence of circumstances at the date of the contract which might easily have led to fraud, and the want of any professional adviser on the part of the defendant, are insufficient to defeat the right to specific performance, if no fraud be shown (*k*).

Misrepresentation of matter of Law does not disentitle.

A misrepresentation of matter of law will not disentitle the plaintiff. Therefore where A., who was under an agreement to take the lease of a house containing "all usual covenants," agreed to assign all his interest to B. and forwarded him a copy of the original agreement, and afterwards, in answer to inquiries by B., stated that the lessee would not have to do substantial repairs: upon a bill filed by A. for a specific performance, it was held that A.'s statement was a misrepresentation of matter of law, and that he would not be bound or prejudiced by it (*l*).

Concealment of material Facts.

A specific performance will not be decreed at the instance of a person who has obtained an advantageous agreement for a renewed lease for lives, by knowingly concealing an important fact, viz., that the last life named in the lease was then *in extremis*, of which he well knew that the lessor was then ignorant (*m*). So where the plaintiff held part of the premises as lessee only, under onerous covenants, but concealed that fact, and represented himself to be owner in fee (*n*).

Public Nuisance affecting the Property.

The existence of a public nuisance in the immediate neighbourhood of a house agreed to be taken as a residence, and rendering it unfit for that purpose,—its existence, however, being unknown to either party, although easily ascertainable by the lessor,—seems to afford no defence to his suit for a specific performance, although it will induce the court to try the case strictly (*o*).

(*h*) *Collier* v. *Mason*, 25 Beav. 200.

(*i*) Dart V. & P. 1174; *Willingham* v. *Joyce*, 3 Ves. 168; *Clermont* v. *Tasburgh*, 1 Jac. & W. 112; *Cadman* v. *Horner*, 18 Ves. 10; 11 R. R. 135; *O'Herlihy* v. *Hedges*, 1 Sch. & Lef. 123; *Tildesley* v. *Clarkson*, 30 Beav. 419; 31 L. J., Ch. 362; *Moxey* v. *Bigwood*, 12 W. R. 811; 10 Jur., N. S. 597; *Higgins* v. *Samels*, 2 J. & H. 460; 7 L. T. 240.

(*k*) *Lightfoot* v. *Heron*, 3 Y. & C. 586; Dart V. & P. 1155; see also *Johnson* v. *Smart*, 2 Giff. 151; *Cook* v. *Waugh*, Id. 201.

(*l*) *Kendall* v. *Hill*, 6 Jur., N. S. 968, M.R.; *Great Western R. Co.* v. *Cripps*, 5 Hare, 91.

(*m*) *Ellard* v. *Ld. Llandaff*, 1 Ball & B. 241; Fry, ss. 383, 684—688.

(*n*) *Baskcomb* v. *Phillips*, 29 L. J., Ch. 380; 6 Jur., N. S. 363.

(*o*) *Lucas* v. *James*, 7 Hare, 410, 418; Dart V. & P. 1184.

Illegal Contract.

If the agreement is illegal the court will not decree a specific performance (*p*). But the agreement must be legal or illegal, and it is not within the discretion of the court to refuse specific performance because an agreement savours of illegality; it must be shown to be illegal (*q*). Where a stipulation is omitted from the written agreement, upon the supposition that it is illegal (*r*), or where a party having bargained for the insertion of a particular term, knowingly, and without being fraudulently induced thereto, executes an agreement from which it is omitted (*s*), equity will hold the omission binding.

Plaintiff no sufficient Title. V. & P. Act, 1874.

By the Vendor and Purchaser Act, 1874, 37 & 38 Vict. c. 78, sect. 2, rule 1, it is enacted that "under a contract to grant a term of years, whether derived or to be derived out of a freehold or leasehold estate, the intended lessee shall not be entitled to call for the title to the *freehold*," and by the Conveyancing and Law of Property Act, 1881, 44 & 45 Vict. c. 41, s. 13, sub-s. (1), that "on a contract to grant a lease for a term of years to be derived out of a leasehold interest, with a *leasehold* reversion, the intended lessee shall not have the right to call for the title to *that reversion;*" but by sub-s. (2), this section applies only "if and so far as a contrary intention is not expressed in the contract, and shall have effect subject to the terms of the contract and to the provisions therein contained."

Proof of Bad Title aliunde. Right of Way. *Jones* v. *Watts.*

It has been held that the 2nd section of the Vendor and Purchaser Act, 1874, does not prevent an intending lessee from showing aliunde that the title of the intending lessor is bad (*t*); and, in the same case, that an agreement for a right of way during the term is within the section (*u*). In this case the plaintiffs agreed to grant and the defendant to accept a lease of house and land with stipulations for the use of a drive to the house. In an action for specific performance, the defendant denied the plaintiff's title to grant amongst other things the use of the drive, and applied for production of title deeds, but the Court of Appeal refused to order production.

Further decisions as to Defective Title.

If a party agrees to let an estate, and brings an action for the specific performance of the agreement, it will be dismissed with costs, if, in the course of the action, it should appear that the intended lessor had a defective title, even though the objections on which the refusal to take the lease was grounded were frivolous and untenable (*x*). If it appear to the court that the plaintiff as

(*p*) Fry, Part III., Chap. IX.; Dart V. & P. 1162; *Dr. Bettesworth* v. *Dean and C. of St. Paul's*, Select Cas. Ch. 66.

(*q*) *Aubin* v. *Holt*, 2 Kay & J. 70.

(*r*) *Ld. Irnham* v. *Child*, 1 Bro. C. C. 92; 6 Ves. 332; Sug. V. & P. 173 (14th ed.); Dart V. & P. 1159.

(*s*) *Shelburne* v. *Inchiquin*, 1 Bro. C. C. 350; *Jackson* v. *Cator*, 5 Ves. 688; 5 R. R. 144; *Rich* v. *Jackson*, 4 Bro. C. C. 514, 518; Dart V. & P. 1159.

(*t*) *Jones* v. *Watts*, 43 Ch. D. 574; 62 L. T. 471; 38 W. R. 725;—C. A. varying judgment of North, J., 62 L. T. 58.

(*u*) *Jones* v. *Watts*, supra.

(*x*) *Baskcomb* v. *Phillips*, 29 L. J., Ch. 380; 6 Jur., N. S. 363.

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sole acting executrix had power to let or sell, a specific performance may be decreed, notwithstanding one of the conveyancing counsel of the court has given a contrary opinion (*y*). It has been said that an appellate court, notwithstanding its impression in favour of a vendor's title, will not decree specific performance in opposition to the decision of the court below that a good title cannot be made, unless such decision be clearly wrong (*z*); but this has been doubted (*a*), and a purchaser has been compelled to take a title which appears to the court of appeal to be good, although the judge of the court below was of a different opinion; that fact not being sufficient to constitute a doubtful title (*b*).

Unreasonable Hardship.

Where a decree for specific performance would impose serious and unreasonable hardship on the defendant the court will sometimes refuse to interfere, and only award the plaintiff damages; but much depends on the nature of the hardship, and when and how it arose (*c*).

*Costigan* v. *Hastler.*

Thus, in *Costigan* v. *Hastler* (*c*), where a mortgagor had contracted to grant a lease, but failed to obtain the mortgagee's consent, as he expected to do, and was also shown to be unable to redeem, the intending tenant failed to obtain a decree for specific performance, and only succeeded in getting the contract rescinded. But in

*Long* v. *Bowring.*

*Long* v. *Bowring* (*c*), where the defendant contracted to grant a sub-lease, and to pay to the intended sub-lessee 1,000*l.* by way of liquidated damages if he should fail to obtain the assent of his landlord to the sub-lease, it was held that he was not entitled to refuse to apply to his landlord for such assent, and by paying the 1,000*l.* to escape a decree for specific performance. And the general rule is, that a hardship which arises subsequently to, or independently of, the contract will not be taken into consideration (*d*).

Injury to Property by Fire, &c.

The accidental destruction by fire or tempest of any of the property agreed to be demised would seem to afford no defence to an action for specific performance. The rule of *Paine* v. *Meller* (*e*), and similar cases, that a party who enters into a binding contract for the purchase of an estate, becomes in equity the owner of it, and is entitled to any profit and subject to any loss which may afterwards occur, is applicable to a contract for a lease. This was

*Counter* v. *Macpherson.*

clearly recognized in a case heard before the Judicial Committee of the Privy Council in 1845 (*f*), although the plaintiff (the intended

(*y*) *Hamilton* v. *Buckmaster*, L. R., 3 Eq. 323, Wood, V.-C.

(*z*) *Collier* v. *M'Bean*, 35 L. J., Ch. 144.

(*a*) In *Beioley* v. *Carter*, infra.

(*b*) *Beioley* v. *Carter*, L. R., 4 Ch. 230; *Sheppard* v. *Doolan*, 3 Dru. & W. 8; and see *Hamilton* v. *Buckmaster*, supra.

(*c*) *Costigan* v. *Hastler*, 1 Sch. & Lef. 166; *Long* v. *Bowring*, 33 Beav. 585; Fry, Part. III., Chap. VI.

(*d*) *Evans* v. *Walshe*, 2 Sch. & Lef. 419; *Revell* v. *Hussey*, 2 Ball & B. 280; 12 R. R. 87; Fry, s. 399.

(*e*) *Paine* v. *Meller*, 6 Ves. 349; 5 R. R. 327.

(*f*) *Counter* v. *Macpherson*, 5 Moore, P. C. 83; *Taylor* v. *Caldwell*, 3 B. & S. 826, where the plaintiff agreed to let a music

landlord) failed to obtain specific performance on the ground of non-performance on his part of an agreement to put the premises in repair.

Failure to give Possession.

Where the intended landlord could not give possession on the appointed day, and time was of the essence of the contract, his bill for a specific performance was dismissed (*g*). Where the intended tenant, knowing that the premises were greatly out of repair, stipulated for certain specific repairs, which were done accordingly, and he took possession after being warned that much more expensive repairs were required, and it turned out on a subsequent examination that it was necessary to take down and rebuild a wall at great expense, specific performance was decreed (*h*).

Breach of Trust.

Where trustees have inadvertently entered into a contract to grant or to renew a lease, in excess of their power, and which if performed would amount to a breach of trust, specific performance will not be decreed (*i*). In *Sneesby* v. *Thorne*, one of two executors, erroneously believing that he was acting with the authority of the other, contracted to sell a leasehold house, part of the testator's estate: it was held that the purchaser could not enforce a specific performance, and it seems doubtful whether he could have done so if the executor had been under no misapprehension (*k*). A contract for a lease by a mortgagor cannot be enforced by him unless he procure a reconveyance of the mortgage, or procure the mortgagee to join in or confirm the lease (*l*), but in such case the court may decree the damages sustained and cause them to be assessed (*m*). Where a mortgagee agreed with the plaintiff to grant him a lease, upon the mutual understanding that the mortgagor should concur, but the mortgagor refused concurrence, the court held that the plaintiff was not entitled to insist on having a lease from the mortgagee alone: and, further, that he was not entitled to damages (*n*).

Forfeiture.

The possibility of a forfeiture being incurred if the intended lessor perform his agreement is no defence to an action for specific performance (*o*). But where a lessee sold certain lots of building ground,

hall for four days, and, the music hall having been burnt down between agreement and time for performance, failed to recover damages, is distinguishable on the ground that the existence of the music hall was an implied essential condition of the agreement.

(*g*) *Tilley* v. *Thomas*, L. R., 3 Ch. Ap. 61; 16 W. R. 166.

(*h*) *Cook* v. *Waugh*, 2 Giff. 201; 6 Jur., N. S. 596; compare this case with *Tildesley* v. *Clarkson*, 30 Beav. 419; 31 L. J., Ch. 362, and p. 113, ante.

(*i*) *Byron* v. *Acton*, 1 Bro. P. C. 186; *Hartnell* v. *Yielding*, 2 Sch. & Lef. 549; *Bellringer* v. *Blagrave*, 1 De Gex & S. 63; *Haywood* v. *Cope*, 25 Beav. 153; *Phillips* v. *Edwards*, 33 Beav. 440; *Dunn* v. *Flood*, 28 Ch. D. 586; *Gas Light and Coke Co.* v. *Towse*, 35 Ch. D. 519.

(*k*) *Sneesby* v. *Thorne*, 7 De G. M. & G. 399.

(*l*) *Costigan* v. *Hastler*, 1 Sch. & Lef. 160.

(*m*) *Howe* v. *Hunt*, 31 Beav. 420; 32 L. J., Ch. 36.

(*n*) *Franklinski* v. *Ball*, 33 Beav. 560; 34 L. J., Ch. 153.

(*o*) *Helling* v. *Lumley*, 3 De Gex & J. 493. As to acts of forfeiture by intending tenant, see *Hill* v. *Barclay*, 18 Ves. at p. 63; 11 R. R. 147; and p. 123, post.

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and agreed to make a road, which it was afterwards found he could not do without incurring the risk of forfeiting a piece of leasehold land through which it was to pass, or of being sued by the lessor, the court granting the purchaser specific performance of the agreement for sale refused to enforce the stipulation, but gave him compensation as to that (*p*).

Contract for Longer Lease than grantable.

Where a tenant for life contracts to grant a lease for a longer period than he has power to grant, the court will decree him to grant such lease as he is able to make (*q*), with compensation for the residue of the agreed term (*r*). If a copyholder were to agree to grant a lease for a longer term than the custom allowed, he would, it seems, be compelled to effectuate his contract in substance, by from time to time executing leases for such terms as he could, till he had made up the term contracted for (*s*). The court never decrees performance of that which is impossible to be done (*t*).

Impossibility.

Fraud—Surprise—Mistake.

*Jeffreys* v. *Fairs.*

The contract must not only be legal, but it must not be hard or unreasonable (*u*), it must be free from fraud and surprise (*x*), and from mistake (*y*). In *Jeffreys* v. *Fairs* (*z*), the plaintiff agreed to grant the defendants a lease of a vein of coal, called the Shenkin vein, "about two feet thick, with the overlying and underlying beds of clay," at a certain dead rent and royalties; it was held that this agreement could be enforced against the defendants, whether the Shenkin vein existed or not. But this was said to be "because the defendants had in fact got all they bargained for, which was the chance of finding the vein of coal under the particular property," so that it would have been "against reason, against justice, and against the whole chain of authorities, to let the defendants off their bargain." A mistake of law is not sufficient (*a*), nor a mistake as to the legal consequences of an act (*b*). A substantial misdescription in the particulars of sale will entitle the purchaser to avoid the contract even at law (*c*), but he must do so immediately (*d*). In equity such a contract will not be enforced against him (*e*). Where there has been a misrepresentation made by the vendor, the court applies

No decree of specific Performance with a Variation in favour of Plaintiff.

(*p*) *Peacock* v. *Penson*, 11 Beav. 355. See also *Wilmott* v. *Barber*, 15 Ch. D. 96.

(*q*) As to lease by tenant for life, see Chap. I., Sect. 4, ante.

(*r*) *Cleaton* v. *Gower*, Finch, 164; *Dale* v. *Lister*, cited 16 Ves. 7; *Hanbury* v. *Litchfield*, 2 Myl. & K. 629; Fry, s. 413; Dart V. & P. 1187—1190; *Painter* v. *Newby*, 11 Hare, 20.

(*s*) *Paxton* v. *Newton*, 2 Sm. & Giff. 437; Fry, s. 982.

(*t*) *Green* v. *Smith*, 1 Atk. 572.

(*u*) *Tildesley* v. *Clarkson*, 30 Beav. 419; 31 L. J., Ch. 362, and p. 113, ante.

(*x*) Fry, s. 687; Dart V. & P. 1175; *Walters* v. *Morgan*, 3 De Gex, F. & J. 718.

(*y*) Fry, Part III., Chap. XIV.; Dart V. & P. 1153; *Wood* v. *Scarth*, 2 Kay & J. 33; *Brown* v. *Marquis of Sligo*, 10 Ir. Ch. R. 1.

(*z*) *Jeffreys* v. *Fairs*, 4 Ch. D. 448, per Bacon, V.-C.

(*a*) Fry, s. 765; *Croombe* v. *Lediard*, 2 Myl. & K. 251.

(*b*) *Great Western R. Co.* v. *Cripps*, 5 Hare, 91.

(*c*) *Flight* v. *Booth*, 1 Bing. N. C. 376; *Wood* v. *Keep*, 1 F. & F. 331.

(*d*) *Selway* v. *Fogg*, 5 M. & W. 83.

(*e*) *Dimmock* v. *Hallett*, L. R., 2 Ch. 21; 36 L. J., Ch. 146.

the rule caveat emptor with great caution (*f*). If the written contract omits any material term, or inaccurately expresses the real intentions of the parties, the court will not enforce, with a variation to correct the mistake, at the instance of the party in whose favour such correction would operate (*g*). Thus, where a person has contracted for the assignment of a lease, he will not be decreed to take the assignment of an underlease even with compensation (*h*). If he has contracted for an estate in possession, he will not be decreed to take a reversionary lease with compensation (*i*). If he has contracted for a specific term, *ex. gr.* sixteen years, he will not be decreed to take a considerably less term, *ex. gr.* six years with compensation (*k*). By an agreement in writing, A. agreed to demise to B. premises which were then in lease to C., and B. undertook to procure a surrender from C. of the existing lease and to accept a new lease. C. having afterwards refused to surrender, A. filed a bill against B. for a specific performance, *with a modification*. It was held, upon demurrer, that the bill could not be sustained (*l*). On the other hand, if the opposite party files the bill, the court will not decree a specific performance unless he submits to such alterations or compensation as the court thinks ought to be made upon a consideration of the parol evidence (*m*). Where a plaintiff alleges a written agreement with a parol variation *in favour of the defendant*, and offers to perform the agreement with the variation, the court will enforce specific performance, although the defendant insists on the statute (*n*). In one case, A. agreed to grant the lease of a public-house to B., "the lessor to make certain alterations suggested and to make and form a spirit-vault, and put in plate-glass windows, and to do everything therewith necessary at his own expense, and paint new the outside of all woodwork, as well as put the slates, chimney-pots and roofing in thorough repair." B., by his bill, offered to waive the performance of the agreement so far as regarded any alterations not specifically mentioned therein. It was held, that

Otherwise at the instance of Defendant.

(*f*) *Colby* v. *Gadsden*, 15 W. R. 1185; 17 L. T. 97.

(*g*) Fry, ss. 779—801; Dart V. & P. 1149; *Woolam* v. *Hearn*, 7 Ves. 211; 6 R. R. 113; *Winch* v. *Winchester*, 1 V. & B. 375, 378; 12 R. R. 238; *Higginson* v. *Clowes*, 15 Ves. 516, 523; 10 R. R. 112; *Clinan* v. *Cooke*, 1 Sch. & Lef. 22; 9 R. R. 3; *Manser* v. *Back*, 6 Hare, 447; *Squire* v. *Campbell*, 1 Myl. & Cr. 480; *Emmet* v. *Dewhurst*, 3 Myl. & Cr. 587; *Davies* v. *Fitton*, 2 Dru. & W. 225; *Nurse* v. *Lord Seymour*, 13 Beav. 254.

(*h*) *Madeley* v. *Booth*, 2 De Gex & S. 718; *Darlington* v. *Hamilton*, 1 Kay, 550; *Warren* v. *Richardson*, You. 1; Fry, s. 1209.

(*i*) *Lincham* v. *Cotter*, 7 Ir. Eq. 176; Sug. V. & P. 304 (14th ed.); Dart V. & P. 1199.

(*k*) *Long* v. *Fletcher*, 2 Eq. Cas. Abr. 5; Dart V. & P. 1200.

(*l*) *Beeston* v. *Stutley*, 26 L. J., Ch. 156, Wood, V.-C.

(*m*) *Joynes* v. *Statham*, 3 Atk. 388; *Barnard* v. *Cave*, 26 Beav. 253; *Clarke* v. *Moore*, 1 Jon. & Lat. 722; *Browne* v. *Marquis of Sligo*, 10 Ir. Ch. R. 1; *London and Birmingham R. Co.* v. *Winter*, Cr. & Ph. 57, 62; *James* v. *Lichfield*, L. R., 9 Eq. 51; Fry, s. 1222; Dart V. & P. 1153.

(*n*) *Martin* v. *Pycroft*, 2 De Gex, M. & G. 785; Dart V. & P. 1148, 1156, 1176.

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he was entitled to a decree for specific performance, minus the waiver (*o*). Where the defendant relies on a parol variation of a written contract, as a defence, he must prove such part performance of the agreement as altered as would induce the court to enforce it as an original independent agreement (*p*).

Where anything remains to be fixed or decided by third Persons over whom the Court has no control.

If the amount of premium or rent to be paid, or any other material point, is by the agreement left to be determined by third persons, *ex. gr.*, arbitrators or surveyors, and that has not been done before suit, the court will not decree specific performance, having no power to compel such third persons to perform their duty: it therefore treats the contract as too imperfect to be specifically enforced (*q*). But after such matter has been so determined, the contract may be enforced by decree even where the sum fixed appears to be exorbitant, no fraud, mistake or miscarriage being proved (*r*). B. agreed to grant a lease to W. as soon as W. should have built a house with the necessary outbuildings on the land, of the value of £1,400 at the least, "according to a plan to be submitted to and approved by B." W. agreed to build such house and take the lease; no plan was submitted to or approved by B., but he was ready and willing to approve of any reasonable plan; under such circumstances, a bill filed by B. for a specific performance, was dismissed with costs (*s*).

When Contract conditional on Lessor's ability.

If a contract for a lease be made conditional on the lessor's ability to grant it, an action for specific performance cannot be supported without proof of the lessor's ability; or that he has received part of the agreed premium, and interest on the balance, and so in effect estopped himself from relying on the condition (*t*). But the plaintiff may be entitled to an equitable lien on the land for the sums expended on the faith of the agreement, with interest thereon, and to consequential relief (*u*).

Requirement of Licence to assign.

Where the lessor's consent or licence is necessary to an assignment of a lease, it is the vendor's duty to obtain it, and if he cannot do so before the commencement of an action for specific performance he cannot maintain such action (*v*).

(*o*) *Middleton* v. *Greenwood*, 2 De Gex, J. & S. 142.

(*p*) *Legal* v. *Miller*, 2 Ves. Sen. 299; *Price* v. *Dyer*, 17 Ves. 356, 364; 11 R. R. 102; *Robinson* v. *Page*, 3 Russ. 121.

(*q*) *Milnes* v. *Gery*, 14 Ves. 450; 9 R. R. 307; *Darby* v. *Whittaker*, 4 Drew. 134; *Tillett* v. *Charing Cross Bridge Co.*, 26 Beav. 419; 28 L. J., Ch. 863; Fry, ss. 337—348; see also *Collins* v. *Collins*, 26 Beav. 306; 28 L. J., Ch. 184; *Jackson* v. *Jackson*, 1 Sm. & Giff. 184; *Vickers* v. *Vickers*, L. R., 4 Eq. 529; 36 L. J., Ch. 946.

(*r*) *Collier* v. *Mason*, 25 Beav. 200; *Ormes* v. *Beadel*, 2 Giff. 166; 30 L. J., Ch. 1; *Blackett* v. *Bates*, 34 L. J., Ch. 515; 2 H. & M. 270, 610; L. R., 1 Ch. 117.

(*s*) *Brace* v. *Wehnert*, 25 Beav. 348. But see *Mayor, &c., of London* v. *Southgate*, 38 L. J., Ch. 411.

(*t*) *Abbot* v. *Blair*, 8 W. R. 672; *Bauman* v. *Matthews*, 4 L. T. 783, L.C.

(*u*) *Middleton* v. *Magnay*, 2 H. & M. 233; 12 W. R. 706; *Hindley* v. *Emery*, L. R., 1 Eq. 52; 35 L. J., Ch. 6; *Turner* v. *Marriott*, L. R., 3 Eq. 744; 15 W. R. 420.

(*v*) *Forrer* v. *Nash*, 35 Beav. 167; 14 W. R. 8; and see post, Ch. XVII., Sect. 2.

Agreement not enforceable for Uncertainty.

An agreement to take a lease of a house, if put into thorough repair, and the drawing-room "handsomely decorated according to the present style," is too uncertain to be enforced by a decree for a specific performance (*x*); but where a lessor agreed to let a house, and to put it into decorative repair, and afterwards refused to fulfil his contract, the court, at the instance of the lessee, who had entered into possession, decreed specific performance of the agreement, with an inquiry whether the agreement as to decorative repair had been performed; and if not, decreed that the lessor should compensate the lessee in damages (*y*). In *Faulkner* v. *Llewellyn*, B. agreed with C. to take a lease of a house which C. was building, when it was "complete, finished, and fit for habitation:" B. took possession, but afterwards found various objections to it, contending that it was not properly finished. The matter being referred to an expert, he reported that, although there might be some objections, yet the house was "complete, finished, and fit for habitation." A decree for a specific performance of the agreement was granted (*z*). Where terms for letting farms provided that all materials required for buildings proposed to be built, or that might thereafter be built, should be led at the expense of the tenant; that the landlord should drain, the tenant leading tiles; that gates, building, "&c." should be left in repair by the tenant, the landlord finding new gates when required; and the landlord reserved to himself all customary rights and reservations, such as liberty to cut and plant timber, search for and work mines or minerals, "&c.," allowing the tenant for any reasonable damages:—It was held, that these stipulations did not render the agreement uncertain, so as to be incapable of being enforced specifically (*a*).

No Decree for Performance of *Part* of a Contract.

Exceptions.

The court will not decree specific performance of part of a contract (*b*), unless the residue has been already performed (*c*), or the unperformed part is separable and divisible from the rest, and does of itself form a complete contract. Thus, in *Green* v. *Low*, the owner of a plot of ground agreed to grant a lease of it to A. as soon as the latter had erected a villa thereon, but it was stipulated that if A. should not perform the agreement on his part, the agreement for a lease was to be void, and that the owner might re-enter. A. was to insure in a particular way, and he was to have the option of purchasing the fee within two years, upon certain terms. A. erected

(*x*) *Taylor* v. *Portington*, 7 De Gex, M. & G. 328; and see *Jeffery* v. *Stephens*, 6 Jur., N. S. 947; 8 W. R. 427, M.R.

(*y*) *Samuda* v. *Lawford*, 4 Giff. 42; 8 Jur., N. S. 739.

(*z*) *Faulkner* v. *Llewellyn*, 31 L. J., Ch. 549; 11 W. R. 1055; 12 W. R. 193.

(*a*) *Parker* v. *Taswell*, 2 De G. & J. 559; 27 L. J., Ch. 812; and see *Norris* v. *Jackson*, 3 Giff. 396; 8 Jur., N. S. 930.

(*b*) Fry. Part III., Chap. XVI.; Dart V. & P. 1200; *Ogden* v. *Fossick*, 32 L. J., Ch. 73; 11 W. R. 128; *Scottish North-Eastern R. Co.* v. *Stewart*, 3 Macq. H. L. Cas. 382.

(*c*) *Hope* v. *Hope*, 22 Beav. 351.

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the villa, but insured in a wrong office, and in a wrong name. It was held that the contract for a lease was independent of the option to purchase, and that notwithstanding the forfeiture of the first, the latter still subsisted, and a specific performance of the contract for sale was decreed (*d*). And where a landlord agreed to give a builder leases of successive plots of land as the houses upon each of them should be built up to a successive stage, it was held that the agreement was in its nature separable, and could be enforced as to some of the plots by an assignee of the builder (*e*). A tenant for years, with an option of purchasing the fee, must not only give due notice but also on the proper day pay or tender the purchase-money; that being a condition precedent (*f*). Such a notice may be given to the infant heir of the lessor, and will constitute a valid contract, which may be enforced in equity notwithstanding the infant cannot give a discharge for the purchase-money (*g*).

After unnecessary Delay by Plaintiff.

Where one party to an agreement trifles, or shows backwardness in performing his part of it, equity will not decree a specific performance in his favour, especially if the circumstances and situation of the other party are materially altered in the meantime (*h*), or if the contract be in anywise unilateral, as where there is an option to purchase, or a right of renewal, or any other condition in favour of one party and not of another (*i*). As a general rule, a party cannot call upon a court of equity for a specific performance, unless he has shown himself ready, desirous, prompt and eager (*k*). "It would be dangerous to permit parties to lie by, with a view to see whether the contract will prove a gaining or losing bargain, and according to the event either to abandon it, or, considering time as nothing, to claim a specific performance, which is always the subject of discretion" (*l*).

Possession under Contract for Lease.

But it is otherwise where the defendant has entered into possession, and paid the rent regularly for fourteen or fifteen years (*m*), although the mere payment of rent is not enough (*n*). In other cases the rule will be relaxed where the strict application of it would

(*d*) *Green* v. *Low*, 22 Beav. 625.

(*e*) *Wilkinson* v. *Clements*, L. R., 8 Ch. 96; 42 L. J., Ch. 38; 27 L. T. 834.

(*f*) *Weston* v. *Collins*, 34 L. J., Ch. 353; 13 W. R. 510; *Ld. Ranelagh* v. *Melton*, 2 Dr. & Sm. 278; 34 L. J., Ch. 227.

(*g*) *Woods* v. *Hyde*, 31 L. J., Ch. 295; 10 W. R. 339.

(*h*) *Hays* v. *Caryll*, 1 Bro. P. C. 126; *Norris* v. *Jackson*, 1 Johns. & H. 319; 7 Jur., N. S. 540; *Southcomb* v. *Bp. of Exeter*, 6 Hare, 213, 218; *Chesterman* v. *Mann*, 9 Hare, 206; *Eads* v. *Williams*, 4 De Gex, M. & G. 691; *Walters* v. *Northern Coal Mining Co.*, 5 De Gex, M. & G. 629; *Sneesby* v. *Thorne*, 1 Jur., N. S. 1058; Fry, ss. 1070—1079.

(*i*) Fry, s. 1073, citing *Brooke* v. *Garrod*, 27 L. J., Ch. 226.

(*k*) *Milward* v. *Earl of Thanet*, 5 Ves. 720, n.; 5 R. R. 150, n.

(*l*) *Alley* v. *Deschamps*, 13 Ves. 225; *South Eastern R. Co.* v. *Knott*, 10 Hare, 122; *Firth* v. *Greenwood*, 1 Jur., N. S. 866.

(*m*) *Sharp* v. *Milligan*, 22 Beav. 606; 23 Beav. 419; *Clarke* v. *Moore*, 1 Jon. & L. 723; *Cartan* v. *Bury*, 10 Ir. Ch. R. 387; Fry, s. 1080.

(*n*) *Davenport* v. *Walker*, 34 L. T. 168; *Powis* v. *Ld. Dynevor*, 35 L. T. 940.

work injustice (*o*), as where a landlord has sent a draft lease to a tenant who fails to return it (*p*), or where any objection on the ground of delay has been waived (*q*).

Urgency in case of Mines;

In contracts for the lease of working mines, the time for completion, whether specified or not, is, from the fluctuating nature of the property, considered as of the essence of the contract, and the intended lessor is bound to use his utmost diligence to complete, and in default thereof the proposed lessee may, by notice, fix a reasonable time for completion, and, in case of non-compliance therewith, may rescind the contract (*r*).

or Leases by Ecclesiastical Corporations, &c.

Time will be considered of the essence of the contract in contracts with ecclesiastical corporations for leases, because every day changes the value and nature of the thing to be granted, and also the persons who are to participate in the fine or premium to be paid (*s*): also in other cases where the property is of fluctuating value (*t*), or the property is wanted for commercial purposes (*u*).

When the Tenant has committed Acts of Forfeiture.

Specific performance will not be decreed at the instance of a tenant who, having entered into possession under an agreement for a lease, has committed waste, or omitted to repair, or done other acts which would *clearly* amount to breaches of the covenants to be contained in the lease, and for which the lessor would have been entitled to re-enter and determine the lease, pursuant to a proviso for re-entry to be therein contained (*x*). But if such breaches are disputed, and the evidence thereof is not clear and cogent, or if it appears doubtful whether such breaches have not been waived by the receipt of subsequent rent or otherwise, the court will decree a specific performance, and direct the lease to be ante-dated, with liberty for the landlord to proceed by ejectment, action of covenant, or otherwise for such alleged breaches, the tenant undertaking to admit in any such action that the lease was executed on the day it bears date (*y*). In such case the tenant must insure *immediately* after the execution of the lease, if it contain a covenant to insure, &c. (*z*). Acts creating a nuisance to the landlord, for which a

If not clearly proved Lease ante-dated.

(*o*) *Walker* v. *Jefferys*, 1 Hare, 353; *Jones* v. *Jones*, 12 Ves. 188; 10 R. R. 77, n.

(*p*) *Shepheard* v. *Walker*, L. R., 20 Eq. 659; 33 L. T. 17.

(*q*) Fry, ss. 1090—1098; *Hudson* v. *Bartram*, 3 Mad. 440; *King* v. *Wilson*, 6 Beav. 124; *Ex parte Gardner*, 4 Y. & C. Ex. 503.

(*r*) *Macbryde* v. *Weekes*, 22 Beav. 533; *Sharp* v. *Wright*, 28 Beav. 150.

(*s*) *Carter* v. *Dean of Ely*, 7 Sim. 211.

(*t*) *Doloret* v. *Rothschild*, 1 Sim. & Stu. 590; 24 R. R. 243.

(*u*) 2 Tudor, L. C. Eq. 569 (6th ed.).

(*x*) *Hill* v. *Barclay* (general), 18 Ves. 63; 11 R. R. 147; *Lewis* v. *Bond* (offensive trades), 18 Beav. 185; *Gregory* v. *Wilson* (insurance and repairs), 9 Hare, 683; *Nunn* v. *Truscott* (repairs), 3 De Gex & Sm. 304; Fry, ss. 939—953.

(*y*) Fry, s. 954; *Pain* v. *Coombs*, 3 Sm. & Giff. 449; 1 De Gex & J. 34; 3 Jur., N. S. 307, 847; *Lilley* v. *Leigh*, 3 De Gex & J. 204; *Rankin* v *Lay*, 2 De Gex, F. & J. 65; 29 L. J., Ch. 734; *Rogers* v. *Tudor*, 6 Jur., N. S. 692; *Poyntz* v. *Fortune*, 27 Beav. 393; *Browne* v. *Marquis of Sligo*, 10 Ir. Ch. R. 1; *Blackett* v. *Bates*, 2 H. & M. 270; 34 L. J., Ch. 515.

(*z*) *Doe* d. *Darlington* v. *Ulph*, 13 Q. B. 204.

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remedy may be had in damages, but which do not occasion a forfeiture, are no ground for refusing a specific performance (*a*).

Proviso against Assignment.

A proviso against assignment to be contained in the lease will prevent an assignment of the agreement itself (*b*). But the benefit of such proviso may be waived (*c*).

Where there was a covenant in the lease of a house against assignment or sub-letting without the lessor's licence, not to be withheld in the case of the lessee obtaining a respectable and responsible person as tenant, and the lessee agreed with such a person for a sub-lease to him, but the lessor refused the licence unless such person would undertake not to make structural alterations, it was held that such person would get a good title, and run no substantial risk of having it impeached for breach of covenant, and such person was ordered at the suit of the lessee to specifically perform the contract by executing a sub-lease (*d*).

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SECT. 6.—*Specific Performance by or against particular Persons.*

Who may sue for a Specific Performance generally.

The person to maintain an action for specific performance must be either, 1st, the lessor himself or his representatives in interest; or, 2ndly, the lessee himself or his representatives in interest. If, however, the contract be entered into by a tenant for life in due exercise of a power, specific performance will, it is conceived, be decreed at the suit of a remainderman (*e*), except where there is an undue exercise of the power (*f*). Where A. agreed to grant B. a lease, and before he had done so mortgaged the property to C. with notice, who in no way contested B.'s right to the lease:—Held, that C. was not a proper party to a suit for a specific performance (*g*).

Against Executors of Lessee.

Where a person who has agreed to take a lease dies, the executors admitting assets may be compelled to take a lease, the covenants being so qualified as that the executors shall be no further liable therein than they would have been on the covenants which ought to have been entered into by their testator (*h*).

Where action necessary to obtain Possession.

The court in one case refused to enforce performance of an agreement by a person out of possession to grant a present lease to a person who was at the time apprised that he could not obtain possession except by a suit (*i*). It seems, too, that a lessee will not be compelled to assign his lease (containing a covenant not

(*a*) *Gordon* v. *Smart*, 1 Sim. & Stu. 66.
(*b*) *Weatherall* v. *Geering*, 12 Ves. 504; 8 R. R. 369.
(*c*) *Dowell* v. *Dew*, 1 You. & Coll. C. C. 345; Fry, s. 210.
(*d*) *White* v. *Hay*, 72 L. T. 281, per Romer, J.
(*e*) *Shannon* v. *Bradshed*, Sch. & Lef. 52, 65; *Lowe* v. *Swift*, 2 Ball & B. 529.
(*f*) *Ricketts* v. *Bell*, 1 De Gex & S. 335.
(*g*) *Long* v. *Bowring*, 33 Beav. 585.
(*h*) *Phillips* v. *Everard*, 5 Sim. 102; *Stephens* v. *Hotham*, 1 K. & J. 571; *Page* v. *Broom*, 3 Beav. 36; Fry, s. 198.
(*i*) *Bayly* v. *Tyrrell*, 2 Ball & B. 358; 12 R. R. 99; Fry, s. 132; but now see Real Property Act, 1845, 8 & 9 Vict. c. 106, s. 6; ante, p. 2.

to assign without licence) where the agreement to assign is made "subject to the landlord's approval," although the landlord unreasonably withholds his licence, contrary to his covenant not to do so, contained in the lease (*k*).

Infants.

An infant cannot sue or be sued for a specific performance (*l*).

Infant, one of two joint tenants.

Where two joint tenants, one of whom was an infant, agreed through their agent to let their entirety, the court refused to grant specific performance of the agreement by the adult as to his moiety, there having been no misrepresentation on his part (*m*), and à fortiori, to grant an interim injunction against him to restrain him, until trial of action for specific performance, from dealing with his interest under the joint tenancy (*n*).

Married Women.

A married woman may bind her separate estate, and by s. 1 of the Married Women's Property Act, 1882, as amended by the Married Women's Property Act, 1893 (ante, p. 76), is presumed to bind such estate, unless the contrary be shown. She may therefore sue or be sued alone on a contract for a lease. Prior to the act of 1882 she sued or was sued with her trustees (*o*).

Lunatics.

A contract to grant or take a lease may be enforced against a lunatic, if made during a lucid interval (*p*); and it is conceived that such a contract by a sane person becoming insane may be enforced against his committee under s. 120, par. (i) of the Lunacy Act, 1890, by which a committee may be directed by order to "perform any contract relating to the property entered into by the lunatic before his lunacy."

The court has jurisdiction to order a committee to grant a lease in pursuance of a contract by him not sanctioned by it (*q*).

Felons.

The court has refused to execute an agreement to grant a lease to a man who has committed felony (*r*); but the terms of the Forfeiture Act, 1870, 33 & 34 Vict. c. 23, by which forfeiture for felony is abolished, seem to point to such an agreement being enforceable by and against the trustees of the felon's property.

Insolvents.

The insolvency of the intended tenant is a valid ground for resisting the specific performance of an agreement for a lease (*s*).

(*k*) *Lehmann* v. *M'Arthur*, L. R., 3 Ch. 496; 37 L. J., Ch. 625.

(*l*) *Flight* v. *Bolland*, 4 Russ. 298; 28 R. R. 101; *Hoggart* v. *Scott*, 1 Russ. & Myl. 293; 31 R. R. 112.

An option of purchase is exerciseable against an infant heir of the lessor: *Woods* v. *Hyde*, 31 L. J., Ch. 295.

(*m*) See as to this, *Price* v. *Griffith*, 1 D. M. & G. 80.

(*n*) *Lumley* v. *Ravenscroft*, [1895] 1 Q. B. 683; 64 L. J., Q. B. 441; 72 L. T. 382; 43 W. R. 584; 14 R. 347—C. A.

(*o*) *Johnson* v. *Gallagher*, 3 De Gex, F. & J. 494, 519; 30 L. J., Ch. 298; *Picard* v. *Hine*, L. R., 5 Ch. 274.

(*p*) Fry, s. 261; 1 Ves. jun. 82; but see *Hall* v. *Warren*, 9 Ves. 605; 7 R. R. 306.

(*q*) *Re Wynne*, L. R., 7 Ch. 229, decided on s. 129 of the Lunacy Regulation Act, 1853, repealed by the Lunacy Act, 1890, and re-enacted by s. 120, par. (d) of that Act. The intending tenant had spent money in improvements.

(*r*) *Willingham* v. *Joyce*, 3 Ves. 169; see 8 R. R. 302, n.

(*s*) *Buckland* v. *Hall*, 8 Ves. 92; 7 R. R. 1;

CH. IV. SEC. 6. *Parties to Agreement for Lease.*

Bankrupts.

The bankruptcy of the intended tenant does not determine the contract for a lease (*t*) : but it vests in his trustee in bankruptcy, who may disclaim it (*u*). If the trustee elect to take a lease, he must enter into such covenants as the bankrupt himself would have had to enter into (*x*) : or he may assign the agreement for a lease to a purchaser, who may enforce a specific performance, unless indeed the agreement contains a proviso against alienation (*y*). If the trustee elect not to take a lease, the court will not enforce the agreement at the instance of the bankrupt (*z*). Where a person agreed to grant a lease to A., his executors, administrators and assigns, upon certain conditions, and A. assigned his interest in the contract to B., and afterwards became bankrupt, it was held that B., on performing the conditions, had a right to enforce the agreement specifically (*a*).

Corporations.

The general rule is, that as a corporation cannot grant a lease except under their common seal, so neither is a contract for a lease binding on them, except it be under their common seal (*b*), and an unsealed contract is not even enforceable by them (*c*) ; but where there has been a part performance of the contract for a lease by a corporation, the court has decreed a specific performance of it, though the contract was not under the common seal of the corporation (*d*).

Commissioners of Woods.

It has been held, that the commissioners of woods and forests are neither entitled to sue nor liable to be sued for the specific performance of contracts entered into with or by them (*e*).

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## SECT. 7.—*Form of Lease, and how settled after a Decree.*

Form of Lease—how settled.

Questions as to the validity of the contract, and as to whether it is inequitable to enforce its specific performance, must be determined at the hearing : questions of title are referred to chambers (*f*). The court, on pronouncing a decree for specific performance of an agree-

*Neale* v. *Mackenzie*, 1 Keen, 474 ; *Price* v. *Assheton*, 1 Y. & C. 441 ; *O'Herlihy* v. *Hedges*, 1 Sch. & Lef. 123 ; *M'Nally* v. *Gradewell*, 16 Ir. Ch. R. 512.

(*t*) *Buckland* v. *Papillon*, L. R., 1 Eq. 477 ; 35 L. J., Ch. 387 ; 36 Id. 81 ; L. R., 2 Ch. Ap. 67 ; and see *Kell* v. *Nokes*, 14 W. R. 908 ; *Mackley* v. *Pettenden*, 1 B. & S. 178 ; 30 L. J., Q. B. 225.

(*u*) Post, Chap. VII., Sect. 7.

(*x*) *Powell* v. *Lloyd*, 2 Y. & J. 372.

(*y*) *Crosbie* v. *Tooke*, 1 Myl. & K. 431 ; *Morgan* v. *Rhodes*, Id. 495 ; *Buckland* v. *Papillon*, supra.

(*z*) *Brook* v. *Hewett*, 3 Ves. 255 ; *Weatherall* v. *Geering*, 12 Ves. 504 ; 8 R. R. 369.

(*a*) *Morgan* v. *Rhodes*, 1 Myl. & K. 435.

(*b*) *Oxford* (*Mayor*) v. *Crow*, infra.

(*c*) *Oxford* (*Mayor*) v. *Crow*, [1893] 3 Ch. 535 ; 69 L. T. 228 ; 42 W. R. 200 ; 8 R. 279, per Romer, J.

(*d*) *Steeven's Hospital* v. *Dyas*, 15 Ir. Ch. R. 405.

*Wilson* v. *West Hartlepool R. Co.*, 34 L. J., Ch. 241, in which specific performance was decreed against the defendants, was a case in which the defendants were enabled to make an unsealed contract by their directors by s. 97 of the Companies Clauses Consolidation Act, 1845.

(*e*) *Nurse* v. *Ld. Seymour*, 13 Beav. 254.

(*f*) *Hood* v. *Oglander*, 34 Beav. 513.

ment to grant or to take a lease, will not usually enter into the question as to what covenants the lease shall contain. But it will do so where the nature of the decree to be made depends upon that question (*g*). In ordinary cases any such questions must, if necessary, be settled in chambers: and for that purpose one party must prepare the draft of a lease, and hand a copy to the other, that such alterations may be made as may be deemed necessary: and when the parties cannot agree upon any point, it may be brought before the judge's chief clerk, who will settle the draft lease in such manner as he thinks fit (*h*). Either party may appeal to the judge, and apply to him to vary the terms of the draft lease as settled by the chief clerk: but at the peril of costs (*i*).

Enforcement of Decree by appointing Person to execute Lease.

If the defendant refuse or neglect to comply with the decree, the court may, on such terms and conditions (if any) as may be just, "order that the lease be executed by such person as the court may nominate for that purpose," and in such case the lease so executed "shall operate and be for all purposes available as if it had been executed by the person originally directed to execute it" (*k*).

"Usual Covenants." *Church* v. *Brown.*

The question what covenants the parties to an agreement for a lease are entitled to have inserted in the lease itself is of great importance (*l*), but it seems clear, that whether the agreement for the lease stipulates for usual covenants or not, the law implies that usual covenants shall be inserted (*m*). The question what are usual covenants appears to be one of fact, not of law, in a case where the parties stipulate for usual covenants (*n*), but to be a question of law where the contract for the lease is silent as to covenants (*o*).

What are "usual" covenants depends, in some measure, on the practice of conveyancers, which varies from time to time, so that

(*g*) *Blakesley* v. *Wheildon*, 1 Hare, 176, 183 (where see form of minutes giving such directions); *Reeves* v. *Greenwich Tanning Co.*, 2 H. & M. 54; *Onions* v. *Cohen*, 2 H. & M. 354; 34 L. J., Ch. 338; *Beadel* v. *Pitt*, 11 Jur., N. S. 152; 13 W. R. 287.

(*h*) *Jenkins* v. *Green*, 27 Beav. 440; 28 L. J., Ch. 817, 820; *Parish* v. *Sleeman*, 1 De Gex, F. & J. 326; 29 L. J., Ch. 53.

(*i*) *Parish* v. *Sleeman*, supra; *Sharp* v. *Milligan*, 23 Beav. 419.

(*k*) Jud. Act, 1884, 47 & 48 Vict. c. 61, s. 14. See *Hall* v. *Hall*, 51 L. T. 226, in which Kay, J., appointed a person in place of a defaulting defendant to execute a lease, under the somewhat similar section 30 of the Trustee Act, 1850, and *Edwards, In re*, 33 W. R. 578, in which Pearson, J., appointed his chief clerk to execute a mortgage.

(*l*) See the question carefully discussed, Dav. Prec. vol. 5, pt. 1, p. 51 (ed. 3, A.D. 1876), where it is said that the result of the authorities is that the only covenants which the lessor can insist on as "usual covenants" are covenants to pay rent and taxes, and to repair and to allow the lessor to enter and view the state of repair, with a proviso for re-entry on breach of the covenant to pay rent; and that the only covenant which the lessee can insist on is the usual qualified covenant for quiet enjoyment; a passage cited with approval by Jessel, M.R., in *Hampshire* v. *Wickens*, 7 Ch. D. 555, and infra, p. 129.

(*m*) *Church* v. *Brown*, 15 Ves. at p. 265; 10 R. R. 74; *Propert* v. *Parker*, 3 My. & K. 280.

(*n*) In *Bennett* v. *Womack*, 7 B. & C. 627; and in *Brookes* v. *Drysdale*, L. R., 3 C. P. D. 52, post, it was assumed to be a question of fact.

(*o*) *Church* v. *Brown*, ubi supra.

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what was a usual covenant in Lord Eldon's time would not necessarily be held to be a usual covenant now; and also depends upon the character of the property agreed to be demised, so that what would be a usual covenant in a contract for a mining, would not necessarily be held to be so in a contract for an agricultural lease.

Rent.

The covenant to pay rent has been held to be a usual covenant in the construction of a lease under a power (*p*), and seems indeed to be in all cases a usual covenant.

Repair.

The covenant to repair seems clearly usual (*q*), but it has been twice held on the construction of a contract for a lease (*r*), that the exception which has for some time been commonly inserted in leases, in case of destruction of the premises by fire, is not "usual."

To pay Taxes.

A covenant by the tenant to pay rates and taxes ought clearly to be inserted, if the contract for the lease stipulate for a *net* rent (*s*); but this is not so much because the covenant is usual, as because the words "net rent" imply it; and the better opinion seems to be —though there is no express decision to that effect—that amongst "usual covenants" must be reckoned a covenant by the tenant "to pay taxes, except such as are usually payable by the landlord" (*t*).

Not to assign or underlet.

The covenant not to assign or underlet, without the leave of the lessor, is not a usual covenant (*u*), whether it be restricted by such words as "such leave not to be withheld to a respectable and responsible tenant," or not (*x*); nor does the fact that the subject matter of the agreement is a public-house make any difference (*y*).

Not to trade.

A covenant not to carry on a particular trade without the leave of the lessor, is not a usual covenant (*z*), and a contract for a lease of a house to contain usual covenants between landlord and tenant, and a covenant not to convert the house into a school, does not imply a restrictive covenant upon trading generally (*a*).

To use for particular purpose.

In *Bennett* v. *Womack* (*b*), the defendant contracted for the purchase of the lease of a public-house described as held "upon usual and common covenants." In an action for not completing, the judge directed the jury to find for the plaintiff upon evidence that six out of ten public-house leases contained the proviso for re-entry if the lessee should carry on any other business than that

(*p*) *Taylor* v. *Horde*, 1 Burr. 60.
(*q*) *Kendall* v. *Hill*, 6 Jur., N. S. 968.
(*r*) Id.; *Sharp* v. *Milligan*, 23 Beav. 419.
(*s*) *Bennett* v. *Womack*, 3 C. & P. 96; 7 B. & C. 627; 6 L. J. K. B. 175; 31 R. R. 270.
(*t*) *Hampshire* v. *Wickens*, infra.
(*u*) *Church* v. *Brown*, 15 Ves. 258; 10 R. R. 74; *Henderson* v. *Hay*, 3 Bro. C. C. 632; *Vere* v. *Loveden*, 12 Ves. 179; *Buckland* v. *Papillon*, L. R., 2 Ch. 67; 36 L. J., Ch. 83.
(*x*) *Hampshire* v. *Wickens*, 7 Ch. D. 555; 47 L. J., Ch. 243; 26 W. R. 491, per Jessel, M.R.; followed in *Bishop* v. *Taylor*, 60 L. J., Ch. 556; 64 L. T. 529; 39 W. R. 542, in which the purchaser of a lease successfully repudiated the purchase.
(*y*) *Henderson* v. *Hay*, 3 Bro. C. C. 632; *Lander and Bagley's Contract, In re*, [1892] 3 Ch. 41, per Chitty, J.
(*z*) *Propert* v. *Parker*, 3 Myl. & K. 280.
(*a*) *Van* v. *Corpe*, 3 Myl. & K. 269.
(*b*) *Bennett* v. *Womack*, supra (*s*).

of a victualler, which proviso had been objected to by the defendant as uncommon (*c*); and the court refused to enter a nonsuit.

Residence on demised premises.

A covenant to reside and personally carry on the business of a public-house is not a usual covenant in an agreement for the lease of one (*d*).

A contract for a lease (to contain usual covenants) of land on which the lessee was to build and not to use the premises for any other purpose than a glass manufactory, was held not to entitle the lessor to an affirmative covenant by the lessee to use the premises for such purpose (*e*).

Registration of Sub-lease with Ground Landlord.

Where there was an agreement to take an assignment of a public-house lease subject to covenants "common and usual in leases of public-houses," and the lease was found to contain a condition that every underlease, &c., should be left with the ground landlord's solicitor, it was held, the jury having found as a fact that the condition was not usual, that the condition was a covenant within the contemplation of the agreement, and that the purchaser was not bound to complete (*f*).

List of "Usual Covenants." *Hampshire* v. *Wickens*.

The whole question was considered in 1878 by Jessel, M.R., in *Hampshire* v. *Wickens* (*g*). In that case the defendant agreed to accept a lease of a dwelling-house in London "on all usual covenants and provisoes," but declined to accept the lease proposed to be granted on the ground that such lease contained a covenant by the lessee "that he would not, without the previous consent of the lessor, assign, underlet, or part with the possession of the said premises, but such consent not to be withheld to a respectable and responsible tenant," &c. Jessel, M.R., after ruling that "if no objection can be made to an unrestricted covenant against assignment, none can be made to a covenant that is restricted," held, that the agreement could not be specifically enforced, and cited with approval the passage from Davidson's Precedents in Conveyancing, of which an abstract has already been given (*h*). Subsequently in *Eadie* v. *Addison* (*i*), where the defendant had agreed to grant to the plaintiff, a brewer, a "proper" lease of a public-house, "to be drawn up with all proper clauses," and approved of by the defendant and his solicitor, and the defendant refused to grant a lease unless it contained a clause against underletting, it was held, that such a clause was not a "proper clause," and the defendant was decreed to grant the lease without it; and *Hampshire* v. *Wickens* has also been followed in a

Not to assign.

"Proper Clauses."

(*c*) See note (*b*) on p. 128.

(*d*) *Lander and Bayley's Contract, In re*, [1892] 3 Ch. 41; 61 L. J., Ch. 707; 67 L. T. 521, per Chitty, J.

(*e*) *Doe* d. *Marquis of Bute* v. *Guest*, 15 M. & W. 160.

(*f*) *Brookes* v. *Drysdale*, 3 C. P. D. 52; 37 L. T. 467; 26 W. R. 331.

(*g*) *Hampshire* v. *Wickens*, 7 Ch. D. 555; 47 L. J., Ch. 243; 26 W. R. 491, per Jessel, M.R.

(*h*) Ante, 127 (*l*).

(*i*) *Eadie* v. *Addison*, 52 L. J., Ch. 80; 47 L. T. 533; 31 W. R. 329.

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case where the purchaser of a lease was held to be entitled to repudiate his contract of purchase on the ground that the lease contained a covenant not to assign, &c. without consent, such consent not to be unreasonably withheld, and that such covenant had not been disclosed to him (*j*).

Proviso for Re-entry. *Hodgkinson* v. *Crowe.*

In *Hodgkinson* v. *Crowe* (*k*), it was laid down by the Court of Appeal that, as a "usual" term, the proviso for re-entry is applicable to the breach of the covenant to pay rent, and to the breach of no other covenant. In that case there was an agreement for a lease of mines to contain numerous terms succinctly stated, and amongst them "all usual and customary mining clauses." Bacon, V.-C., held that the intending landlord was entitled to have inserted in the lease a proviso for re-entry on non-payment of rents and royalties, "or if and whenever there should be any breach of the covenants and agreements in the lease contained." But this ruling was reversed on appeal; and James, L.J., expressed the opinion that the clause of forfeiture for breach of covenant generally was "a most odious stipulation, offensive and oppressive beyond measure." This decision is not affected by s. 14 of the Conveyancing Act, 1881 (post, Ch. VIII., Sect. 6), by which provision is made for "relief against forfeiture." So it was held by Chitty, J., in a case where the agreement was for a lease to contain usual covenants, and the conveyancing counsel of the court had settled the lease with a proviso for re-entry on breach of any of the covenants, which proviso the learned Judge directed to be limited to the non-payment of rent (*l*). Even in the case of a public-house lease the proviso for re-entry in the general form is no "usual" clause, but must be limited as in other cases (*m*).

Public House.

Re-entry on Bankruptcy.

A proviso for re-entry on the bankruptcy of the lessee has been held to be usual in the case of a contract for a lease of an hotel (*n*), but not of a contract for a mining lease (*o*), or for a farming lease (*p*). There is strong authority for saying that it is not "usual" (*q*).

Concluding Remarks on "Usual Covenants."

It is to be observed that in the majority of the cases (*r*) the question was decided by an equity judge without a jury. Was it so

(*j*) *Bishop* v. *Taylor*, 60 L. J., Q. B. 556; 64 L. T. 529; 39 W. R. 542. The earlier authorities of *Morgan* v. *Slaughter*, 1 Esp. 8; 5 R. R. 715 (where see the note), and *Folkingham* v. *Croft*, 3 Anst. 700; 4 R. R. 844, appear to be inconsistent with, but overruled by the later ones, so far as decisions on a question of fact can be said to be overruled.

(*k*) L. R., 10 Ch. 622; 44 L. J., Ch. 680; 33 L. T. 388; 23 W. R. 885.

(*l*) *Anderton and Milner's Contract, In re*, 45 Ch. D. 476; 39 W. R. 44.

(*m*) *Lander and Bagley's Contract, In re*, [1892] 3 Ch. 41; 61 L. J., Ch. 607.

(*n*) *Haines* v. *Burnett*, 27 Beav. 500; 29 L. J., Ch. 289.

(*o*) *Hodgkinson* v. *Crowe*, L. R., 19 Eq. 591; 44 L. J., Ch. 238; 33 L. T. 122.

(*p*) *Hyde* v. *Warden*, 3 Ex. D. 72; 47 L. J., Ch. 121—C. A.

(*q*) *Hyde* v. *Warden*, supra; *Hampshire* v. *Wickens*, supra, where it is said that *Haines* v. *Burnett*, supra, "must be treated as distinctly overruled" by *Hodgkinson* v. *Crowe*, supra. But note, that in *Haines* v. *Burnett* the words were, "such covenants as are usually inserted in leases of property of a similar description."

(*r*) Only in *Bennett* v. *Womack*, 7

decided as a question of fact or of law? Is evidence admissible? Would a judge be bound to direct a jury to find in accordance with the equity decisions? These are open questions upon the authorities, but it is submitted that what is usual must in every case be a question of fact to be decided upon evidence if either party so require, that upon an action for specific performance in the Chancery Division there would be some reason for applying for a jury under Order XXXVI., Rule 6, and that such a jury might find independently of the equity decisions.

## Sect. 8.—*Solicitor's Charges.*

The Solicitors' Remuneration Order, 1882 (*s*), prescribes a scale of remuneration to solicitors for agreements for leases and leases varying in proportion to the rent, and accordingly as the transaction is completed or not, but not including stamps, counsel's fees, and other disbursements "reasonably and properly paid" (Rule 4). The scale, which is set out in full hereafter (*s*), may be generally described here as a 7½ per cent. scale on the rental for the intending lessor's solicitor, and half that amount for the intending lessee's solicitor. A solicitor concerned for both parties is to charge the lessor's solicitor's charges, and one half the lessee's solicitor's charges.

Charges for negotiations preparatory to an agreement which resulted in a lease have been, under the order, disallowed on taxation (*t*).

B. & C. 627; 31 R. R. 270, and *Brookes* v. *Drysdale*, 3 C. P. D. 52, was the question submitted to a jury.

(*s*) See so much of the Order as applies to agreements for leases and leases, post, Appendix A., and for the cases upon the Order, see Ch. V., Sect. 16 (b), post.

(*t*) *Field, In re*, 29 Ch. D. 608; 54 L. J., Ch. 661; 52 L. T. 480; 33 W. R. 553—C. A., affirming Chitty, J.

# CHAPTER V.

## THE LEASE.


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### Sect. 1.—*Definition of "Lease."*

Definition.

A LEASE is a conveyance (*a*) by way of demise of lands or tenements, for life or lives, for years, or at will, but always for a less term than the party conveying himself has in the premises; for if it be for the whole interest, it is an assignment and not a lease (*b*). A lease is usually made in consideration of rent, or some other annual recompense rendered to the party conveying the premises—who is called the lessor or landlord—by the party to whom they are conveyed or let, who is called the lessee or tenant (*c*).

(*a*) In the Conveyancing Act, 1881, the word "conveyance" includes "lease" unless a contrary intention appears.

(*b*) *Beardman* v. *Wilson*, L. R., 4 C. P. 57; 17 W. R. 54; and see the cases cited, post, Ch. VII., Sect. 5.

(*c*) Shep. Touch. 266.

A lease is also a contract for the *exclusive* possession of lands or tenements for some certain number of years or other determinate period (*d*). An instrument is not a demise or lease, although it contains the usual words of demise, if its contents show that such was not the intention of the parties. Thus where A. agreed with B. to let him have the use of the Surrey Gardens and Music Hall, Newington, for four days at 100*l.* per day, for the purpose of giving a series of four grand concerts and day and night fêtes; but from the terms of the agreement it was evident that A. was not to part with the possession of the premises during those four days: this was held no demise (*e*). So where A., an owner of lace machines, paid 12*s.* a week to B. for permission to place the machines in a room in B.'s factory, and for free ingress and egress to the room for himself and workmen for the purpose of working and inspecting the machines; B. supplied the necessary steam power for working the machines, payment for which was included in the above sum: it was held that there was no demise to A. of any part of the room, and no relation of landlord and tenant created between him and B. (*f*). Where an incorporated canal company by deed granted to the plaintiff the sole and exclusive right or liberty of putting or using pleasure boats for hire on their canal, it was held that the grant did not create such an interest or estate in the plaintiff as to enable him to maintain an action in his own name against a person who disturbed his right of putting and using pleasure boats for hire on the canal (*g*). A licence to fasten a coal-barge to moorings fixed in a river, until determined by a month's notice—the licensee to pay 30*l.* annually towards the expense of the moorings—does not amount to a demise, nor give the licensee an exclusive right to the use of the moorings, nor render him liable to be rated as the occupier of part of the bed of the river (*h*). The grant by a riparian proprietor of a right to take water from a natural stream on which his land abuts, operates as a licence in gross, and not as a demise, and will not enable the grantee to maintain an action in his own name against a wrongdoer (*i*). The gratuitous loan of a shed for a particular purpose operates as a mere licence revocable at any time (*k*); and the permission to use a stall at an exhibition between 10 a.m. and 11 p.m. at a weekly rent has the same operation and gives no right to distrain (*l*). A licence

Distinction between Lease and Licence to Use.

*Taylor* v. *Caldwell.*

Boats on Canal.

Licence to moor Barge.

Right to take water.

Shed and Stall.

(*d*) *Reg.* v. *Morrish*, 32 L. J., M. C. 245.
(*e*) *Taylor* v. *Caldwell*, 3 B. & S. 826; 32 L. J., Q. B. 164.
(*f*) *Hancock* v. *Austin*, 14 C. B., N. S. 634; 32 L. J., C. P. 252.
(*g*) *Hill* v. *Tupper*, 2 H. & C. 121; 32 L. J., Ex. 217.
(*h*) *Watkins* v. *Overseers of Milton next Gravesend*, L. R., 3 Q. B. 350; 37 L. J., M. C. 73; *Grant* v. *Oxford Local Board*, L. R., 4 Q. B. 9; 17 W. R. 76; see also *London and North-Western R. Co.* v. *Buckmaster*, L. R., 10 Q. B. 444; 44 L. J., M. C. 180; 33 L. T. 329; *Cory* v. *Bristow*, 2 App. Cas. 262.
(*i*) *Stockport Waterworks Co.* v. *Potter*, 3 H. & C. 300.
(*k*) *Williams* v. *Jones*, 3 H. & C. 256; 33 L. J., Ex. 297.
(*l*) *Rendell* v. *Roman*, 9 T. L. R. 192.

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to get all the copperas stone which may be found in part of a manor, for twenty-one years, at the yearly rental of 25*l.*, is not a demise, and will not support a distress for the rent (*m*). A demise of a fire-brick manufactory, for twenty-one years, with powers during such term to dig fire-clay from under certain adjoining land, does not amount to a lease, but only to a licence as to the fire-clay, and will not prevent the licensor from digging parts of such fire-clay, or authorizing others to do so, or otherwise dealing with such adjoining land in a manner not inconsistent with the licence (*n*).

Stone and Clay.

Right of Shooting, &c. *Wood* v. *Leadbitter.*

A licence to hunt or shoot over land, although it does not give the licensee any estate in the land (*o*), amounts to the grant of an incorporeal hereditament; and an assignee of the reversion may sue for breaches of any covenant which touches or relates to the land and runs with it (*p*). But the licence to convey an estate must be by deed; for a parol licence to exercise a right of way or other easement over land of the licensor, whether anything was paid for such licence or not, may be revoked at any time, either expressly or by doing some act inconsistent with such licence (*q*), though the licensee may sue the licensor for breach of implied contract not to revoke (*r*). Any such licence is determined by the death of the licensor or of the licensee, or by an assignment of the land over which, or of the subject-matter in respect of which, the easement or privilege is to be enjoyed (*s*). But an action lies for a breach of contract to grant an incorporeal hereditament, although the contract be not under seal (*t*).

Revocation of licence.

General Requisites of a good Lease.

These things must concur in the making of every good lease: 1. There must be a lessor, who is able to make the lease. 2. There must be a lessee, who is capable of taking the thing demised. 3. There must be a thing demised which is demisable. 4. If the thing demised or the term expressed to be granted be not grantable, without a deed, or the party demising be not able to grant without a deed, the lease must be made by deed, containing a sufficient description of the lessor, the lessee, the thing demised, the term granted, and the rent and covenants: and all necessary circumstances, as sealing, delivery, &c., must be observed. 5. If it be a lease for years, it must have a certain commencement, at least when it takes effect in interest or possession, and a certain determination, either by an express enumeration of years, or by reference to a certainty that is expressed, or by reducing it to a certainty upon

(*m*) *Ward* v. *Day*, 4 B. & S. 337; 5 Id. 359; 33 L. J., Q. B. 3, 254.

(*n*) *Carr* v. *Benson*, L. R. 3 Ch. 524.

(*o*) *Bird* v. *Great Eastern R. Co.*, 19 C. B., N. S. 268.

(*p*) *Hooper* v. *Clark*, 8 B. & S. 150; L. R., 2 Q. B. 200; 36 L. J., Q. B. 79.

(*q*) *Wood* v. *Leadbitter*, 13 M. & W. 838.

(*r*) *Kerrison* v. *Smith*, 77 L. T. 344.

(*s*) *Coleman* v. *Foster*, *Bart.*, 1 H. & C. 37; *Roberts* v. *Rose*, 3 H. & C. 162; 33 L. J., Ex. 1, 241; 35 Id. 62; *Wallis* v. *Harrison*, 4 M. & W. 538; 5 Id. 142; *Roffey* v. *Henderson*, 17 Q. B. 575.

(*t*) *Smart* v. *Jones*, 33 L. J., C. P. 154.

some contingent event, which must happen before the death of the lessor or lessee. 6. There must be an acceptance of the thing demised, and of the estate by the lessee (*u*).

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## Sect. 2.—*What Leases must be by Deed.*

A lease for three years or less may be in writing or parol as the parties please (*x*), but a lease for more than three years from the making (*y*) must be by deed. Such is the effect of the Real Property Act, 1845, 8 & 9 Vict. c. 106, s. 3, taken in conjunction with sects. 1, 2 of the Statute of Frauds. By 8 & 9 Vict. c. 106, s. 3, "a lease required by law to be in writing, of any tenements or hereditaments made after the 1st October, 1845, shall be void at law unless made by deed." And by the Statute of Frauds, 29 Car. 2, c. 3, s. 1, "all leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in, to or out of any messuages, manors, lands, tenements or hereditaments, made or created by livery and seisin only, or by parol and not put in writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing (*z*), shall have the force and effect of leases or estates at will only; and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect, any consideration for making any such parol leases or estates to the contrary notwithstanding" (*a*): excepting, nevertheless, sect. 2, "all leases not exceeding the term of three years *from the making* (*y*) thereof, whereupon the rent reserved to the landlord during such term shall amount unto two third parts at the least of the full improved value of the thing demised." A lease for a term of less than three years, with the right in the lessee, at his option, to prolong it to a period exceeding three years from the date of the lease, is within this exception (*b*). Sect. 4 enacts "that no action shall be brought whereby to charge any person upon any contract or (*sic*) sale of lands, tenements or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized" (*c*).

Lease for 3 years may be in Writing or by Parol: Lease for more than 3 years must be by Deed.

No action on unwritten contract as to land.

(*u*) Shep. Touch. 267.

(*x*) See *Ryley* v. *Hicks*, 1 Stra. 651; *Lord Bolton* v. *Tomlin*, 5 A. & E. 856.

(*y*) *Rawlins* v. *Turner*, 1 Ld. Raym. 736.

(*z*) Smith L. & T. 82 (2nd ed.).

(*a*) But such estates at will may change into tenancies from year to year, when any of the agreed rent is paid and received. *Tress* v. *Savage*, 4 E. & B. 36; *Doe* d. *Rigge* v. *Bell*, 5 T. R. 471; 2 R. R. 642; 2 Smith, L. C.; 3 R. R. 642; and see Ch. VI., s. 21, post.

(*b*) *Hand* v. *Hall*, 2 Ex. D. 355; 46 L. J., Ex. 603; 36 L. T. 765; 25 W. R. 734 — C. A., reversing decision below, 2 Ex. D. 318; 46 L. J., Ex. 242.

(*c*) This extends to all mere agreements for leases (even for less than three years);

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Non-continuous letting.

In the peculiar case of *Smallwood* v. *Sheppards*, where there was an oral letting of a piece of ground for three successive Bank Holidays in the same year at a lump rent payable by equal instalments for each of the three days, the defendant, having occupied and paid for the first of the three days, unsuccessfully set up the above section of the Statute of Frauds in answer to a claim for the two remaining instalments, not having occupied for the two remaining days (*d*).

Void Lease may operate as Agreement.
*Parker* v. *Taswell.*

The effect of the Real Property Act, 1845, 8 & 9 Vict. c. 106, s. 3, is, that an instrument not under seal which purports to demise or let premises for more than three years from the making thereof, or even for a less term, if the rent reserved does not amount unto two third parts at the least of the full value of the thing demised, is *void at law as a lease ;* but it may operate as an agreement for a lease (*e*), even at law. Since the above act the courts of law have construed a writing rather as a valid agreement for a lease than as a void lease (*f*).

Tenant entering under void Lease is Tenant from Year to Year.
*Doe* v. *Bell.*

If the tenant enter into possession under a void lease he thereupon becomes tenant from year to year upon the terms of the writing, so far as they are applicable to and not inconsistent with a yearly tenancy (*g*). Such tenancy may be determined by the usual notice to quit at the end of the first or any subsequent year thereof (*h*) ; and it will determine, without any notice to quit, at the end of the term mentioned in the writing (*i*). But if the lessee do not enter, he will not be liable to an action for not taking possession (*k*) ; nor, on the other hand, will an action lie against the lessor for not giving possession at the time appointed for the commencement of the term but before the lease is executed (*l*). The effect of the Real Property Act, 1845, 8 & 9 Vict. c. 106, is not to put an end to oral leases, but merely to superadd to such leases as are required by the Statute of Frauds to be in writing, the necessity of their being *by deed.*

but the agent need not be authorized *by writing* as under sect. 1 ; Smith L. & T. 93 (2nd ed.) ; *Clarke* v. *Fuller*, 16 C. B., N. S. 24 ; *Foster* v. *Rowland*, 7 H. & N. 103 ; *Heard* v. *Pilley*, L. R., 4 Ch. Ap. 548. For the effect of sect. 4 upon an agreement for a lease, see ante, p. 90.

(*d*) *Smallwood* v. *Sheppards*, [1895] 2 Q. B. 627 ; 64 L. J., Q. B. 727.

(*e*) *Parker* v. *Taswell*, 2 De G. & J. 559 ; 27 L. J., Ch. 812 ; *Cowen* v. *Phillips*, 33 Beav. 18.

(*f*) *Bond* v. *Rosting*, 1 B. & S. 371 ; 30 L. J., Q. B. 227 ; *Rollason* v. *Leon*, 7 H. & N. 73 , 31 L. J., Ex. 96 ; *Tidey* v. *Mollett*, 16 C. B., N. S. 298 ; 33 L. J., C. P. 235 ; *Hayne* v. *Cummings*, 16 C. B., N. S. 421.

(*g*) *Doe* d. *Rigge* v. *Bell*, 5 T. R. 472 ; 2 R. R. 642 ; 2 Sm. L. C. 96 ; *Richardson* v. *Gifford*, 1 A. & E. 52; *Doe* d. *Thompson* v. *Amey*, 12 A. & E. 479 ; *Berrey* v. *Lindley*, 3 M. & Gr. 498 ; *Lee* v. *Smith*, 9 Exch. 662 ; *Beale* v. *Saunders*, 3 B. N. C. 850 (assignee under void lease) ; *Doe* d. *Pennington* v. *Taniere*, 12 Q. B. 998, 1013 ; *Tress* v. *Savage*, 4 E. & B. 36 ; *Pistor* v. *Cater*, 9 M. & W. 315 ; *Doe* d. *Browne*, 8 East, 165 ; 9 R. R. 397 ; *Cooch* v. *Goodman*, 2 Q. B. 580.

(*h*) Cole Ejec. 36, 222.

(*i*) *Tress* v. *Savage*, 4 E. & B. 36 ; Cole Ejec. 223, 444.

(*k*) *Inman* v. *Stamp*, 1 Stark. 12 ; *Edge* v. *Strafford*, 1 C. & J. 391 ; 1 Tyr. 295.

(*l*) *Drury* v. *Macnamara*, 5 E. & B. 612 ; *Jinks* v. *Edwards*, 11 Exch. 775.

First, then, of leases by deed. A deed is a writing sealed and delivered by the parties, and is either an indenture or a deed-poll. If a deed be made by more parties than one, there ought regularly to be as many copies of it as there are parties, and each formerly was cut or indented (instar dentium) on the top or to tally or correspond with the other, which deed so made is called an indenture (*m*). Formerly, if a deed began "This indenture" made, &c. and the parchment or paper was not indented, it was not an indenture, because the words could not make it indented; but if the deed was actually indented, though there were no words of indenture in the deed, yet it was an indenture in law; for it might be an indenture without words, but not by words without indenting (*n*). But now, by the Real Property Act, 1845, 8 & 9 Vict. c. 106, s. 5, "a deed executed after the 1st October, 1845, purporting to be an indenture, shall have the effect of an indenture, although not actually indented." All the parts of an indenture make but one deed, and each part is of as great force and effect as all the parts together; so they are esteemed the mutual acts of the respective parties, each of whom may be bound by either part of the same, for the words of the indenture are the words of each party (*o*).

Leases by Indenture.

The common usage is for the lessor to execute one instrument to be handed to and kept by the lessee—which is the lease—and for the lessee to execute another instrument of precisely similar tenor, to be handed to and kept by the lessor—which is called the counterpart (*p*), and is distinguished from a mere copy as bearing the actual signature of the lessee (which a mere copy does not), and as forming an instrument on which the lessor can sue the lessee. A lessee who executes the counterpart of a lease or any person claiming under him, cannot dispute its admissibility in evidence, or impeach its validity on the ground of the original lease not being properly stamped (*q*). A counterpart is primary evidence against the lessee, and all the persons claiming under him, of the contents of the lease, and of the execution thereof by the lessor (*r*).

The Counterpart.

The ordinary rule is, that where the lease and the counterpart conflict, the lease prevails; but this rule does not apply where the mistake is clearly in the lease. So it was held by the Court of Appeal in *Burchell* v. *Clark* (*s*). There, by lease dated in 1784, the

Discrepancy between counterpart and lease.

*Burchell* v. *Clark*.

(*m*) 1 Inst. 171; 2 Blac. Com. 295.

(*n*) Co. Lit. 229.

(*o*) Plowd. 134, 421; Lit. s. 370.

(*p*) "When the several parts of an indenture are interchangeably executed by the several parties, that part or copy which is executed by the grantor is usually called the original, and the rest are termed counterparts," 1 Steph. Com. 465, where it is said that of late it is most frequent for all the parties to execute every part.

(*q*) *Paul* v. *Meek*, 2 Y. & J. 116.

(*r*) *Burleigh* v. *Stibbs*, 5 T. R. 465; *Doe* d. *West* v. *Davis*, 7 East, 363; *Hughes* v. *Clark*, 10 C. B. 905; *Houghton* v. *Kenig*, 18 C. B. 235; *Homes* v. *Pearce*, 1 F. & F. 283; Cole Ejec. 170, 253.

(*s*) *Burchell* v. *Clark*, 2 C. P. D. 88; 46 L. J., C. P. 115; 35 L. T. 690; 25 W. R. 334.

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lessor demised the premises to the lessee for 94¼ years, "yielding during the said term of" 91¼ years a certain rent. The counterpart spoke of the term as 91¼ years in both instances. The court (Kelly, C.B., diss.), reversing the decision below, held that as it was clear that there was some clerical error in the lease, the counterpart might be used to correct it, and that the premises were recoverable by action brought at the end of the 91¼ years.

General Requisites.

A lease by deed must be written or printed: it may be in any character or language: it cannot be exemplified upon wood, leather, cloth, or the like, but only upon parchment or paper: for the writing or printing upon them can be least vitiated, altered, or corrupted. It must also have the regular stamps imposed upon it by statute for the increase of the public revenue (*t*).

Stamp.

Effect of the Loss of a Lease.

The estate of the lessee is not determined by the loss or cancellation of the lease, so that the existence of the term can be proved; for the estate is derived from the lessor, and not from the lease otherwise than as it shows the intention of the parties, which is not altered by the loss or cancellation of the instrument of demise (*u*). Where no counterpart can be found, the landlord is entitled to inspect and take a copy of the lease (*x*). So, on the other hand, in a proper case, the tenant may obtain an inspection of the duplicate or counterpart lease (*y*). Under an agreement that the lessor would, at the request and costs of the lessee, grant a lease, the lessor is not entitled to charge the tenant with the expense of a counterpart (*z*).

## SECT. 3.—*Form of Lease.*

Statutory Form under 8 & 9 Vict. c. 124.

An attempt has been made by the legislature to shorten leases, and accordingly the Leases Act, 1845, 8 & 9 Vict. c. 124, gives a concise form, which may be adopted if parties desire it (*a*). But this form is somewhat inaccurate, and is, it is believed, seldom used (*b*).

Usual Words of Demise.

The usual words by which a lease is made are, "demise and lease," *or*, "demise, grant and to farm let;" but any words which amount to a grant are sufficient to make a lease (*c*); and it may be laid down for a rule, and whatever words are sufficient to explain the intent of the parties, that the one shall divest himself of the

(*t*) See the Stamp Act, 1891, a consolidating Act, post, Appendix, A.; and see also Sect. 13 of this chapter.

(*u*) *Read* v. *Brookman*, 3 T. R. 151; *Lord Ward* v. *Lumley*, 5 H. & N. 87, 656; 29 L. J., Ex. 322.

(*x*) *Doe* v. *Slight*, 1 Dowl. 163; *Doe* d. *Morris* v. *Roe*, 1 M. & W. 207.

(*y*) *Doe* d. *Child* v. *Roe*, 1 E. & B. 279; Cole Ejec. 120, 200.

(*z*) *Jennings* v. *Major*, 8 C. & P. 61; see post, Sect. 13.

(*a*) See post, Appendix A., Sect. 1.

(*b*) Numerous precedents of leases, &c., are given in Appendix B., post.

(*c*) Co. Lit. 45; 2 Blac. Com. 318.

possession and the other come into it, for any determinate time, whether they run in the form of a licence, covenant, or agreement, are of themselves sufficient, and will in construction of law amount to a lease for years as effectually as if the most proper and pertinent words had been made use of for that purpose; for a lease of years being no other than a contract for the *exclusive* possession and profits of the land on the one side, and a recompense of rent or other income on the other,—if the words made use of are sufficient to prove such a contract, in whatsoever form they are introduced, or howsoever variously applicable,—the law calls in the intent of the parties, and moulds and governs the words accordingly (*d*). Where the owner in fee of premises demised them for a term of 999 years, and afterwards released to the lessee the reversion in fee; and the latter, by indenture reciting the demise, did "grant, bargain, sell, assign, and set over" the premises for the residue of the term of 999 years:—held, that there was a resuscitation of the term by virtue of these words (*e*). In *Cottee* v. *Richardson*, the plaintiff in consideration of 530*l.* to be paid by A. demised to him premises for 55 years at the yearly rent of 84*l.*, and subject to covenants to repair, &c. The consideration not having been paid, A. assigned to the plaintiff the residue of the term then unexpired, subject to the rents and covenants, and with a power of sale. In pursuance of that power the plaintiff, in consideration of 500*l.* "bargained, sold, assigned, and transferred, and set over" to the defendant the said premises, to hold "for the residue of the *term* of 55 years," subject to the yearly rent of 84*l.*, and the covenants contained in the lease to A.; and the defendant covenanted to pay the rent and perform the covenants. The defendant having entered, it was held, that although the mortgage by A. to the plaintiff operated as a merger of the term originally granted, yet the assignment by the plaintiff to the defendant created a new lease for the residue of the unexpired term, and consequently the defendant was liable on the covenants (*f*).

Lease must show an intention to Demise.

Although no specific words are necessary to create a lease, yet there must be words used which show an intention to demise (*g*): therefore, where, on the letting of land to a tenant, a memorandum was drawn up, the terms of which were, that he should on a future day bring a surety and sign the agreement, neither of which he ever did; it was held, that the memorandum was a mere unaccepted proposal, and did not operate as a lease (*h*); an agreement bearing even date with a lease, by which it was agreed that the lessor should

(*d*) Bac. Abr. tit. *Leases* (K.); Smith L. & T. 84, 85 (2nd ed.). For distinction between lease and licence, see ante, p. 133.

(*e*) *Denn* d. *Wilkins* v. *Kemeys*, 9 East, 366; 9 R. R. 581.

(*f*) *Cottee* v. *Richardson*, 7 Exch. 148.

(*g*) *Brewer* v. *Hill*, 2 Anstr. 413; 3 R. R. 596.

(*h*) *Doe* d. *Bingham* v. *Cartwright*, 3 B. & A. 326.

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manage the farm leased for the lessee; the lessee giving 12*s.* a week to the lessor, and "allowing him and his family to reside and have the use of the dwelling-house and furniture free of rent:" has been held not to be a lease (*i*); and where a contract was made between A. and B., that B. should receive certain sums of money from A., and should build certain houses on A.'s land, and procure responsible tenants for the same at a given rate, and himself pay the rent from a certain day till he procured such tenants: it was held that no tenancy was created between A. and B. (*k*).

Particular Words which have been decided upon.

The word "*dedi*" is said to be a sufficient word to make a lease for years (*l*), and even a "licence" to inhabit or enjoy (*m*), if it give an *exclusive* right to occupy (*n*), may have the same effect. The words "covenant, grant, and agree" that A. shall have the lands for so many years, enure as a lease for years (*o*); so the word "covenant" will make a lease, though the words "grant and agree" be omitted (*p*). So a covenant "to stand seised," if made by the owner, or a covenant for quiet enjoyment (*q*) is a lease (*r*): for a covenant together with an entry amounts to a lease; but a covenant merely does not vest the estate in the lessee, but only gives him a right to enter and possess it; and therefore the estate is not vested in him till actual entry (*s*).

*Interesse termini.*

A lease, however formal (not being a bargain and sale under the Statute of Uses), creates only an *interesse termini* before entry (*t*).

## SECT. 4.—*Construction of Lease.*

Whether Lease or Agreement.

Before the Real Property Act, 1845 (8 & 9 Vict. c. 106), s. 3, required all leases for more than three years to be by deed, questions very frequently arose whether a particular instrument was intended to operate as an actual lease, or merely as an agreement to grant one. The decisions were numerous and conflicting (*u*), but as the Act of 1845 has very considerably diminished their importance, it is sufficient to state here that their general effect may be taken to be that the intention of the parties was considered, and that the courts would construe the document very liberally in order to effectuate that intention (*x*).

(*i*) *Doe* d. *Hughes* v. *Derry*, 9 C. & P. 494; *Mayhew* v. *Suttle*, 4 E. & B. 347.
(*k*) *Taylor* v. *Jackson*, 2 C. & K. 22.
(*l*) Co. Lit. 301 b; *Right* d. *Green* v. *Proctor*, 4 Burr. 2209.
(*m*) *Hall* v. *Seabright*, 1 Mod. 14.
(*n*) *Reg.* v. *Morrish*, 32 L. J., M. C. 245.
(*o*) *Whitlock* v. *Horton*, Cro. Jac. 91.
(*p*) *Richards* v *Sely*, 2 Mod. 80.
(*q*) *Doe* d. *Pritchard* v. *Dodd*, 5 B. & Adol. 689.
(*r*) *Right* d. *Bassett* v. *Thomas*, 3 Burr. 1441, 1446; 1 W. Blac. 446.
(*s*) *Copley* v. *Hepworth*, 12 Mod. 1; Co. Lit. 37.
(*t*) *Barnett* v. *Earl of Guildford*, 11 Exch. 19; *Anderson* v. *Radcliff*, E. B. & E. 806. And see Sect. 17, infra.
(*u*) See *Chapman* v. *Bluck*, 4 B. N. C. 187; *Chapman* v. *Turner*, 6 M. & W. 100; *Rawson* v. *Eicke*, 7 A. & E. 451.
(*x*) See *Poole* v. *Bentley*, 12 East, 168.

Effect of void Lease.

A written contract not under seal made since the Act of 1845 for a longer term than three years, or for three years to begin from a subsequent day, or even for a less term if the rent reserved is less than two-thirds of the full improved value of the thing demised, cannot operate as a lease, or create any term, it being "void at law." But it may operate as an agreement for a lease (*y*), and so be enforced in equity by a decree for a specific performance (*z*), or even treated as an actual lease (*a*). An action at law may be maintained upon it for not granting, or not accepting, as the case may be, a lease pursuant to such contract (*b*); but not an action for not giving possession at the time appointed for the commencement of such lease, because the possession bargained for is not a possession as a tenant at will or from year to year, but a possession for a term of years to be created by the lease (*c*). Such last-mentioned action lies, however, upon a contract for a less term than three years (*d*).

Effect of Entry under void Lease.
*Clayton* v. *Blakey.*

Even when the contract is for more than three years, if the tenant be allowed to enter and take possession under such contract, and pays any of the rent therein expressed to be reserved, a tenancy from year to year will be thereby created upon the terms of such contract, so far as they are applicable to and not inconsistent with a yearly tenancy (*e*). Actual payment of rent is not always essential; if the payment be allowed to stand over by mutual consent, that is sufficient (*f*); payment of the rent does not of itself create a tenancy from year to year, but is *only evidence* from which a jury may find the fact (*g*). Where payment of rent unexplained would ordinarily imply a yearly tenancy, it is open to the payer or receiver of such rent to prove the circumstances under which such payment was made for the purpose of repelling such implication (*h*). Until there had been a payment of rent, or something equivalent to such payment, a distress could not, before the Judicature Acts, be made for the rent expressed to be reserved, no *actual tenancy at an agreed rent* having been created (*i*). But it is otherwise with respect to an agreement for a lease which contains an express stipulation for an

(*y*) *Tidey* v. *Mollett*, 16 C. B., N. S. 298; 33 L. J., C. P. 235; *Hayne* v. *Cummings*, 16 C. B., N. S. 421; overruling *Stratton* v. *Pettitt*, 16 C. B. 420.

(*z*) *Parker* v. *Taswell*, 2 De G. & J. 559; 27 L. J., Ch. 812; *Cowen* v. *Phillips*, 33 Beav. 18.

(*a*) See *Walsh* v. *Lonsdale*, 21 Ch. D. 9, and p. 91, ante; but that case has no application to a void lease not capable of being construed as an agreement for a lease.

(*b*) *Bond* v. *Rosling*, 1 B. & S. 371; 30 L. J., Q. B. 227.

(*c*) *Drury* v. *Macnamara*, 5 E. & B. 612.

(*d*) *Jinks* v. *Edwards*, 11 Exch. 775.

(*e*) *Clayton* v. *Blakey*, 8 T. R. 3; 2 Smith L. C.; 4 R. R. 575; *Tress* v. *Savage*, 4 E. & B. 36; *Doe* d. *Pennington* v. *Taniere*, 12 Q. B. 998, 1013; *Lee* v. *Smith*, 9 Exch. 662; *Beale* v. *Sanders*, 3 Bing. N.C. 850; *Richardson* v. *Gifford*, 1 A. & E. 52; Smith L. & T. 80, 81 (2nd ed.).

(*f*) *Cox* v. *Bent*, 5 Bing. 185; *Vincent* v. *Godson*, 24 L. J., Ch. 122.

(*g*) *Jones* v. *Shears*, 4 A. & E. 832; *Finlay* v. *Bristol and Exeter R. Co.*, 7 Exch. 415, 420.

(*h*) *Doe* d. *Lord* v. *Crago*, 6 C. B. 90.

(*i*) *Hegan* v. *Johnson*, 2 Taunt. 148; see now *Walsh* v. *Lonsdale*, L. R., 21 Ch. D. 9, p. 91, ante.

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intermediate tenancy at the rent and subject to the covenants and conditions therein mentioned until the lease shall be prepared (*k*). A yearly tenancy created by entry under the contract, and payment of any of the rent therein mentioned (or anything equivalent thereto), may be determined at the end of the first or any subsequent year of the term mentioned in the contract, by the usual notice to quit (*l*); and at the end of the term mentioned in the contract the tenancy will expire without any notice to quit (*m*). When the contract is for a lease for twenty-one years, determinable at the end of the first seven or fourteen years, the tenant cannot quit at the end of the first seven or fourteen years, *without any previous notice* (*n*).

Lease or Agreement. *Poole* v. *Bentley.*

It is very seldom, if ever, that any question now arises whether a contract for less than three years amounts to a lease or only to an agreement. It depends upon the *intention* of the parties, to be collected from the writing, and from collateral circumstances. If it contains words of present demise ("doth agree to let," &c.), although to hold from a subsequent day, it will amount to a lease, notwithstanding a more formal lease is stipulated for, that being considered only as a further assurance (*o*). The question in such cases is, whether the parties intended to create a tenancy before the execution of any further instrument (*p*). An instrument containing an express proviso that it shall not operate as a lease but only as an agreement, will be construed to be a mere agreement, notwithstanding it contains words of present demise (*q*). But if it contains a clause to the following effect, viz.: "And it is hereby mutually agreed that these presents shall operate as an agreement only, and that until a lease shall be executed, the rents, covenants, and agreements agreed to be therein reserved and contained shall be paid and observed, and the several rights and remedies shall be enforced, in the same manner as if the same had been actually executed;" and the tenant enters into possession under such agreement, the concluding stipulation will create an actual tenancy at a fixed rent, for which a distress may be made (*r*). So where an agreement for a lease, to contain certain specified covenants, concluded thus: "And in the meantime and until such lease shall be executed, to pay the said yearly rent, and to hold the same premises, subject to the covenants above mentioned:" it was held that the latter words amounted to an actual demise (*s*).

*Anderson* v. *Midland R. Co.*

(*k*) *Pinero* v. *Judson*, 6 Bing. 206; *Rollason* v. *Leon*, 7 H. & N. 73; 31 L. J., Ex. 96; *Anderson* v. *Midland R. Co.*, 3 E. & E. 614; 30 L. J., Q. B. 94.

(*l*) *Doe* d. *Thompson* v. *Amey*, 12 A. & E. 476; Cole Ejec. 36, 222, 444.

(*m*) *Tress* v. *Savage*, 4 E. & B. 36.

(*n*) *Chapman* v. *Towner*, 6 M. & W. 100.

(*o*) *Poole* v. *Bentley*, 12 East, 168; *Pinero* v. *Judson*, 6 Bing. 206; 3 M. & P. 497; 8 L. J., C. P. 19; 31 R. R. 388; *Anderson* v. *Midland R. Co.*, 3 E. & E. 614; 30 L. J., Q. B. 94.

(*p*) Smith, L. & T. 85.

(*q*) *Perring* v. *Brook*, 1 Moo. & R. 510; 7 C. & P. 360.

(*r*) *Anderson* v. *Midland R. Co.*, 3 E. & E. 614; 30 L. J., Q. B. 94.

(*s*) *Pinero* v. *Judson*, 6 Bing. 206; *Rollason* v. *Leon*, 7 H. & N. 73; 31 L. J.,

General Rules for the Construction of Leases by Deed.

Deeds—including, of course, leases by deed—being the highest description of private written documents, are themselves the best evidence of the facts which they contain, the circumstances which they relate, and their makers' intentions. In their construction, regard must be had to all their parts; and general words may be restrained by particular recitals (*t*). Where the recitals in a lease stated that a sum of money which was in part to be given for fixtures was part of the consideration for the lease, it was held, that, whether the lessee would or would not be estopped by it, he was not bound to execute such a lease (*u*).

Ambiguities.

If a deed may operate in two ways, the one consistent with the intent of the parties, and the other repugnant to it, the courts will put such a construction on it as to give effect to the intent (*x*); for deeds must be construed so as to operate according to the intention of the parties, if by law they may; and if they cannot operate in one form they will in another (*y*).

Clerical errors.

Where a material word appears to have been omitted in a lease by mistake, and other words cannot have their proper effect unless it be introduced, such lease must be construed as if that word were inserted, although the particular passage where it ought to stand conveys a sufficiently distinct meaning without it (*z*). An instrument of demise was produced in evidence, by which the plaintiff agreed to let for the term of one year fully to be complete and ended; most of the subsequent stipulations in the leases were wholly inapplicable to a tenancy determinable by a notice to quit; the document appeared on the face of it to have originally contained words creating a tenancy from year to year, which were struck out, and the above words as to the term only remained; it was held, that the words struck out might be looked at to show what the intention of the parties was; that the tenancy was for a single year only; and that the terms inapplicable to such a tenancy must be considered as expunged, or as only applicable in case the tenancy should continue (*a*).

General Words.

General words at the end of a particular specification will not pass any property of a different nature from that particularly mentioned (*b*).

Ex. 96. Compare these cases with *Holland* v. *Kensington Vestry*, L. R. 2 C. P. 565; 36 L. J., M. C. 105.

(*t*) *Payler* v. *Homersham*, 4 M. & S. 423; 16 R. R. 516; *Simons* v. *Johnson*, 3 B. & Adol. 175; *Bain* v. *Cooper*, 9 M. & W. 701; *Major* v. *Salisbury*, 2 D. & L. 763, 768.

(*u*) *Vonhollen* v. *Knowles*, 12 M. & W. 602.

(*x*) *Solly* v. *Forbes*, 4 Moo. 448; *Hotham* v. *East India Co.*, 1 T. R. 638; 1 R. R. 333.

(*y*) *Goodtitle* d. *Edwards* v. *Bailey*, Cowp. 600; Shep. Touch. 81 (sect. 13).

(*z*) *Wright* v. *Dickson*, 1 Dow. 114, 147.

(*a*) *Strickland* v. *Maxwell*, 2 C. & M. 539. And see sect. 24, post.

(*b*) *Anon.*, Lofft. 398; *Sandiman* v. *Breach*, 7 B. & C. 96; *Hare* v. *Horton*, 5 B. & Adol. 715; *Reg.* v. *Nevill*, 8 Q. B. 452, 463; *East London W. W. Co.* v. *Trustees of Mile End Old Town*, 17 Q. B. 512; *Lyndon* v. *Standridge*, 2 H. & N. 51.

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Parol Evidence inadmissible to vary writing.

The general rule with regard to the admission of parol evidence to explain the meaning of, or to add to or alter, the express terms of a written instrument, is, that it shall not be admitted (*c*). Thus where property has been conveyed by deed, parol evidence of an agreement to apportion the rent of the current quarter, contrary to the terms of the deed, is inadmissible (*d*). So parol evidence is inadmissible to show that a particular close was intended to be included in or to be excluded from the deed (*e*). The exceptions to such rule are—

Exceptions.

Ambiguity.

1, where, although the deed is clearly enough expressed, some ambiguity arises from extrinsic circumstances; 2, where the language of a charter or deed has become obscure, and the construction doubtful from antiquity; 3, where the grant appears uncertain, owing to a want of acquaintance with the grantor's estate; 4, where it is important to show a different consideration consistent with but not repugnant to that stated in the deed itself; 5, where it becomes necessary to show a different time of delivery from that at which the deed purports to have been made;

Custom of Country.

6, where it is sought to prove a customary right not expressed in the deed, but which is not inconsistent with any of its stipulations; 7, where fraud or illegality in the formation of the deed is relied on to avoid it. If a clause in a deed be so ambiguously or defectively expressed, that a court of justice cannot, even by reference to the context, collect the meaning of the parties, it will be void on account of uncertainty (*f*). But this is the last rule of construction ever resorted to.

Cases illustrative of exception on ground of Ambiguity.

Where a party granted a manor by a particular name, and he had two manors of that name, parol evidence was admitted to show which of them he meant; and where there was a demise of premises in Westminster, late in the occupation of A., particularly describing them, part of which was a yard, parol evidence was received to show that a cellar situated under that yard, but which was then in the occupation of B., another tenant of the lessor, was not intended to pass (*g*). Evidence of usage was received to show that a room which had not been occupied with a certain messuage did not pass under a demise of that messuage, together with all the rooms, chambers, and appurtenances thereunto belonging (*h*). Where a lease grants a right of way, evidence may be received of the state of the premises at the time of granting the lease, and then the judge will put a construction on the lease as to the line along which the way granted runs; but if it is uncertain on the words which of

(*c*) See Chitty on Contracts (13th ed.) at p. 132. The rule appears to be the same, whether the written instrument be *a deed under seal* or not.

(*d*) *Flinn* v. *Calow*, 1 M. & G. 589.

(*e*) *Meres* v. *Ansell*, 3 Wils. 275; *Doe* d. *Norton* v. *Webster*, 12 A. & E. 442; *Barton* v. *Dawes*, 10 C. B. 261. And see *Minton* v. *Geiger*, 28 L. T. 449.

(*f*) *Anon.*, 1 Mod. 180; *Doe* d. *Wyndham* v. *Carew*, 2 Q. B. 317.

(*g*) *Doe* d. *Freeland* v. *Burt*, 1 T. R. 701; 1 R. R. 367; *Paddock* v. *Fradley*, 1 C. & J. 90.

(*h*) *Kerslake* v. *White*, 2 Stark. 508; 20 R. R. 731.

two ways is intended, parol evidence may be given to show which the grantor meant (*i*).

Where an expression used in a written instrument has technical meaning, parol evidence is admissible to show that it has been used in that sense, and not in its ordinary meaning in common parlance, although that may be perfectly clear and unambiguous in itself: therefore, where a lessee of a coal mine covenanted to get the whole of the coals "not deeper than or below the *level* of the bottom of the mine," at a particular point, it was held, that parol evidence of the understanding amongst miners was admissible to show that the word "level" had a particular technical meaning different from its ordinary signification of "horizontal line." It might be questionable whether a previous agreement between the parties for a lease of the same mine, and for which the lease in question was substituted, was also admissible in evidence for the same purpose (*k*). Again, where in a lease of a rabbit warren, &c., the lessee covenanted that on the expiration of the term he would leave on the warren 10,000 rabbits, the lessor paying for them 60*l.* per thousand, it was held, that parol evidence was admissible to show that, by the custom of the country where the lease was made, the word "thousand," as it applied to rabbits, denoted twelve hundred (*l*). Where the lessee of a coal mine covenanted to pay a certain share of all such sums of money as the coals should sell for at the pit's mouth, evidence of the lessee's having accounted with the lessor, and paid him the share of the money produced by the sale of coals elsewhere, was not considered admissible to explain the intention of the parties (*m*). Where a lessee made an agreement for a lease, and the under-lessee contracted to erect a shop-front to the house; in ejectment for a forfeiture for not erecting the shop-front, it was held, that the original lease by which a penalty was imposed, if the lessee allowed a trade to be carried on upon the premises, was not admissible in evidence for the defendant to explain the meaning of the words "shop-front" in the agreement (*n*).

Expression of technical meaning.

Admissibility of Parol Evidence.

Since the passing of the Calendar (New Style) Act, 1750, 24 Geo. 2, c. 23, for altering the style, a lease of lands by *deed*, to hold from the feast of *St. Michael*, must, unless there be a custom to the contrary, as in Kent (*o*), be taken to mean *New Michaelmas*, and cannot be shown by extrinsic evidence to refer to a holding from *Old Michaelmas*, unless there be such custom, or a reference in the lease

Dates.

"New Michaelmas."

(*i*) *Osborne* v. *Wise*, 7 C. & P. 761.
(*k*) *Clayton* v. *Gregson*, 5 A. & E. 302; 4 N. & M. 602; 6 Id. 694; *Shore* v. *Wilson*, 9 Cl. & F. 365.
(*l*) *Smith* v. *Wilson*, 3 B. & Adol. 728.
(*m*) *Clifton* v. *Walmsley*, 5 T. R. 564; *Gerrard* v. *Clifton*, 7 T. R. 676; 1 B. & P. 524.
(*n*) *Doe* d. *Nash* v. *Birch*, 1 M. & W. 402.
(*o*) *Furley* d. *Mayor, &c., of Canterbury*, v. *Wood*, 1 Esp. 198.

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to a prior holding from Old Michaelmas (*p*). But this rule has been held to relate only to leases by deed; for in a lease by parol made to commence at Lady-Day, evidence is admissible to prove that by the custom of the country Old Lady-Day was intended (*q*). If there be any ambiguity or contradiction in expressing the time of the commencement of a lease, the lease is construed beneficially for the lessee, on the principle that every man's grant shall be taken most strongly against himself (*r*).

Cases illustrative of the other Exceptions.

Where a man granted an estate for life, without saying whether it was for his own life or for that of the grantee, parol evidence was received to show what interest he had in the estate: for if he was tenant in fee, it was considered that the grantee should take an estate for his own life; but that if the grantor himself was a tenant for life only, the grantee would take an estate for the grantor's life only (*s*).

Evidence of Custom.

The express terms of a lease cannot be controlled by the custom of the country; but if the lease be entirely silent as to matters regulated by such custom, *e.g.*, as to the time of quitting, evidence of the custom of the country may be given to fix the time (*t*); similarly,

*Wigglesworth* v. *Dallison.*

although no right to an away-going crop is reserved in a lease, if there are no covenants which either in express terms or by implication of law *exclude* such right, the lessee may produce parol evidence to show that he is entitled to such away-going crop by the custom of the country (*u*). So evidence of custom for an away-going tenant to provide work and labour, tillage and sowing, and all materials for the same in his away-going year, the landlord making him a reasonable compensation, has been received, although there was an express written agreement between the parties, when that agreement was not *inconsistent* with such custom (*x*).

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## SECT. 5.—*Description of the Demised Premises.*

### (a) *Generally.*

Parts of a Lease by Deed.

A lease by deed usually consists of the following parts: viz. 1. What is usually called the *Premises*, which contain a statement of

(*p*) *Doe* d. *Spicer* v. *Lee*, 11 East, 312; *Doe* d. *Hall* v. *Benson*, 4 B. & A. 588; *Denn* d. *Peters* v. *Hopkinson*, 3 D. & R. 507; *Smith* v. *Walton*, 8 Bing. 235.

(*q*) *Doe* d. *Hall* v. *Benson*, 4 B. & A. 588; *Furley* d. *Mayor, &c., of Canterbury*, v. *Wood*, supra; *Denn* d. *Peters* v. *Hopkinson*, supra,

(*r*) *Anon.*, Dyer, 261 b, pl. 28; *Lilley* v. *Whitney*, Dyer, 272 a; *Seamen's case*, Godb. 166; *Doe* d. *Davies* v. *Williams*, 1 H. Blac. 25; 2 R. R. 703; Shep. Touch. 88, s. 6.

(*s*) *Smith* v. *Earl of Jersey*, 2 Brod. & B. 551; 3 Moo. 339; 7 Price, 281; 3 Bligh. 290; 22 R. R. 19.

(*t*) *Webb* v. *Plummer*, 2 B. & A. 746.

(*u*) *Caldecott* v. *Smythies*, 7 C. & P. 808; *Wigglesworth* v. *Dallison*, 1 Doug. 201; 1 Sm. L. C.; and see Chap. XX., s. 4 (e), post.

(*x*) *Senior* v. *Armytage*, Holt, 197; 7 R. R. 627; *Hutton* v. *Warren*, 1 M. & W. 466, 476.

the date; the names, addresses, and additions of the parties; the recitals (if any); the operative words; the descriptions of the parcels demised and the appurtenances; also any exceptions or reservations thereout: 2. The *Habendum*, or that part which fixes the duration of the term: 3. The *Reddendum*, or reservation of rent: 4. The covenants: 5. A proviso or condition for re-entry for non-payment of rent or non-observance of covenants; or, for the determination of the term by notice before the expiration thereof; *e.g.*, at the end of the first seven or fourteen years.

The Premises. The Premises in a lease are all the parts which precede the *habendum*. The office of this part of the lease is rightly to name and describe the lessor and lessee; to state the consideration (*y*); to set forth with certainty the thing demised, either by express words, or by that which by reference may be reduced to a certainty; and to state the exceptions or things reserved, if any.

Description of the Property. With respect to the proper mode of describing the property to be demised, it may be remarked, "that corporeal hereditaments consist wholly of substantial and permanent objects; all which may be comprehended under the general denomination of land only; for *land* comprehends, in its legal signification, any ground, soil or earth whatsoever; so the word 'land' includes, not only the face of the earth, but everything under it or over it; and therefore if a man grant all his lands, he grants thereby all his mines of metal and other fossils, his woods, his waters, and his houses, as well as his fields and meadows; not but that the particular names of the things are equally sufficient to pass them, except in the instance of water, by a grant of which nothing passes but a right of fishing; and to recover the land at the bottom of which, it must be called so many 'acres of land covered with water.' But the capital distinction is this, that by the name of a castle, messuage, toft, croft, or the like, nothing else will pass, except what falls with the utmost propriety under the term made use of (though, indeed, by the name of a castle one or more manors may be conveyed; and è converso, by the name of the manor a castle may pass); but by the name of land, which is nomen generalissimum, everything terrestrial will pass" (*z*). The expressions "arable land, meadow or pasture land," are specific descriptions of land, and are confined to land of that particular species; and in general, where meadow or pasture land is named, it must be understood of ancient meadow or pasture (*a*). The words "more or less," must be confined to a reasonable quantity (*b*).

"Land."

"Arable, meadow," &c.

"More or less."

(*y*) The premium or fine, if any, is generally expressed in words at length.

(*z*) 2 Blac. Com. 18.

(*a*) *Tresham* v. *Lamb*, 2 Brownl. 46; *Gunning* v. *Gunning*, 2 Show. 8.

(*b*) *Day* v. *Fynn*, Owen, 133; 1 Esp. 229; *Cross* v. *Elgin*, 2 B. & Adol. 106.

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If the thing described be sufficiently ascertained, it is sufficient, though all the particulars are not true; as if a man demise his meadows in B. and D., containing ten acres, whereas they contain twenty acres, all the meadows pass (*c*). Whatever constitutes the essence of the thing granted, or is parcel of it, will pass with it, although it be accidentally severed at the time of the lease; therefore, by the lease of a mill, the millstone passes, though severed at the time; so by the lease of a house, the doors, window sashes, locks, keys, &c., pass as parcel of it, although by accident they may not be in their proper places when the lease is made. A man may demise his farm, which may comprehend a messuage and much land, meadow, pasture, wood, &c., thereunto belonging, or therewith used; for the word "farm" properly signifies a capital or principal messuage, and a quantity of land thereunto appertaining (*d*). So by the name of a messuage, he may pass a house, a curtilage, a garden, an orchard, a dove-house, a shop, or a mill, as parcel of the same (*e*); so the word "house" includes everything that would ordinarily pass by that name (*f*), the like of a cottage, a toft, a chamber, a cellar, &c. (*g*). Under a lease of all that part of the park called B. situate and being in the county of O., and now in the occupation of S., lying within certain specified abuttals, with all houses, &c., belonging thereto, and which are now in the occupation of S., a house on a part which is within the abuttals, but not in the occupation of S., will pass (*h*). By a lease of all that part of the townland of B., containing 509 acres, arable, meadow, and pasture, bounded by certain boundaries, it was held that 400 acres of bog and land reclaimed from bog within the boundaries, also passed (*i*). If garden ground be let for years, and the lessee demise part of the term to an under-tenant, who builds on it, by a grant of the garden ground, the buildings thereon will pass (*k*). It would appear that a lease of "the issues and profits" of land would pass the land itself; for to have the issues and profits is the same thing as to have the land itself (*l*); and it has been held, that if a grant be made of a boilery of salt, the land passes, for that is the whole profit (*m*). If in a lease the demised land be mentioned and described as meadow land, no other evidence is necessary to

Where the Description is untrue in Part.

"House."

Meadow Land.

(*c*) Com. Dig. tit. *Fait* (E. 4).

(*d*) Shep. Touch. 93; *Lord Portman* v. *Mill*, 3 Jur. 356, L.C.; *Goodtitle* v. *Paul*, 2 Burr. 1089; *Goodtitle* v. *Southern*, 1 M. & S. 298; 14 R. R. 435.

(*e*) Shep. Touch. 94; *Doe* d. *Norton* v. *Webster*, 12 A. & E. 442; *Cole* v. *West London and Crystal Palace R. Co.*, 27 Beav. 242; 28 L. J., Ch. 767.

(*f*) *Grosvenor* v. *Hampstead Junction R. Co.*, 1 De Gex & J. 446; 26 L. J., Ch. 731; *Hewson* v. *South-Western R. Co.*, 8 W. R. 467; *Steele* v. *Midland R. Co.*, L. R., 1 Ch. Ap. 275.

(*g*) Shep. Touch. 94.

(*h*) *Doe* d. *Smith* v. *Galloway*, 5 B. & Ad. 43; compare this with *Martyr* v. *Lawrence*, 2 De Gex, J. & S. 261.

(*i*) *Jack* v. *McIntyre*, 12 Cl. & Fin. 151.

(*k*) *Burton* v. *Brown*, Cro. Jac. 648.

(*l*) *Parker* v. *Plumber*, Cro. Eliz. 190.

(*m*) Co. Lit. 4 b.

prove that it was meadow land at the commencement of the term (*n*). By the grant of a forest, park, chase or warren in the soil of the grantor, the soil as well as the privilege passes; but it is otherwise if the soil be another's (*o*); and a sheep walk or a foldcourse may include the soil by the custom of the country (*p*).

Fishery.

In a parish settlement case, it was held that the lease of a fishery of a pond, with the spear sedge and the flags and rushes growing in and about the same, passed the soil (*q*).

Ferry.

If a lease of a ferry describes it as a ferry both ways across a river, whereas it is but one way only, yet it will pass (*r*). In the Irish case of *Dwyer* v. *Rich* (*s*), the lease described the lands demised as "bounded on the west by the river Shannon," and as containing 31½ acres or thereabouts: it was held that half the soil of the bed of the river passed under these words, although a map annexed to the lease showed no boundary either on the bank or the middle of the river.

Way.

Where an annual sum was payable as tenants' damages, besides a way-leave rent for a coal railway passing through a farm, it was left to the jury to say whether the land covered by the railway passed by the agreement of letting to the tenant, because if it did the tenant, and not the landlord, was entitled to the sum payable as tenants' damages (*t*). A demise of a house and garden described the premises by boundaries which strictly would include a portion of a piece of ground at the back and adjoining the garden, which was laid out as a common walk for a row of houses; it was held, that this portion of the common walk was included in the premises demised, though by the lease a right was granted to the lessee of the use of the whole of the common walk (*u*).

Prehistoric Boat embedded in soil.

In the peculiar case of *Elwes* v. *Brigg Gas Co.* (*x*) the plaintiff had demised land to the defendants for 99 years, reserving minerals and impliedly authorizing excavations for the purpose of erecting a gasholder. In the course of the excavations, a wooden boat was found 6 feet below the surface. It was held by Chitty, J., that this boat was the property of the plaintiff, and ought to be at once delivered to him, the decision proceeding not on the ground that the boat was a mineral, but on the ground that the implied licence to remove the excavated soil could not extend to the boat, it not being known of or contemplated.

Effect of the word "Appurtenances."

The demise of a house "with the appurtenances" will pass the house, with the orchards, yards and curtilage and gardens, but not

(*n*) *Birch* v. *Stephenson*, 3 Taunt. 469; 12 R. R. 679; *Shipwith* v. *Green*, 1 Stra. 610.
(*o*) *Cromwell's case*, Dyer, 169 b.
(*p*) *Huddlestone* v. *Woodroffe*, 2 Roll. R. 61.
(*q*) *Rex* v. *Old Alresford*, 1 T. R. 358.
(*r*) *Pim* v. *Curell*, 6 M. & W. 234.
(*s*) *Dwyer* v. *Rich*, Ir. R., 6 C. L. 144, Exch.
(*t*) *Wilson* v. *Anderson*, 1 C. & K. 544.
(*u*) *Curling* v. *Mills*, 6 M. & G. 173.
(*x*) *Elwes* v. *Brigg Gas Co.*, 33 Ch. D. 562; 55 L. J., Ch. 734; 55 L. T. 831.

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the land; especially if it be at a distance, though occupied with the house; so the demise of a house "and the appurtenances" will not pass an adjoining building not accounted parcel of the house, although held with it for thirty years (*y*). So a demise of premises in Westminster, late in the occupation of A. (particularly describing them), part of which was a yard, was held not to pass a cellar situate under that yard, which was then occupied by B., another tenant of the lessor; for though primâ facie the property in the cellar would pass by the demise, yet that might be regulated and explained by circumstances (*z*). Under a demise of a messuage, with all rooms and chambers, and the appurtenances thereto belonging, is to be understood all that is occupied together as an entire messuage at one and the same time; therefore, such a demise will not comprehend a room which had once formed part of the messuage, but which had been separated from it by means of a wooden partition, and had not been occupied with it for many years previously to the demise (*a*).

Cellar.

Staircase.

In one case, the defendant being lessee of house A. took a lease from the plaintiff of the second and third floors of adjoining house B., and an opening in the wall between the two houses was made, the staircase down from the second floor of house B. being shut off by a partition. Before the lease of house B. had come to an end, the assignees of the reversion of house A. took possession, and closed up the opening between the two houses. It was held that the plaintiff was not then bound to allow the defendant the use of the staircase (*b*).

Outside walls of part of building let.

The letting of a studio work-room and drawing-room on the top floor of a building and the reception-room on the second floor has been held to include the part of the outer walls enclosing the part of the building let, and to entitle the tenant to remove an advertising sign put up on such part and put up an advertising sign of his own instead (*c*).

Stable.

So a stable will not pass under the renewed lease of a messuage with the appurtenances, which was not originally demised therewith and actually forms no part thereof (*d*).

Land adjoining a House.

Generally speaking, land will not pass as appurtenant to a house, but it may sometimes do so, to effectuate the obvious intention of the parties (*e*). Land cannot be appurtenant to a messuage in the

(*y*) *Fryan* v. *Wetherhead*, Cro. Car. 17.

(*z*) *Doe* d. *Freeland* v. *Burt*, 1 T. R. 701; 1 R. R. 367; *Press* v. *Parker*, 2 Bing. 456; 3 L. J., C. P. 96; 27 R. R. 687.

(*a*) *Kerslake* v. *White*, 2 Stark. 508; 20 R. R. 731.

(*b*) *Chappell* v. *Mason*, 10 T. L. R. 404—C. A., affirming Day, J.

(*c*) *Carlisle Café Co. and Todd* v. *Muse Brothers & Co.*, 42 S. J. 67; 67 L. J., Ch. 53; 77 L. T. 515, per Byrne, J.

(*d*) *Maitland* v. *Mackinnin*, 1 H. & C. 607; 32 L. J., Ex. 49.

(*e*) *Hill* v. *Grange*, Dyer, 130 b; Plow. 170, S. C.; *Baudeley* v. *Brook*, Cro. Jac. 189; *Hearn* v. *Allen*, Cro. Car. 57; *Roe* d. *Walker* v. *Walker*, 3 Bos. & P. 375; *Buck* d. *Whalley* v. *Nurton*, 1 Bos. & P. 53; cited 5 C. B., N. S. 463.

proper sense of the word; nor can one species of land be appurtenant to another, because the term is only properly applied to the annexation of incorporeal to corporeal hereditaments, in those cases in which the law permits such a union; but land may be appurtenant to a messuage in common parlance, as being usually occupied with it (*f*).

Easements.

There is a distinction between easements which are in their nature continuous and apparent, such as drains, &c., and other easements, such as ordinary rights of way, or the right to use a pump in adjoining land—the former pass by a devise or conveyance of the messuage without any general words; but the others must be created by an express grant (*g*).

"Appurtenances."

According to the current of the most recent decisions it would seem that nothing will pass under the word "appurtenances" which would not equally pass by a conveyance of the principal subject-matter, without the word "appurtenances" (*h*).

Rights of Way.

Under a lease of premises, "together with all ways appertaining, or with any parts thereof used or enjoyed," a right of way was held to pass, although not expressly mentioned, upon proof that it was used with the premises at the time the lease was granted (*i*); but where an underlease described the road demised and the ways granted by the words "all ways thereunto appertaining," it was held that a right of way over the original lessor's soil would not pass by these words (*k*). A grant of a close, "together with all ways, easements, and appurtenances thereto appertaining, and with the same now or heretofore used, occupied or enjoyed," will not pass a right of way over an adjoining close used by the grantor as owner of both closes, no such way having existed before the unity of possession became vested in him (*l*). Generally speaking, a right of way cannot pass under "appurtenances" (*m*). But a way of necessity may so pass (*n*). In the case of a formed road made over an alleged servient

(*f*) *Wilmore* v. *Cain*, Cro. Eliz. 918; *Anon.*, Moor. 221; Cro. Eliz. 16.

(*g*) *Fyer* v. *Carter*, 1 H. & N. 916; *Worthington* v. *Gimson*, 2 E. & E. 618; 29 L. J., Q. B. 116, 120; *Pearson* v. *Spencer*, 1 B. & S. 571, 583; 3 B. & S. 761; S. C., *Polden* v. *Bastard*, 4 B. & S. 258, 263; 32 L. J., Q. B. 372; S. C. (in error), L. R., 1 Q. B. 156; 7 B. & S. 130; 35 L. J., Q. B. 92.

(*h*) Cases supra; and see Shep. Touch. 89; 7 M. & W. 189; *Thomas* v. *Owen*, 36 W. R. 440.

(*i*) *Kooystra* v. *Lucas*, 5 B. & A. 830; *James* v. *Plant* (in error), 4 A. & E. 749; ante, Ch. III., Sect. 5.

(*k*) *Harding* v. *Wilson*, 2 B. & C. 96; 1 L. J., K. B. 238; 26 R. R. 287.

(*l*) *Thomson* v. *Waterlow*, L. R., 6 Eq. 36; 37 L. J., Ch. 495; *Langley* v. *Hammond*, L. R., 3 Ex. 161, 169; ante, Ch. III., Sect. 5.

(*m*) *Worthington* v. *Gimson*, 2 E. & E. 618; 29 L. J., Q. B. 116; *Clements* v. *Lambert*, 1 Taunt. 205; 9 R. R. 749; *Plant* v. *James*, 5 B. & Adol. 791; 4 A. & E. 749, 761; *Ackroyd* v. *Smith*, 9 C. B. 689; 10 C. B. 164; *Dodd* v. *Burchill*, 1 H. & C. 113, 121; 31 L. J., Ex. 364; *Thomson* v. *Waterlow*, L. R., 6 Eq. 36; 37 L. J., Ch. 495; *Langley* v. *Hammond*, L. R., 3 Exch. 161, 169.

(*n*) *Pinnington* v. *Galland*, 9 Exch. 1; 22 L. J., Ex. 348; *Pheysey* v. *Vicary*, 16 M. & W. 484; *Hinchcliffe* v. *Earl of Kinnoul*, 5 Bing. N. C. 1; *Davies* v. *Sear*, L. R., 7 Eq. 427.

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tenement to and for the apparent use of the dominant tenement, there is an implied reservation of the right of way on a demise of the soil of the road, although the easement be neither continuous nor of necessity. In such a case a subsequent demise of the dominant tenement "together with the appurtenances belonging thereto" will pass the right of way (*o*).

Encroachments during term by tenant on landlord's adjoining land.

In *Tabor* v. *Godfrey* (*p*) the tenant under a lease for years encroached upon and occupied a piece of land belonging to his landlord and adjoining the demised premises for more than twelve years. The landlord during the term brought an action for an injunction and damages for trespass. It was held by Charles, J. (who tried the action without a jury), that the action would not lie. The tenant must be deemed to have occupied the piece of land as part of the holding, and was entitled so to occupy it for the remainder of his lease.

### (b) "*General Words*" *implied by Conveyancing Act*, 1881.

Conv. Act, 1881, s. 6.

If the lease be by deed, and bear date on or after 1st Jan., 1882, certain "general words" are implied by virtue of the Conveyancing Act, 1881, 44 & 45 Vict. c. 41, by s. 2, sub-s. (v.), of which "conveyance" includes a lease made by deed; for s. 6 of that act enacts that:—

Lease of Land.

"(1.) A conveyance of land shall be deemed to include and shall by virtue of this act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, water-courses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or at the time of the conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof.

Lease of Buildings.

"(2.) A conveyance of land, having houses or other buildings thereon, shall be deemed to include and shall by virtue of this act operate to convey, with the land, houses, or other buildings, all outhouses, erections, fixtures, cellars, areas, courts, courtyards, cisterns, sewers, gutters, drains, ways, passages, lights, water-courses, liberties, privileges, easements, rights and advantages whatsoever, appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them, or any part thereof, or at the time of the conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to, the land, houses, or other buildings conveyed or any of them, or any part thereof.

Lease of Manor.

"(3.) A conveyance of a manor shall be deemed to include and shall by virtue of this act operate to convey, with the manor, all pastures, feedings, wastes, warrens, commons, mines, minerals, quarries, furzes, trees, woods, underwoods, coppices, and the ground and soil thereof, fishings, fisheries, fowlings, courts leet, courts baron, and other courts, view of frankpledge and all that to view of frankpledge doth belong, mills, mulctures, customs,

(*o*) *Thomas* v. *Owen*, 36 W. R. 440—C. A., affirming decision below.

(*p*) *Tabor* v. *Godfrey*, 64 L. J., Q. B. 245.

tolls, duties, reliefs, heriots, fines, sums of money, amerciaments, waifs, estrays, chief rents, quit rents, rents charge, rents seek, rents of assize, fee farm rents, services, royalties, jurisdictions, franchises, liberties, privileges, easements, profits, advantages, rights, emoluments, and hereditaments whatsoever, to the manor appertaining or reputed to appertain, or at the time of conveyance demised, occupied or enjoyed with the same, or reputed or known as part, parcel, or member thereof.

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"(4.) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and shall have effect subject to the terms of the conveyance and to the provisions therein contained.

Application of Section.

"(5.) This section shall not be construed as giving to any person a better title to any property, right, or thing in this section mentioned than the title which the conveyance gives to him to the land or manor expressed to be conveyed, or as conveying to him any property, right, or thing in this section mentioned, further or otherwise than as the same could have been conveyed to him by the conveying parties.

"(6.) This section applies only to conveyances made after the commencement of this act."

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## Sect. 6.—*Term granted.*

### (a) *The Habendum.*

Office and use of the Habendum.

The habendum is that part of the lease which begins with "to have and to hold," and properly succeeds the premises: its office is to limit with certainty the estate: it may also abridge or alter the generality of the premises (*q*); in short, it fixes the quality and quantity of the estate, and ascertains the meaning of the premises, but cannot contradict or destroy them (*r*). Its operation as a grant is merely prospective from the time of the execution of the lease: the term is then first created (*s*); but the duration of it is to be computed from the day in that behalf mentioned in the habendum (*t*). By indenture dated and made on 19th July, 1851, A. demised to B., to hold from 25th December, 1849, for the term of fourteen years thence next ensuing, determinable as therein mentioned; provided, that either party might determine the demise at the expiration of the first seven years thereof by six months' notice: held that the seven years were to be reckoned from the 25th December, 1849, and that the lease might be determined on 25th December, 1856 (*t*). The word "term" in a covenant in a lease may signify either the time or the estate granted (*u*). Where a lease was made on the 10th of October,

(*q*) Shep. Touch. 75; Com. Dig. tit. *Fait* (E. 9); 2 Prest. Conv. 439, 442.

(*r*) Plowden, 153; *Cocking* v. *Heathcote*, Lofft, 190; *Doe* d. *Timmis* v. *Steele*, 4 Q. B. 663; *Bird* v. *Baker*, 1 E. & E. 12; 28 L. J., Q. B. 7; Smith L. & T. 104 (2nd ed.).

(*s*) *Jerris* v. *Tomkinson*, 1 H. & N. 195, 206; *Shaw* v. *Kay*, 1 Exch. 412; *Lewis* v. *Hilliard*, 1 Sid. 374; *Wyburd* v. *Tuck*, 1 B. & P. 464.

(*t*) *Bird* v. *Baker*, 1 E. & E. 12; 28 L. J., Q. B. 7.

(*u*) *Evans* v. *Vaughan*, 4 B. & C. 261; 3 L. J., K. B. 213; 6 D. & R. 349; 28 R. R. 250; *Wright* d. *Plowden* v. *Cartwright*, 1 Burr. 282; 1 Ld. Ken. 529; *Green* v. *Edwards*, Cro. Eliz. 216; *Cottee* v. *Richardson*, 7 Exch. 151.

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habendum from the 20th day of November (not saying in what year) for five years, the court held that the lease was void for uncertainty (*x*). But where a lease was made for years, to begin at the feast of our Lady Mary (without expressing what feast, whether of the Annunciation, Purification, &c.), the court held the lease to be good, and that the lessee by his entry might determine at which of the said feasts the term should begin (*y*). A lease to one for life, habendum to his three sons successively, but omitting to mention the sons in the premises of the deed, was held to be for the life of the father only, and that the sons should not take in possession, or by way of remainder; for it being limited to the father for his life, that was a greater estate than for the lives of others; and the three sons were named as persons to have an estate, and not to make a limitation of an estate (*z*).

Discrepancy between Habendum and Reddendum. *Burchell* v. *Clark*.

The ordinary rule is, that where there is a discrepancy between the habendum and the reddendum, the habendum must prevail (*a*); but this rule does not apply where on the face of the lease the habendum is wrong (*b*).

(b) *Lease for Life of the Lessee.*

Lease for Life of the Lessee.

An estate for life may be created by deed, either by express limitation or by a grant in general terms. Thus a grant by A. to B. of the manor of Dale gives to B. an estate for his life (*c*). This, however, would be otherwise if a contrary intention could be collected from the terms of the deed (*d*). Where A. demises to B. for the term of *his* natural life, the demise is primâ facie for the life of B.; but where A. demised to B., his executors and administrators, for the term of *his* natural life, and the lease contained a covenant by A. for the quiet enjoyment of the premises by B., his executors, &c., during the natural life of A., it was held that the word "his" in the demising clause must be referred to A., the grantor, and not to B., though his name was the last antecedent (*e*).

Absolute or Conditional.

Estates for life granted absolutely will, generally speaking, endure as long as the life for which they are granted (*f*); but there are some estates for life which may determine upon future contingencies, before the life for which they are granted expires: as where a lease is to a man quamdiu se bene gesserit; to a woman durante viduitate or dum sola; to husband and wife during coverture; to A., as long as he inhabits or pays such rent, or till he be preferred to such a benefice, or till out of the profits he has paid 100*l.* or other

(*x*) *Anon.*, 1 Mod. 180.
(*y*) *Anon.*, 1 Leon. 227.
(*z*) *Windsmore* v. *Hubbard*, Cro. Eliz. 57.
(*a*) Shep. Touch. 52.
(*b*) *Burchell* v. *Clark*, 2 C. P. D. 88; and see ante, p. 137.
(*c*) Co. Lit. 42 a, 183 a.
(*d*) *Doe* d. *Pritchard* v. *Dodd*, 5 B. & Ad. 689; Co. Lit. 42 a.
(*e*) *Doe* d. *Pritchard* v. *Dodd*, supra.
(*f*) 2 Blac. Com. 121.

sum:—in these and the like cases, the duration of the estate depends merely upon the condition (*g*). But the estate is as perfect an estate for life until the event take place, as if it had been granted absolutely. A lease for years, if the lessee so long live, with a remainder to another for the residue of the term, must be construed to give the remainderman a power to enjoy during all the residue of the years to come (*h*).

### (c) *Lease for Lives.*

Origin of the Lease for Lives.

The lease for the lives of persons other than the lessee, or as it is commonly called, the "lease for lives" has, notwithstanding its speculative character, been common from very ancient times in many parts of England (*i*), chiefly in the west, or where the landlords have been ecclesiastical corporations. Such a lease confers a freehold interest upon the lessee, whereas a lessee for years has a chattel interest only (*k*), and this is why the lease for lives has so long continued in favour, continuing by mere force of habit, long after the causes for its retention have ceased to operate. It is, however, believed to be gradually falling into desuetude, and, indeed, the objections to it in modern times are too obvious to dwell upon.

Commencement of Leases of Lives.

A lease for lives, to begin from the day of the date thereof, is good and will not be said to convey a freehold to commence in futuro (*l*): so a lease to hold the lessee for his life, which term shall begin after the determination of a previous term for three lives is good (*m*). But, although the above rule prevails at common law as to leases in futuro, a very different rule of law prevails in cases of limitations taking effect under the Statute of Uses, or as devises or trusts (*n*). And now, by the Real Property Act, 1845, 8 & 9 Vict. c. 106, s. 2, "all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery."

Construction of the Grant for Lives.

The grant of a lease for several lives of which one is not in existence at the date of the grant is good only for the lives which are in existence at such date (*o*).

(*g*) Co. Lit. 42 a.

(*h*) *Wright* d. *Plowden* v. *Cartwright*, 1 Burr. 282; 1 Ld. Ken. 529; Shep. Touch. 272.

(*i*) The lease for lives is also very common in Ireland. See Furlong's Landlord and Tenant, bk. ii., ch. 4.

(*k*) From the lease for lives giving the lessee an estate of freehold, whereas the lessee for years had no freehold, but only a chattel interest, it resulted (1) that the lessee for lives had the right to reinstatement after eviction, whereas the lessee for years had only a right to damages; (2) that the lessee for lives had the parliamentary franchise (not obtained by the lessee for years until 1832); and (3) that the lessee for lives had an estate descendible free from debts.

(*l*) *Freeman* d. *Vernon* v. *West*, 2 Wils. 165.

(*m*) *Underhay* v. *Underhay*, Cro. Eliz. 296.

(*n*) *Rivis* v. *Watson*, 5 M. & W. 255; *Gilbertson* v. *Richards*, 4 M. & N. 277; 5 Id. 453.

(*o*) *Doe* d. *Pemberton* v. *Edwards*, 1 M. & W. 553.

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How far Subsistence of Lease for Lives warranted.

*Coates* v. *Collins.*

It was held by a Court of Appeal, in *Coates* v. *Collins* (*p*), that a covenant in a lease for lives, that the lease is good for the lives for which it is granted, does not warrant the subsistence of the lives. Therefore, where the defendant assigned a lease for the lives of W., J., and H., and the survivors and survivor of them, and covenanted that the lease was "a good and valid lease" for such lives, and was "not forfeited, surrendered, or become void or voidable," and J. had died before the making of the assignment, the plaintiff failed to recover as for a breach of covenant.

Devolution of Lease for Lives on Death of Lessee.

At common law a lease for lives to the lessee only, without naming a successor, entitled any person whatever, upon the death of the lessee, to enter upon the demised premises, as "general occupant," and to continue in possession till the last of the lives dropped (*q*), but such a lease to the lessee, his heirs and assigns, entitled the heir to enter as "special occupant," and perhaps also the executor (*r*). The 12th section of the Statute of Frauds made the estate pur autre vie devisable by will, and provided that it should be chargeable as assets either in the hands of the heir or executor, if no devise should be made. The 6th section of the Wills Act, 1837, 1 Vict. c. 26, after giving an absolute disposing power by will, and repealing s. 12 of the Statute of Frauds, provides that:

Wills Act, s. 6.

"If no disposition by will shall be made of any estate pur autre vie of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee-simple; and in case there shall be no special occupant of any estate pur autre vie, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator either by reason of a special occupancy or by virtue of this act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate."

Effect of Land Transfer Act, 1897.

The effect of s. 1 of the Land Transfer Act, 1897, 60 & 61 Vict. c. 65, appears to be, a lease for lives being real estate, to vest the lease for lives in the personal representatives of the lessee, as trustees for the heir in case it come to him as special occupant.

Proof of Death of *cestui que vie.*

It is of the essence of the estate pur autre vie that one of the lives should be in existence, and at common law the burden of proof of death lay upon the party seeking to take advantage of it, who would in all ordinary cases, unless the covenants should be very onerous,

(*p*) *Coates* v. *Collins*, L. R., 7 Q. B. 144; 41 L. J., Q. B. 90; 26 L. T. 134. Lush, J., dissented in the court below. The Exchequer Chamber was unanimous, both on principle and on the authority of *Basket* v. *Scott*, Roll. Abr. vol. ii. p. 249.

(*q*) Co. Litt. 41 b.

(*r*) See Platt on Leases, vol. i. p. 689, and the cases there cited.

be the reversioner. To remedy this inconvenience the statute 19 Car. 2, c. 6, was passed, which shifted the burden of proof in many cases by the enactment that if persons for whose lives estates have been granted shall remain beyond the seas, or elsewhere absent themselves in this realm by the space of seven years together, and no sufficient and evident proof be made of the lives of such persons, in any action for the recovery of the tenements, "the persons upon whose lives the estate depended shall be accounted as naturally dead, and the judges before whom such action shall be brought shall direct the jury to give their verdict as if the person so remaining beyond the seas, or otherwise absenting himself, were dead." The 3rd section of the same act allows the plaintiff in any such action to challenge any juror the greatest part of whose real estate is held by lease or copy for lives, and the 4th section provides for the reinstatement, with damages against the lessor for mesne profits, of any lessee evicted by virtue of the act who shall afterwards be able to prove that the cestui que vie, whose death was presumed, was in fact alive.

Presumption of Death after 7 Years.
19 Car. 2, c. 6.

There is no legal presumption as to the time of the death of a cestui que vie (*s*); the fact of his having been alive or dead at any time during the seven years must be proved by the party relying on it (*t*), and it will be seen from the Cestui que Vie Act, 1707, 6 Ann. c. 18 [72 in the Revised Statutes], s. 5, which will be presently referred to, that the lessor can recover mesne profits from a lessee holding over after the dropping of the last life. Where a lease for lives contained a covenant that the lessee would produce a cestui que vie, or make it appear, if he should be abroad, that he was living, it was held that it was not enough for the lessee to depose to circumstances from which one jury might infer that the cestui que vie was living, and another not (*u*).

A further and very stringent act in favour of lessors, but chiefly applicable only in the case of fraud, is the Cestui que Vie Act, 1709, 6 Ann. c. 18 [72 in the Revised Statutes], whereby a lessor for lives upon affidavit made that he has cause to believe that the cestui que vie is dead, and that his death is concealed by any person, may, once a year, move the High Court for an order upon the person concealing the death to produce the cestui que vie to one or two persons named in order. Upon a failure to obey such order, the court is "authorized and required" (*x*) to make a further order for the production of the cestui que vie before the court itself or before Commissioners to

Production of *cestui que vie*.
6 Ann. c. 18.

(*s*) *Nepean* v. *Doe*, 2 M. & W. 894 (in error), 5 B. & Ad. 86.
(*t*) Ib. *Holman* v. *Exton*, Prec. Ch. 246.
(*u*) *Randle* v. *Long*, 6 Ad. & E. 218.
(*x*) The court has no discretion, but is bound to make this order. See *re Isaac*, 4 M. & C. 11.

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Production of *cestui que vie*—*contd.*

be appointed by the court (two of them upon the nomination of the party prosecuting the order) (*y*). Upon failure to comply with such further order, the cestui que vie is to be taken to be dead, and the lessor is empowered to enter upon the demised premises. By s. 2 of the act, an affidavit that the cestui que vie "is or lately was at some certain place beyond the seas," the party prosecuting the order may send over persons to procure a personal view of him, and if such view cannot be had, to make a return to the court to that effect, whereupon the lessor may enter as if he were dead; by s. 3, the lessee for lives may re-enter if after order made it should turn out that the cestui que vie was in fact alive, and by s. 4 if the lessee for lives prove that he has used all endeavours to produce the cestui que vie, and also that such cestui que vie is in fact alive, he may continue in possession.

Lessee for Lives holding over after dropping of last Life, a Trespasser.

The 5th section of the Cestui que Vie Act, 1709, is a very important one, inasmuch as it constitutes a trespasser any lessee for lives holding over after the determination of the last life, whether he knew of such determination or not. The section is as follows:—

Cestui que Vie Act, 1709, s. 5.

Every person who, as guardian or trustee for any infant, and every husband seised in right of his wife only, and every other person having any estate determinable upon any life or lives, who after the determination of such particular estates or interests, without the express consent of him, her or them, who are or shall be next and immediately entitled upon and after the determination of such particular estates or interests, shall hold over and continue in possession of any manors, messuages, lands, tenements, or hereditaments, shall be and are hereby adjudged to be trespassers, and every person and persons, his, her, and their executors and administrators, who are or shall be entitled to any such manors, messuages, lands, tenements, and hereditaments, upon or after the determination of such particular estates or interests, shall and may recover in damages against every such person or persons so holding over as aforesaid, and against his, her, or their executors or administrators the full value of the profits received during such wrongful possession as aforesaid.

Renewal.

Leases for lives frequently contain a covenant for renewal. The effect of such covenants is considered hereafter (Ch. IX.).

### (d) *Commencement of Terms for Years.*

Certainty in Commencement.

As a lease *for years* is a mere chattel, it may be made to commence either presently or at a future period, at a date to come, as at *Michaelmas* next, or at three or ten years after, or after the death of the lessor, or of J. S. (*z*). A lease to commence upon the expiration of a previous lease conveys only an interesse termini until the

(*y*) For instances of orders made under this act, see *re Lingen*, 12 Sm. 104; *re Clossy*, 2 Sm. & G. 46; *re Dennis*, 8 W. R. 649; 7 Jur., N. S. 230; *re St. John's Hospital*, 18 L. T. 12; 16 W. R. 556.

(*z*) Shep. Touch. 273.

expiration of the previous lease, and does not amount to an assignment of the reversion expectant on such lease (*a*). After the day appointed for the commencement of the term, an interesse termini is sufficient to support an entry or ejectment (*b*). All leases for years, whether they begin in præsenti or in futuro, must be certain: that is, they must have a certain beginning and a certain ending, and so the continuance of the term must be certain: otherwise they are not good (*c*). Unless the time of the commencement of the lease be stated, it cannot be known when the rent is to become due or when the landlord is entitled to distrain for it. But, though the commencement of a term must be fixed with certainty, it will be sufficient if it be so fixed when the lease is to take effect in interest or possession; for until that time it may depend upon an uncertainty, viz., either a possible contingency, which is to precede the interest or possession, or upon a limitation or condition subsequent; but where it is to be reduced to a certainty upon a precedent contingency, such contingency must happen in the lives of the parties (*d*).

Commencement on the Determination of prior Lease.

A lease to commence after the determination of a prior lease begins at once, if the previous lease be void at law: so a lease intended to commence in future, which misrecites the prior lease on which it depends in a material point, begins immediately (*e*). But if the new lease had misrecited a lease to A., and had then been made for twenty-one years, to commence after the expiration of the term of A., the misrecital would be unimportant, and the new lease would begin from the determination of A.'s term (*f*).

Commencement from Date of Lease.

Unless there is Evidence to the contrary.

"From."

If no date is fixed for the commencement of the tenancy, it is usually taken to commence at the date of the lease. This, however, may be negatived by internal evidence, as where a lease dated on the 20th of December was held, from the fact that the first payment of a quarterly rent was to be on the 25th of March, to commence on 25th of December (*g*). The words "from the day of the date" mean either *inclusive* or *exclusive*, according to the context and subject-matter; and the court will construe them so as to effectuate the intention of the parties (*h*). Generally speaking, a lease from 25th March commences the next day and ends on 25th March,

(*a*) *Smith* v. *Day*, 2 M. & W. 684; *Blatchford*, app., *Cole*, resp., 5 C. B., N. S. 514; *Lock* v. *Furze*, 19 C. B., N. S. 96, 103, 105; L. R., 1 C. P. 441; 34 L. J., C. P. 201; 35 Id. 141.

(*b*) Cole Ejec. 72, 287, 459.

(*c*) 2 Blac. Com. 144; Shep. Touch. 267, 272.

(*d*) Shep. Touch. 272, 273; *Doe* d. *Hall* v. *Richardson*, 3 T. R. 462; 21 R. R. 513.

(*e*) Co. Litt. 46 b.

(*f*) *Foote* v. *Berkeley*, 1 Lev. 235; *Woodhouse's case*, Dyer, 93 b.

(*g*) *Sandill* v. *Franklin*, L. R., 10 C. P. 377; 44 L. J., C. P. 216; 32 L. T. 309; 23 W. R. 473.

(*h*) *Pugh* v. *Duke of Leeds*, Cowp. 714; *Ackland* v. *Lutley*, 9 A. & E. 879; Bac. Abr. tit. *Leases* (L. 1); Smith L. & T. 104, 105 (2nd ed.).

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otherwise the day on which the last quarter's rent is usually reserved would be subsequent to the expiration of the lease (*i*). A lease "from the day of the date," and "from henceforth," is the same thing (*k*). Sometimes a lease "from the day of the date" will be construed to mean "from the day of the execution of the deed" (*l*), but the more literal construction is usually adopted (*m*).

Impossible or uncertain Date.

As to an impossible or uncertain date, there appears to have been this distinction taken in the books, viz. that if a lease be made to begin from an impossible date, as from the 30th of February, or the like, it takes effect from the delivery (*n*). So if the lease be dated and is to commence from the "making hereof," or "from henceforth" (*n*) or from the executing of a former lease, and no such lease in fact exist, or if the prior lease be void in law (*o*); but where the limitation is uncertain, as a lease made the 10th day of October, to hold from the 20th day of November, without saying what November is meant, the lease is thereby vitiated, because the limitation is part of the agreement and the court cannot determine it, not knowing the terms of the contract (*p*). Where a deed has no date, or an impossible date, as the 30th of February, and in the deed reference is made to the date, that word must be construed "delivery;" but if it have a sensible date, the word *date* occurring in other parts of the deed means the day of the date and not of the delivery; and therefore, in covenant on an indenture of lease dated the 24th day of December, 1822, whereby the defendant agreed, within twenty-four calendar months then next after the date of the indenture, to procure a certain thing to be done: it was held, that the deed took effect from the day of the date, and that the twenty-four calendar months reckoned from the date (*q*). Where a lease was dated 25th March, 1783, habendum "from the 13th March *now last past*," and it was proved that the deed was not executed until some time after the date, it was held, that the term commenced on the 25th March, 1783, and not in 1782 (*r*). A deed having been made in the month of August in a leap year, the words "the 29th February then next ensuing" were construed to mean the 29th February in the next leap year (*s*). A lease operates as a grant only from the time of its execution, and the tenant is not liable for previous

Commencement from delivery, where no Date.

(*i*) *Ackland* v. *Lutley*, supra; *Wilkinson* v. *Gaston*, 9 Q. B. 137.

(*k*) *Llewellyn* v. *Williams*, Cro. Jac. 258; *Clayton's case*, 5 Rep. 1.

(*l*) *Underhill* v. *Horwood*, 10 Ves. 209.

(*m*) *Doe* d. *Cox* v. *Day*, 10 East, 427; 10 R. R. 345; *Steele* v. *Mart*, 4 B. & C. 272; 28 R. R. 256; *Styles* v. *Wardle*, 4 B. & C. 908; 28 R. R. 501; 4 L. J., K. B. 81; *Cooper* v. *Robinson*, 10 M. & W. 694; *Doe* d. *Darlington* v. *Ulph*, 13 Q. B. 204; *Bird* v. *Baker*, 1 E. & E. 12.

(*n*) *Styles* v. *Wardle*, 4 B. & C. 908.

(*o*) *Miller* v. *Mayuwaring*, Cro. Car. 397; *Bassett* v. *Lewis*, 1 Lev. 77.

(*p*) Bac. Abr. tit. *Leases* (L. 1); *Anon.*, 1 Mod. 180; *Foote* v. *Berkeley*, 1 Sid. 164.

(*q*) *Styles* v. *Wardle*, 4 B. & C. 908.

(*r*) *Steele* v. *Mart*, 4 B. & C. 272.

(*s*) *Chapman* v. *Beecham*, 3 Q. B. 723.

breaches of covenant, although committed after the date of the deed (*t*). But the duration of the term is to be computed from the day in that behalf mentioned in the lease (*u*).

Commencement with reference to Entry.

In general a letting by parol will be considered to commence from the day of the tenant's entering, and not with reference to any particular quarter day (*x*). But where a tenant entered in the middle of a quarter, and afterwards paid for that time to the beginning of a succeeding regular quarter, from which time he paid half-yearly, his tenancy was held to commence from the quarter succeeding his entering (*y*). Where, however, the tenant entered in the middle of a quarter, upon an agreement to pay rent "quarterly and for the half-quarter," the jury, under the judge's direction, found that the tenancy commenced from the quarter day preceding the entry (*z*). A party having taken possession on the first of August, and at the Michaelmas following paid the half-quarter's rent, and continued afterwards to pay quarterly on the usual feast days, it was held, that a notice to quit at Michaelmas was sufficient; and that although the landlord had at first given notice expiring with the half-quarter, it was not necessarily to be inferred from that circumstance that the tenancy from year to year commenced on that day (*a*). Where a tenant under a lease continued to hold after the expiration of it as a tenant at will, and assigned it to another, the tenancy of the assignee was held to commence at the day on which the original tenancy commenced under the lease, notwithstanding the assignee came in on a different day (*b*).

Different Computation of Time and Interest.

A lease may commence at one day in point of computation, and at another in point of interest (*c*), and it may commence from a day that is past; therefore, a lease "to hold from a day past for fifty years then next ensuing, the said term to commence and begin immediately after the determination of an existing lease in the same premises," was not esteemed uncertain as to its commencement (*d*).

Leases to commence on the happening of Contingencies.

If when the lease is to take effect in interest or possession the years be certain, it is sufficient, for until that time it may depend upon an uncertainty; either upon a possible contingency precedent to its beginning in possession or interest, or upon a limitation or condition subsequent; but if it is to be reduced to a certainty upon a

(*t*) *Shaw* v. *Kay*, 1 Exch. 412; *Jervis* v. *Tomkinson*, 1 H. & N. 195, 206.
(*u*) *Bird* v. *Baker*, 1 E. & E. 12; 28 L. J., Q. B. 7.
(*x*) *Kemp* v. *Derrett*, 3 Camp. 510; 14 R. R. 820.
(*y*) *Doe* d. *Holcomb* v. *Johnson*, 6 Esp. 10; 9 R. R. 800.
(*z*) *Doe* d. *Wadmore* v. *Selwyn*, Hil. T. 1807; Adams. Ejec. 107 (4th ed.).
(*a*) *Doe* d. *Savage* v. *Stapleton*, 3 C. & P. 275.
(*b*) *Doe* d. *Castleton* v. *Samuel*, 5 Esp. 173; 8 R. R. 845.
(*c*) Smith L. & T. 106 (2nd ed.).
(*d*) *Enys* v. *Donnithorne*, 2 Burr. 1190; *Moore* v. *Musgrove*, Hob. 18; 2 Roll. Abr. 850.

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contingency precedent, the contingency must have happened in the lives of the parties (*e*).

Though there appear no certainty of years in the lease, yet if by reference to a certainty it may be made certain, it is sufficient (*f*). Thus if a lease be granted for years after lives in being, though it is uncertain at first when that term will commence, because those lives are in being, yet when they die it is reduced to a certainty, and that is certain which can be rendered so (*g*). So a lease may be granted for a term of years to commence at the determination of a previous term for years which is still subsisting (*h*). If the lease be made to commence from the end and expiration of the previous term, then, if the previous term be surrendered or forfeited, &c., the second term commences immediately; but if made to commence after the end and expiration of the twenty-one years aforesaid, then the second term would not commence until after the expiration of the twenty-one years (*i*). Where a lessor let Whiteacre to A. for twenty years, and Blackacre to B. for forty years, and then demised both to C. for a term of years, habendum from the end or determination of the said several demises to A. and B., it was held, that as to Whiteacre the term granted to C. commenced immediately upon the expiration of that granted to A., and was not to be deferred until the expiration of the demise to B. (*k*). Where a lease is thus made to A., reciting a former one to B., and demising for a term of years to commence at the determination of B.'s lease, if in fact no such lease had been made to B., then A.'s term will commence at once (*l*); and the same if the lease be void (*m*). But if there be such a former lease, and it be misrecited in a material part in the second, then the new lease can commence presently only in the enumeration of years, but not in interest until the expiration of the first lease (*n*). If A. seised of lands in fee grant to B. that, when B. shall pay to A. twenty shillings, from thenceforth he shall hold the lands for twenty-one years, and afterwards B. pay the twenty shillings: in this case B. has a good lease for twenty-one years from the date of the payment (*o*). If one make a lease to another for so many years as J. S. shall name, this at the beginning

Reference to a Certainty may cure an Uncertainty.

(*e*) Shep. Touch. 272.

(*f*) Id.

(*g*) *Goodright* v. *Richardson*, 3 T. R. 463; Bac. Abr. tit. *Leases* (K.); Bro. Abr. tit. *Leases*, 71; *Clarke* v. *Sydenham*, Yelv. 85; S. C., 1 Brownl. & G. 136.

(*h*) 1 Roll. Abr. 849; Dyer, 261 b, pl. 28; *Lord Paget's case*, 1 Leon. 199; *Smith* v. *Day*, 2 M. & W. 684; *Blatchford*, app., *Cole*, resp., 5 C. B., N. S. 514; *Doe* d. *Agar* v. *Brown*, 2 E. & B. 331.

(*i*) Co. Lit. 45 b; *Wrotesley* v. *Adams*, Dyer, 177, pl. 35; Plowd. 198.

(*k*) *Windham's case*, 5 Co. R. 7; Moor. 191; Cro. Eliz. 199; 2 Leon. 105.

(*l*) Bac. Abr. tit. *Leases* (L. 1).

(*m*) Id.; Co. Lit. 46 b.

(*n*) Bac. Abr. tit. *Leases* (L. 1); Co. Lit. 46 b. As to misrecital of date, see *Rowe* v. *Huntingdon*, Vaugh. 73; Bac. Abr. tit. *Leases* (L. 1); *Palmer's case*, 4 Co. R. 74.

(*o*) Shep. Touch. 273; Co. Lit. 45 b; 6 Co. R. 35 a; 1 Roll. Abr. 849.

is uncertain; but when J. S. has named the years (in the lifetime of the lessor) this ascertains the commencement and continuance of the lease accordingly: but if the lease had been made for so many years as the executors of the lessor should name, this could not be made good by any nomination (*p*). A lease made to another, until a child en ventre sa mère shall come to the age of twenty-one years, is not good as a lease for years but at will only (*q*).

### (e) *Duration of Term granted.*

What Certainty is requisite generally.

The duration of leases for years ought to be ascertained either by the express limitation of the parties at the time of making, or by a reference to some collateral act, which may with equal certainty measure the continuance thereof, otherwise they will be void (*r*). So an agreement for a lease must mention the term, and from what day it is to commence, otherwise it will not be sufficient to satisfy the Statute of Frauds (*s*). A demise for "one year from the date hereof, and so on from year to year, until determined by three months' notice," has been held to create a tenancy for two years at the least, determinable at the end of the second or any subsequent year by notice expiring at the end of such year (*t*). So a demise "for six months, and so on from six months to six months until determined by either party," will create a tenancy for one year at the least (*u*). So a demise may be made from two years to two years, or from three years to three years, or the like (*x*). So a lease may be made for seven years, and afterwards from year to year (*y*), but an agreement to let from year to year, and for so long as the tenant pays rent, and the landlord has power to let, confers no particular estate beyond a tenancy from year to year (*z*). An instrument, by which A. agreed to let and B. to take certain premises, on the terms that B. should pay certain specified sums varying in amount at the end of every three years up to a specified date, and which provided that from and after that date "*he should pay the clear annual rental of 9l. till the end of the lease*," without mentioning any period at which the lease was to terminate, was held good only for the time previous to the date at which the 9*l.* was to commence (*a*).

*Doe* d. *Chadborn* v. *Green.*

(*p*) Bac. Abr. tit. *Leases* (L. 2); Co. Lit. 45 b; 2 Leon. 86; Plowd. 6, 373, 524.

(*q*) *Say* v. *Smith*, Plowd. 271; *Bishop of Bath's case*, 6 Co. R. 35 b; Bac. Abr. tit. *Leases* (L. 3).

(*r*) Bac. Abr. tit. *Leases* (L. 3).

(*s*) *Bayley* v. *Fitzmaurice*, 9 H. L. Cas. 78; and ante, p. 96.

(*t*) *Doe* d. *Chadborn* v. *Green*, 9 A. & E. 658. (In some previous editions of this work the expression "one year *certain*" occurred in the text by mistake; as to this see Chap. VIII., s. 7 (b), post.)

(*u*) *Rex* v. *Chawton*, 1 Q. B. 247.

(*x*) *Hennings* v. *Brabason*, 2 Lev. 45; *Roe* d. *Bree* v. *Lees*, 2 W. Blac. 1171; 3 Prest. Conv. 76. And see *Richards* v. *Sely*, 2 Mod. 80; 3 Keb. 638.

(*y*) *Brown* v. *Trumper*, 26 Beav. 11.

(*z*) *Wood* v. *Beard*, 2 Ex. D. 30; 46 L. J., Q. B. 100; 35 L. T. 866.

(*a*) *Gwynne* v. *Maynestone*, 8 C. & P. 302.

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If a man grant another lease of land for ten years, and that if at the end of every ten years he shall pay the lessor a certain quantity of tiles, then he shall have a perpetual demise of the land from ten years to ten years continually following: this is a good lease for ten years only, and bad as to the rest for uncertainty (*b*). If a man make a lease for years, without saying how many, it is a good lease for two years certain; because for more there is no certainty, and for less there can be no sense in the words (*c*); but if a man lease lands for such a term as both parties shall please, it is but a lease at will (*d*).

Certainty with reference to collateral Matters.

Determination of Tenancy from Year to Year at end of First Year.

A tenancy from year to year is determinable at the end of the first as well as of any subsequent year, unless in creating such tenancy the parties use words showing that they contemplate a tenancy for two years at least (*e*). If premises are taken "for twelve months certain, and six months' notice to quit afterwards," the tenancy may be determined at the end of the first year by a six months' previous notice to quit (*f*).

Tenancy for Two Years certain.

A lease for one year and so on from year to year until the tenancy thereby created should be determined as after mentioned, with a provision that either party might determine the tenancy by three months' notice, creates a tenancy for two years certain (*g*). A demise for a year, and so from year to year, is, as we have seen, a lease for two years certain at least (*g*): so if a parson make a lease for a year, and so from year to year as long as he shall continue parson, or as long as he shall live; this is a lease for two years at least, if he live or continue parson so long (*h*).

Tenancy for One Year.

A lease for "the term of six months, from the 1st of January, and so on for six months to six months," until six calendar months' notice is given, the first payment of rent to be on the 1st of July, is a tenancy for twelve calendar months at least (*i*).

Lease until Premises required to be pulled down.

Where a railway company let premises on a weekly tenancy, with a collateral agreement that the tenant might have them until the company required to pull them down, it was held that the company, on requiring the premises for their own occupation, and not to pull them down, might determine the tenancy at a week's notice (*k*).

(*b*) *Say* v. *Smith*, Plowd. 271.

(*c*) *Bishop of Bath's case*, 6 Co. R. 35; Bac. Abr. tit. *Leases* (L. 3).

(*d*) Bac. Abr. tit. *Leases* (L. 3); *Bishop of Bath's case*, supra; Com. Dig. *Estates* (H. 1); *Richardson* v. *Langridge*, 4 Taunt. 128; 13 R. R. 570.

(*e*) *Doe* d. *Clarke* v. *Smaridge*, 7 Q. B. 957; *Doe* d. *Plumer* v. *Nainby*, 10 Q. B. 473; Bac. Abr. tit. *Leases* (L. 3); *Agard* v. *King*, Cro. Eliz. 775; *Legg* v. *Strudwick*, 2 Salk. 414; *Denn* d. *Jacklin* v. *Cartwright*, 4 East, 29, 32; *Harris* v. *Evans*, 1 Wils. 262; *Birch* v. *Wright*, 1 T. R. 380; 1 R. R. 223.

(*f*) *Thompson* v. *Maberley*, 2 Camp. 573; and see as to "certain," *Langton* v. *Carleton*, L. R., 9 Ex. 57, and *Gardner* v. *Ingram*, 61 L. T. 729.

(*g*) *Doe* d. *Chadborn* v. *Green*, 9 A. & E. 658; and supra.

(*h*) Bac. Abr. tit. *Leases* (L. 3).

(*i*) *Reg.* v. *Chawton*, 1 Q. B. 247; *Simpson* v. *Margitson*, 11 Q. B. 23.

(*k*) *Cheshire Lines Committee* v. *Lewis*, 50 L. J., Q. B. 121; 44 L. T. 293—C. A.

An agreement that the tenant shall not be disturbed so long as the rent is paid and the landlord remains in possession creates a tenancy during the joint continuance of the life of the tenant and the estate of the landlord (*l*).

Lease so long as Rent paid, and Landlord in possession.

A lease "for seven, fourteen or twenty-one years, as the lessee shall think proper," is a good lease for at least seven years, and not void for uncertainty (*m*). A lease made in 1775, for "three, six or nine years, determinable in 1788, 1791 or 1794," is a good lease for nine years, determinable at the end of three or six years (*n*). But the lessee alone has the option to determine such lease at the earlier periods, on the ground that every doubtful grant must be construed in favour of the grantee (*o*). The usual form of making such leases at present is to insert the full term in the habendum, and add a proviso at the end for one or either of the parties to put an end to the term at the shorter periods. If the option be given expressly to each party, the lease may be determined by either, or by his representative entitled to the reversion or term (*p*); and where the option was given to the respective parties, their executors and administrators, it was held that the devisee of the lessor might determine the lease (*q*). But where the lease contained a proviso that if either of the parties, their respective heirs or executors, should wish to put an end to the term at the end of seven or fourteen years, six months' notice in writing should be given under "his or their respective hands," and the lessor died, leaving three executors; it was held, that a notice signed by two of them only, although given on behalf of themselves and the other executor, was not a good notice within the terms of the proviso (*r*). A lease for twenty-one years expressed to "be determinable nevertheless in seven or fourteen years if the said parties hereto shall so think fit," is determinable only by consent of *both* the parties, although it may have been their intention to give the option to either of them (*s*). The notice must end with the first seven or fourteen years (or other stipulated period), according to the terms of the proviso, and not at any other time (*t*). It must not end *at noon* on the right day (*u*). Sometimes it is made a condition precedent that the tenant shall not only give the above notice, but also duly pay all the rent, and

Option to determine.

*Dann* v. *Spurrier.*

(*l*) *Wood* v. *Davis*, 6 L. R., Ir. 50.
(*m*) *Ferguson* v. *Cornish*, 2 Burr. 1032.
(*n*) *Goodright* d. *Hall* v. *Richardson*, 3 T. R. 462.
(*o*) *Dann* v. *Spurrier*, 3 B. & P. 399; 7 R. R. 797; *Doe* d. *Webb* v. *Dixon*, 9 East, 15; 9 R. R. 501; *Price* v. *Dyer*, 17 Ves. 356; 11 R. R. 102.
(*p*) *Goodright* v. *Mark*, 4 M. & S. 30; *Bird* v. *Baker*, 1 E. & E. 12.
(*q*) *Roe* d. *Bamford* v. *Hayley*, 12 East, 464; 11 R. R. 455.
(*r*) *Right* d. *Fisher* v. *Cuthell*, 5 East, 491; 7 R. R. 752; *Doe* d. *Aslin* v. *Summersett*, 1 B. & Ad. 135, 141.
(*s*) *Fowell* v. *Frank*, 3 H. & C. 458; 34 L. J., Ex. 6.
(*t*) *Cadby* v. *Martinez*, 11 A. & E. 720; *Bird* v. *Baker*, 1 E. & E. 12; 28 L. J., Q. B. 7; Cole Ejec. 398.
(*u*) *Paye* v. *More*, 15 Q. B. 684.

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perform all the covenants on his part, to the termination of the notice (*x*). Such a condition is unreasonable, and ought to be objected to in the first instance (*y*). A lease for three, seven or ten years, determinable on notice, stipulated that a quarter's rent should be paid by the tenant on taking possession, the same to be allowed him for the last quarter's rent "on the determination of the said tenancy;" after a notice to determine the lease at the expiration of the third year had been given, and before its expiration, the parties verbally agreed that the party should continue tenant for another year, no express mention being made of the terms of the tenancy; it was held, that the tenant continued to hold subject to the terms of the original lease, and consequently that the payment on taking possession was applicable to the last quarter of the fourth year (*z*).

Where there is a recurring Number of Years.

If a lease be made for twenty-one years, with a further covenant by the lessor, "that the lessee shall have the same for twenty-one years more after the expiration of the said term, and so from twenty-one years to twenty-one years, until ninety-nine years thence next ensuing shall be complete and ended," the first twenty-one years are not to be reckoned part of the ninety-nine years (*a*). Where one made a lease for three years, and so from three years to three years until ten years should be expired, it was held to be a lease but for nine years, and that the odd year should be rejected, because that could not come to fall within any three entire years, according to the limitation (*b*). Where there was a demise of freehold and copyhold lands at an entire rent, to hold so much as was freehold for twenty-one years and so much as was copyhold for three years, and there was a covenant for renewal of the lease of the copyhold every three years toties quoties during the twenty-one years under the like covenants; and that in the meantime, and until such new leases should be executed, the lessee should hold the said lands, as well copyhold as freehold, &c.; it was held, that this was only a lease of the copyhold for three years, and that the lessor, after the three years, might recover the premises in ejectment against the lessee, there not being any fresh lease granted (*c*).

Where the Term depends on a Contingency.

Sometimes a term is limited conditionally, ex. gr. for ninety-nine years if the lessee or some other person or persons therein named shall so long live (*d*). Where one made a lease for forty years, "if his wife *or* any of their issue should so long live:" it was adjudged that the lease was not determined by the death of one of them, but should continue till all were dead, by reason of the disjunctive *or*, which goes to

(*x*) See for instance *Parker* v. *Shepherd*, 6 L. T. 665.
(*y*) Cole Ejec. 397.
(*z*) *Finch* v. *Miller*, 5 C. B. 428.
(*a*) *Manchester College* v. *Trafford*, 2 Show. 31.
(*b*) Bac. Abr. tit. *Leases* (L. 3); Plowd. 273, 522 a.
(*c*) *Fenny* d. *Eastham* v. *Child*, 2 M. & S. 255.
(*d*) *Hughes and Crowther's case*, 13 Co. R. 66; *Brudnell's case*, 5 Co. R. 9 a; Cole Ejec. 402.

and governs the whole limitation; but if the words had been "if his wife *and* issue should so long live," there clearly, by the death of any of them within the forty years, the term had been at an end, by reason of the copulative *and*, which conjoins all together, and makes all their lives jointly the measure of the estate (*e*). If a lease be made to two for years, if they should so long live, it would determine by the death of one of them, because their life is but a collateral condition and limitation of the estate, which therefore is broken when one dies: this differs therefore from a lease to two persons for their lives, for that gives an estate to both for their lives, and both have an estate of freehold therein in their own right; which consequently cannot determine by the death of one of them, for then the other could not be said to have an estate for his life, as the lessor at first gave it (*f*). A lease made for twenty-one years, if the lessee should live so long and continue in the lessor's service, has been held not to determine on the lessor's death (*g*). If a lease be made for a certain number of years, providing the lessee shall so long continue to occupy the premises personally, it will cease and determine whenever he parts with the possession, even by compulsion of law (*h*). If a lease be made to J. S. for twenty years, if the coverture between A. and B. shall so long continue; this is a good lease for twenty years although the dissolution of the coverture may determine it sooner (*i*). But a lease to one generally during the coverture of A. and B. would create but a tenancy at will, by reason of the uncertainty of the duration of the coverture (*k*). Where a lease for years is made to A. and B., if they should so long live; or to A., if he and B. should so long live; or if the lessor and lessee, or the lessor and J. S. should so long live: in any of these cases, if one die the lease is determined (*l*). If a lease be made during the minority of J. S., or until J. S. shall come to the age of twenty-one years, these are good leases (*m*); and if J. S. die before he come to his full age, the lease is ended: so, if a man make a lease for twenty-one years, if J. S. live so long (*n*), or if J. S. shall continue to be parson of Dale so long; these and such like leases are good (*o*). If A. makes a lease to B. for so many years as A. and B. or either of them shall live, not naming any certain number of years; or, if the parson of Dale make a lease of his glebe for so many years as he shall be parson there: this is not certain, neither can it be made so by any

(*e*) Co. Lit. 255 a; *Ld. Vaux's case*, Cro. Eliz. 269.
(*f*) Bac. Abr. tit. *Leases* (L. 4); Roll. Rep. 309.
(*g*) *Wrenford* v. *Gyles*, Cro. Eliz. 643; Noy, 70; Cole Ejec. 402.
(*h*) *Doe* d. *Lockwood* v. *Clarke*, 8 East, 185; 9 R. R. 402.
(*i*) *Say* v. *Smith*, Plowd. 273.
(*k*) Bac. Abr. tit. *Leases* (L. 3).
(*l*) *Bradnell's case*, 5 Co. R. 9 b; *Daniel* v. *Hill*, Cro. Jac. 377; 1 Roll. R. 197; *Bailes* v. *Wenman*, 2 Ventr. 74.
(*m*) *Bishop of Bath's case*, 6 Co. R. 35; *Boraston's case*, 3 Co. R. 19; *Whittome* v. *Lamb*, 12 M. & W. 813.
(*n*) *Wright* v. *Cartwright*, 1 Burr. 2.
(*o*) Bac. Abr. tit. *Leases* (L. 2, 3).

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means: and yet if a parson shall make a lease from three years to three years, so long as he shall be parson, this is a good lease for six years, if he continue parson so long, and for the residue is void for uncertainty (*p*).

Covenant that lease good for lives mentioned.

A covenant in a lease for lives that the lease is good for the lives mentioned therein has been held not to warrant the subsistence of such lives (*q*).

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## SECT. 7.—*Reddendum.*

What things are requisite in a Reservation.

The reddendum or reservation of rent is a clause in the lease, whereby the lessor reserves some new thing to himself out of that which he granted before; and this commonly and properly succeeds the habendum, and is usually made by the words "yielding and paying," or similar expressions. In every good reservation these things must always occur:—1. It must be by certain and apt words (*r*). 2. It must be of some other thing issuing or coming out of the thing granted, and not a part of the thing itself, nor of something issuing out of another thing (*s*). 3. It must be of such a thing whereunto the grantor may have resort to distrain. 4. It must be made to one of the grantors, and not to a stranger to the deed (*t*). But the usual formal reddendum in a lease is not essential. This subject is more fully treated of hereafter (*u*).

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## SECT. 8.—*Express Covenants and Agreements.*

### (a) *Generally.*

What a Covenant is generally.

A covenant is either expressed or implied—it subsists either in fact or in law. An express covenant is a stipulation in a *deed* that something has or has not been done, or that something shall or shall not be done, or that some right or power then exists, or the like. An implied covenant, or a covenant in law, is that which the law implies, though not expressed by words (*x*). He who makes the covenant is called the covenantor, and he to whom it is made the covenantee (*y*).

Taking benefit by party not named.

By the Real Property Act, 1845, 8 & 9 Vict. c. 106, s. 5, "the benefit of a condition or covenant respecting any tenements or

(*p*) Bac. Abr. tit. *Leases* (L. 3).
(*q*) *Coates* v. *Collins*, L. R., 7 Q. B. 144; 40 L. J., Q. B. 157. See p. 155, ante.
(*r*) *Parker* v. *Harris*, 4 Mod. 76; 1 Salk. 262.
(*s*) *Doe* d. *Douglas* v. *Lock*, 2 A. & E. 705.
(*t*) *Doe* d. *Barber* v. *Lawrence*, 4 Taunt. 23.
(*u*) Chap. X., Sect. 2, and see Smith, L. & T. 111—121 (2nd ed.).
(*x*) Post, Sect. 9.
(*y*) Shep. Touch. 160; 2 Blac. Com. 304.

hereditaments may be taken, although the taker thereof be not named as a party to the same indenture" (*z*). Before this enactment, when a deed was made inter partes, no one who was not expressed to be a party could sue on a covenant contained in it; and this was not a mere rule of construction but a rule of positive law (*a*).

Indorsement after Signing.

A covenant is valid and binding although indorsed on the deed after the signing, but before the sealing and delivery (*b*).

By what Words Covenants may be made.

No particular technical words are requisite towards making a covenant (*c*); for any words or form of expression which import an agreement, or show the party's concurrence in the performance of a future act, or the intention of the parties mutually to contract, will suffice for that purpose (*d*). Thus, "yielding and paying," &c. amount to a covenant, on which an action lies for non-payment (*e*); so, yielding and paying such a rent "free and clear of all manner of taxes, charges, and impositions whatsoever," is a covenant to pay the whole rent discharged of all taxes before or afterwards imposed (*f*). The words "provided always, and it is hereby agreed and declared that," &c. create a covenant (*g*), and so do the words "provided always, and these presents are upon the express condition that," &c. (*h*).

Construction of Covenants.

All contracts are to be construed according to the intent of the parties, as expressed by their own words (*i*); and if there be any doubt upon the sense of the words, such construction shall be made as is most strong against the covenantor, lest by the obscure wording of his contract he should find means to evade and elude it (*k*). There is, however, a distinction between implied covenants and express covenants, namely, that the latter are to be taken more strictly (*l*).

Joint or several.

In preparing covenants entered into with several persons, it should be made clear whether it is intended to be a separate covenant with each person as well as a joint covenant with the whole: and whether a covenant be joint or several (when the words used admit of either construction) depends upon the words used, the subject-matter of the covenant, and the interest which passes thereby (*m*). If the words

(*z*) *Ex parte Cockburn, re Smith*, 12 W. R. 184.

(*a*) *Chesterfield and Midland Silkstone Colliery Co.* v. *Hawkins*, 3 H. & C. 677; 11 Jur., N. S. 468.

(*b*) *Lyburn* v. *Warrington*, 1 Stark, 162; *Reg.* v. *Aldborough*, 13 Q. B. 196; *Broke* v. *Smith*, Moor. 679.

(*c*) *Stephenson's case*, 1 Leon. 324; 12 East, 182, n.; Smith, L. & T. 121 (2nd ed.).

(*d*) *Bush* v. *Coles*, Carth. 232; *Duke of St. Albans* v. *Ellis*, 16 East, 352; 14 R. R. 361; *Sampson* v. *Easterby*, 9 B. & C. 505; *Cannock* v. *Jones*, 3 Exch. 233; *Wood* v. *Copper Miners' Co.*, 7 C. B. 906.

(*e*) *Hellier* v. *Casbard*, 1 Sid. 266; *Porter* v. *Sweetnam*, Styles, 406; Smith, L. & T. 96 (2nd ed.).

(*f*) *Giles* v. *Hooper*, Carth. 135.

(*g*) Bac. Abr. tit. *Covenant* (A.).

(*h*) *Brookes* v. *Drysdale*, L. R., 3 C. P. D. 52; ante, p. 129.

(*i*) Com. Dig. tit. *Covenant* (E. 2); Plowden, 329; *Iggulden* v. *May*, 7 East, 241; 8 R. R. 623.

(*k*) Bac. Abr. tit. *Covenant* (F.).

(*l*) *Shubrick* v *Salmond*, 3 Burr. 1639.

(*m*) *Slingsby's case*, 5 Co. R. 18 b; 3 Ch. R. 126; *Duke of Northumberland* v. *Errington*, 5 T. R. 522; 2 R. R. 666; *Southcote* v. *Hoare*, 3 Taunt. 89; 12 R. R. 600; *Enys* v. *Donnithorne*, 2 Burr. 1190.

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of the covenant are expressly and clearly joint, the covenant will be so construed, although the interest is several; and vice versâ (*n*). If the words used admit of two constructions, and the interest of the covenantees is joint, the covenant will be construed as joint (*o*): but if the interest of the covenantees is several, the covenant will be construed as several (*p*). Where A. by lease demised a house and land to B. and C. for a term of years at 16*l.* per annum, with a covenant by them jointly and severally to pay taxes and rates, &c., but none to pay rent; and B. occupied the whole premises, and paid the rent for five years; it was held that the demise being joint, the rent was payable by the two jointly (*q*).

Collateral Promises and Representations.

Very frequently at the time of granting a lease or during negotiations for one the intending landlord or his agent is understood by the intending tenant to make some representation as to the demised premises, *e.g.*, that drains are sound, or that the landlord will do outside repairs, of which representation there is no evidence except the statement of the tenant. If such representation is for the future, any action upon it must fail except so far as based on the contents of the lease itself, or is "collateral" to the lease, as where a tenant signed a farming lease on the faith of a promise by the landlord that he would keep down the rabbits, and, the rabbits not having been kept down, recovered compensation for damage done by them (*r*).

If the representation, &c., be of an existing fact, as that drains are sound, an action may be maintained upon it, and rescission obtained in case the representation was untrue, and damages also, if the representation was both fraudulent and untrue (*s*).

The action for damages can be brought once only, the cause of it not being of a continuing nature (*t*), and the action for rescission must be brought without delay (*u*).

Lessee liable on express covenant notwithstanding Assignment.

The lessee has both a privity of contract and a privity of estate; and though he assigns, and thereby assigns the privity of estate, yet the privity of contract continues, and although, where there is no express covenant, and the lessor has accepted the assignee as his tenant, the lessee's liability to the lessor is extinguished, yet where

(*n*) *Sorshie* v. *Park*, 12 M. & W. 146; *Keightley* v. *Watson*, 3 Exch. 716; *Lee* v. *Nixon*, 1 A. & E. 201.

(*o*) *Anderson* v. *Martindale*, 1 East, 497; 6 R. R. 334; *Foley* v. *Addenbrooke*, 4 Q. B. 197; *Pugh* v. *Stringfield*, 3 C. B., N. S. 2; *Hopkinson* v. *Lee*, 6 Q. B. 964; *Bradburne* v. *Botfield*, 14 M. & W. 559.

(*p*) *Withers* v. *Birchman*, 3 B. & C. 54; *James* v. *Emery*, 2 Moo. 195; 5 Price, 529, 533; 19 R. R. 503; *Servante* v. *James*, 10 B. & C. 410; *Mills* v. *Ladbrooke*, 7 M. & G. 218; *Poole* v. *Hill*, 6 M. & W. 835; *Harcourt* v. *Wyman*, 3 Exch. 817; but see *Thompson* v. *Hakewill*, 19 C. B., N. S. 713; 35 L. J., C. P. 18; *Wilkinson* v. *Hall*, 1 Bing. N. C. 713.

(*q*) *Rex* v. *Great Wakering*, 5 B. & Ad. 971; see also *Levy* v. *Sale*, 37 L. T. 709.

(*r*) *Morgan* v. *Griffith*, L. R., 6 Ex. 70; 40 L. J., Ex. 46; 23 L. T. 783; 19 W. R. 957.

(*s*) See Chitty on Contracts, Ch. XXI., sect. 4, and Ch. XXII., sect. 7; *Kennard* v. *Ashman*, 10 T. L. R. 213, per Wills, J.

(*t*) *Clarke* v. *York*, 52 L. J., Ch. 32.

(*u*) *Kennard* v. *Ashman*, supra.

the lessee has entered into an express covenant (as in the modern form, for himself and his assigns) the lessee beyond doubt continues liable on such covenant notwithstanding the assignment (*x*) : but the assignee comes in only in privity of estate, and is therefore liable to the lessor and his assigns only on those covenants which run with the land and for those breaches which occur during the continuance of such privity of estate, and before he assigns over (*y*). But he continues liable to his immediate assignor, his executors or administrators, upon any express covenant by him in the deed of assignment, for payment of the rent and performance of the covenants contained in the original lease (*z*). If a covenant by two lessees be joint and several, it binds the executors of the deceased lessee, although the whole term, interest and benefit survived to the other lessee (*a*).

*Auriol* v. *Mills.*

What Covenants void.

For illegality.

A covenant to do a thing which upon the face of it appears to be prejudicial to the public interest, or otherwise contrary to law, is absolutely void (*b*). On this principle it was held that neither the covenant to pay rent, nor any other covenant in a lease expressed to be made for the purpose of the premises being used to boil oil and tar, contrary to the provisions of a Building Act, could be enforced against the lessee (*c*).

Covenant for Impossibility, &c.

A covenant to do a thing which is impossible is void, if the impossibility exist at the time of making the covenant, but not otherwise (*d*). A covenant in a lease to repair *during the term* does not take effect where the lessor does not execute the lease (*e*). A lessee is not liable for the breach of a covenant committed before the execution of the lease, but subsequently to the day from which by the habendum the term was to commence (*f*). Where a covenant is founded on a conveyance of an estate which proves to be void, and no estate passes, the covenant is void also: thus, where the conveyance was "a grant of so much of a term as should be unexpired at the death of A.," and there was a covenant for quiet enjoyment, and a bond for performance; the conveyance being void

(*x*) *Auriol* v. *Mills*, 4 T. R. 94 ; 2 R. R. 341 ; *Eaton* v. *Jacques*, 2 Doug. 455 ; *Chancellor* v. *Poole*, 2 Doug. 764 ; *Orgill* v. *Kemshead*, 4 Taunt. 642 ; 13 R. R. 712.

(*y*) *Harley* v. *King*, 5 Tyr. 692 ; *Taylor* v. *Shum*, 1 B. & P. 21 ; 4 R. R. 759 ; *Le Keux* v. *Nash*, 2 Stra. 1222 ; *Odell* v. *Wake*, 3 Camp. 394 ; 14 R. R. 763 ; *Onslow* v. *Corrie*, 2 Madd. 330.

(*z*) *Harris* v. *Goodwyn*, 2 M. & Gr. 405 ; 9 Dowl. 409 ; *Burnett* v. *Lynch*, 5 B. & C. 589 ; *Wolveridge* v. *Steward*, 1 Cr. & Mee. 644.

(*a*) *Enys* v. *Donnithorne*, 2 Burr. 1190, 1197.

(*b*) *Collins* v. *Blantern*, 1 Smith, L. C.

(*c*) *Gas Light Co.* v. *Turner*, 5 Bing. N. C. 666 ; 6 Id. 324.

(*d*) Shep. Touch. 163. See *Hall* v. *Wright*, E. B. & E. 746 ; 27 L. J., Q. B. 345 ; *Appleby* v. *Myers*, L. R., 2 C. P. 651 ; 36 L. J., C. P. 331 ; 16 L. T. 669.

(*e*) *Pitman* v. *Woodbury*, 3 Exch. 4 ; *Linwood* v. *Squire*, 5 Exch. 234 ; *Wheatley* v. *Boyd*, 7 Exch. 20 ; *Swatman* v. *Ambler*, 8 Exch. 72 ; 22 L. J., Exch. 81.

(*f*) *Shaw* v. *Kay*, 1 Exch. 412 ; *Jervis* v. *Tomkinson*, 1 H. & N. 195, 206 ; *Bird* v. *Baker*, 1 E. & E. 12 ; 28 L. J., Q. B. 7 ; *Browne* v. *Burton*, 5 D. & L. 289 ; *Steele* v. *Mart*, 4 B. & C. 272.

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on account of the uncertainty of the time when the term was to commence and end, the covenants were adjudged to be void, as they depended on the estate (*g*) : but although this is the case with respect to all dependent covenants, it is otherwise of covenants which are independent (*h*).

### (b) *Covenants, whether "Running with Land."*

Meaning of "Running with Land." *Spencer's case.*

Covenants are either real or personal ; the former are such as are annexed to an estate, or are to be performed on it, and are said to "run with the land," so that he who has the one is subject to the other. A covenant is said to run with the land when either the liability to perform it, or the right to take advantage of it, passes to the assignee of that land. A covenant is said to run with the reversion when either the liability to perform it, or the right to take advantage of it, passes to the assignee of that reversion (*i*). Covenants which run with the land bind those who come in by act of law, such as the personal representatives of the assignee of a lessee, as well as those who come in by act of the parties (*k*) ; for the personal representatives of a lessee for years are his assigns (*l*). Covenants which run with the land therefore bind the assigns, although not mentioned. But in preparing covenants which are intended to run with the land, the "assigns" should always be mentioned, for though some covenants will bind them although not mentioned, and others will not bind them although mentioned, yet there is a middle class, in which assignees are bound if mentioned, but not otherwise, and it is prudent to provide for the possibility of a covenant being held to belong to this class.

All implied covenants run with the land (*m*), but with regard to express covenants some little uncertainty has prevailed. The general rules (*n*) appear to be that (1) an assignee, whether of the reversion or the term, can, although not named in the covenant, avail himself of those covenants which touch and concern the thing demised; (2) that of such covenants, those which concern something not in being at the time of the demise, bind the assignees if named, but otherwise not ; and (3) that covenants which do not concern the thing demised, but are personal between the covenanting parties, do not bind assignees in any case.

(*g*) *Capenhurst* v. *Capenhurst*, Sir T. Raym. 27 ; *Hayne* v. *Maltby*, 3 T. R. 438 ; Co. Lit. 456.

(*h*) *Northcote* v. *Underhill*, 1 Salk. 199 ; 1 Ld. Raym. 380.

(*i*) *Spencer's case*, 1 Smith, L. C.

(*k*) Esp. N. P. 290.

(*l*) *Hornidge* v. *Wilson*, 11 A. & E. 645 ; *Wollaston* v. *Hakewill*, 3 M. & G. 297 ; *Hopwood* v. *Whaley*, 6 C. B. 744 ; 6 D. & L. 342 ; *Collins* v. *Crouch*, 13 Q. B. 542.

(*m*) As to implied covenants, see Sect. 9, post.

(*n*) *See Spencer's case*, 1 Sm. L. C. ; Smith L. & T. 388 ; Fawcett, L. & T. 247.

It seems that in equity the question whether assignees are bound turns on the doctrine of notice, so that by the effect of the Judicature Act it will, if the facts admit of it, be immaterial whether a particular covenant run with the land or not (*o*). This doctrine, which applies in cases arising out of the relation between vendor and purchaser to restrictive covenants only (*p*), has been held not to apply to the affirmative covenant of a tenant implied from the covenant in a lease not to suffer a nuisance, of which covenant the assignee of a sublease had notice (*q*).

Binding assignees by notice.

The following covenants seem to run with the land, so as to bind the assignee, whether of the reversion or the term, although not named:

What Covenants run with the Land.

A covenant to pay rent (*r*) or taxes:

Rent.

To repair (*s*), or to leave in repair (*t*): to maintain a sea wall in esse (*u*): to repair, renew and replace tenants' fixtures and machinery fixed to the premises (*x*):

Repair.

Not to plough (*y*): to use the land in a husbandlike manner (*z*): to lay dung on the demised land annually (*a*):

To reside on the demised premises during the term (*b*): to permit the lessor to have access to two rooms excepted from the demise (*c*):

Residence.

To carry all the corn produced on the demised land to the lessor's mill to be ground (*d*): to leave the land as well stocked with game at the end of the term as it was found to be at the beginning of it (*e*):

Game.

To supply demised houses with good water (*f*):

For quiet enjoyment (*g*):

Quiet enjoyment.

To produce title deeds (*h*):

To make further assurance (*i*):

(*o*) See *Tulk* v. *Moxhay*, 2 Ph. 774; *Wilson* v. *Hart*, L. R., 1 Ch. 463, and like cases discussed in the notes to *Spencer's case*, 1 Sm. L. C.

(*p*) *Haywood* v. *Brunswick Permanent Benefit Building Society*, 8 Q. B. D. 403—C. A.; *Austerberry* v. *Oldham Corporation*, 29 Ch. D. 750—C. A.

(*q*) *Hall* v. *Ewin*, 57 L. T. 830, and Chap. VII., Sect. 7, post.

(*r*) *Parker* v. *Webb*, 3 Salk. 5.

(*s*) *Dean and C. of Windsor's case*, 5 Co. R. 24; *Conan* v. *Kemise*, W. Jon. 245; *Smith* v. *Arnold*, 3 Salk. 4; *Martyn* v. *Clue*, 18 Q. B. 661; 22 L. J., Q. B. 147.

(*t*) Vin. Abr. *Covenant* (K. 19); *Doe* d. *Strode* v. *Seaton*, 2 C., M. & R. 730; *Martyn* v. *Clue*, supra (last point).

(*u*) *Morland* v. *Cook*, L. R., 6 Eq. 212, 267; 37 L. J., Ch. 825.

(*x*) *Williams* v. *Earle*, L. R., 3 Q. B. 739; 37 L. J., Q. B. 231.

(*y*) *Cockson* v. *Cock*, Cro. Jac. 125.

(*z*) *Walsh* v. *Watson*, Esp. N. P. 295.

(*a*) —— v. *Davis*, MS. M. T., 42 Geo. 3.

(*b*) *Taten* v. *Chaplin*, 2 H. Blac. 133; 3 R. R. 360.

(*c*) *Cole's case*, 1 Salk. 196, *S. C.* sub nom. *Bush* v. *Coles*, 1 Snow, 389, Carth. 232.

(*d*) *Vyvyan* v. *Arthur*, 1 B. & C. 410; 2 D. & R. 670; 1 L. J., K. B. 138; 25 R. R. 437. See *Hemingway* v. *Fernandes*, 13 Sim. 228.

(*e*) *Hooper* v. *Clark*, L. R., 2 Q. B. 200; 36 L. J., Q. B. 79; 16 L. T. 152; 15 W. R. 347.

(*f*) *Jourdain* v. *Wilson*, 4 B. & A. 266.

(*g*) *Lewis* v. *Campbell*, 8 Taunt. 715; 21 R. R. 516; *Campbell* v. *Lewis* (in error), 3 B. & A. 392; *Noke* v. *Awder*, Cro. Eliz. 375, 436.

(*h*) *Barclay* v. *Raine*, 1 Sim. & Stu. 449; 24 R. R. 206.

(*i*) *Middlemore* v. *Goodhall*, Cro. Car. 503; *Kingdon* v. *Nottle*, 4 M. & S. 53; 14 R. R. 462; *King* v. *Jones*, 5 Taunt. 418; 4 M. & S. 188; 15 R. R. 533.

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*Express Covenants ("Running with the Land").*

To renew the lease (*k*): to endeavour to procure a renewal of the lease for another life (in an underlease by lessee for lives) (*l*):

Renewal.

To build a new smelting mill in lieu of an old one in a lease of mines (*m*):

Public-house management.

In a public-house lease, to conduct the business so as to afford no ground whereby the licence should be suspended, &c., or be in danger of being suspended, &c. (*n*): or not to sell liquor not bought of lessors (*o*), their successors or assigns (*p*).

Moreover, the fact that the ownership of the reversion to the demised property has become severed from the ownership of the business of the lessor does not prevent the lessor or his representatives from enforcing such a covenant; and the assigns of the lease, if they comply with the covenant and purchase from the successors of the lessor, will be entitled to the benefit of a proviso for abatement of rent dependent on observance of the covenant (*q*).

To insure.

There is also authority that the covenant to insure (*r*), the covenant not to assign or sublet without licence (*s*), and the covenant not to carry on a particular trade (*t*), run with the land.

*Vernon* v. *Smith.*

With regard to the covenant to insure against fire, it was held in *Vernon* v. *Smith* (*r*), to run with the land, on the ground that the Building Act, 14 Geo. 3, c. 78, s. 83, in that case assumed to have a local applicatio nonly, enables the landlord to have the insurance money laid out in rebuilding, so that the covenant was in effect a covenant to repair. The statute has since been held to have a general application (*u*), so that if the reasoning in *Vernon* v. *Smith* be correct, the covenant to insure runs with the land.

Not to assign without Licence.

The covenant not to assign or sublet without licence was expressly held to run with the land in *Williams* v. *Earle* (*x*); but in the later case of *West* v. *Dobb* (*y*) (where the point arose, but did not require

(*k*) *Isteed* v. *Stoneley*, 1 Anderson, 82; *Brooke* v. *Bulkeley*, 2 Ves. jun. 498; *Roe* v. *Hayley*, 12 East, 464; 11 R. R. 455.

(*l*) *Simpson* v. *Clayton*, 4 Bing. N. C. 758; 6 Scott, 469.

(*m*) *Sampson* v. *Easterby*, 9 B. & C. 505; *Easterby* v. *Sampson* (in error), 6 Bing. 644; 1 C. & J. 105.

(*n*) *Fleetwood* v. *Hull*, 23 Q. B. D. 35; 58 L. J., Q. B. 141; 60 L. T. 35; 37 W. R. 714, per Charles, J.

(*o*) *Clegg* v. *Hands*, 44 Ch. D. 503; 59 L. J., Ch. 477; 62 L. T. 502; 38 W. R. 433—C. A.; and see Chap. XVII., Sect. 5, post.

(*p*) *White* v. *Southend Hotel Co.*, [1897] 1 Ch. 767; 66 L. J., Ch. 387; 76 L. T. 273; 45 W. R. 434—C. A., affirming Kekewich, J., Ib., and applying the principle of the cases in the last two notes, and of *Tatem* v. *Chaplin*, note (*b*), supra.

(*q*) Ib.

(*r*) *Vernon* v. *Smith*, 5 B. & A. 1. And see post, Chap. XVII., Sect. 1.

(*s*) *Williams* v. *Earle*, L. R., 3 Q. B. 739; 37 L. J., Q. B. 231.

(*t*) *Mayor of Congleton* v. *Pattison*, 10 East, 130. The obiter dicta of Lord Ellenborough and Bayley, J., seem to be in accordance with principle. In *Wilson* v. *Hart*, L. R., 1 Ch. 463, it was held that a tenant from year to year was bound by his landlord's covenant that no building to be erected should be used as a beershop, although such covenant did not run with the land.

(*u*) *Ex parte Gorely*, 34 L. J., Bank. 1. In *Vernon* v. *Smith*, the judgment of Best, J., proceeded independently of the statute.

(*x*) *Williams* v. *Earle*, L. R., 3 Q. B. 739; 37 L. J., Q. B. 231; 19 L. T. 238; 16 W. R. 1041.

(*y*) *West* v. *Dobb*, L. R., 4 Q. B. 634; 38 L. J., Q. B. 289; 9 B. & S. 755.

to be decided), Blackburn, J., who was one of the two judges who decided *Williams* v. *Earle*, pointed out that in that case assigns were named in the covenant, and seems to have wished to confine his judgment accordingly (*z*). However this may be, the covenant not to assign or sublet appears to concern the thing demised in relation to its state at the time of the demise, and consequently to bind assignees whether named or not (*a*).

To pay for Improvements.

It has been stated in many prior editions of this work that a covenant by a lessor to pay on a valuation for all trees planted (*b*), was a personal covenant not running with the land, and for this, *Grey* v. *Cuthbertson* (*b*), was cited; but that case, which is very briefly reported, seems to have been decided on the ground that assigns were not named in the covenant: and from the later case of *Gorton* v. *Gregory* (*c*) it may perhaps be inferred, though the point was not expressly decided, that a covenant to pay for improvements to be executed on the land, whether by the lessor or the lessee, runs both with the land and the reversion, if assigns be named: and this is borne out in principle by the important case of *Mansel* v. *Norton* (*d*), which is more fully noticed elsewhere (*e*).

*Minshull* v. *Oakes.*

In *Minshull* v. *Oakes*, a covenant to repair and leave in repair (inter alia) all buildings which should or might be thereafter erected during the term on the demised premises was considered to be, not a covenant absolutely to do a new thing, but to do something conditionally, viz. if new buildings were erected on the demised premises during the term to repair them; and, as when built they would be part of the thing demised, it was held that the assignee was bound, although not named in the covenant (*f*). In this case the court expressed an opinion that the rule that the naming the assigns in the covenant will bind them in relation to a thing not in esse at the time of the demise, was neither laid down in *Spencer's case*, nor consistent with reason. The rule, however, appears to have been recognized as good law in many other cases, both prior (*g*) and subsequent to (*h*) *Minshull* v. *Oakes*. And it seems to be consistent with reason that the naming of the assigns should vary the liability (*i*).

Personal Covenants do not run with the Land.

A covenant which is merely personal or collateral to the thing demised does not run with the land or the reversion, and therefore assignees are not bound even though they be expressly named. Of

(*z*) And see per Bayley, B., in *Paul* v. *Nurse*, 8 B. & C. 489; *Doe* d. *Cheere* v. *Smith*, 5 Taunt. 795; 15 R. R. 660; *Bally* v. *Wells*, 3 Wils. 33.

(*a*) As to covenant not to assign or sub-let, see post, Chap. XVII., Sect. 2.

(*b*) *Grey* v. *Cuthbertson*, 4 Doug. 351; 2 Chit. R. 482; 1 Selw. N. P. 448.

(*c*) See post, note (*k*).

(*d*) *Mansel* v. *Norton*, 22 Ch. D. (C.A.) 769.

(*e*) Post, Chap. XX., Sect. 5.

(*f*) *Minshull* v. *Oakes*, 27 L. J., Ex. 194; 2 H. & N. 793.

(*g*) *Sampson* v. *Easterby*, 6 Bing. 644, Exch.; *Doughty* v. *Bowman*, 4 Q. B. 444; *Greenaway* v. *Hart*, 14 C. B. 340.

(*h*) *Williams* v. *Earle*, ubi supra; *West* v. *Dobb*, ubi supra.

(*i*) But see contra, *Spencer's case*, 1 Sm. L. C.

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the nature of such personal covenants are these :—A covenant by a lessee to replace chattels which should become damaged or be superseded by new machinery (*k*) (although it would have been otherwise in the case of a covenant to replace fixtures) (*l*) : to give the lessee the option of pre-emption of a piece of ground adjoining the demised premises (*m*) : not to sell hay, &c. (*n*) : not to keep a beershop within a certain distance of the demised premises (*o*) : a covenant to pay rent and repair, made *with a mortgagor* and his assigns, in a lease granted by himself together with the mortgagee (*p*) : a covenant in an underlease, whereby the lessor covenanted to observe and indemnify the lessee against the covenants in the superior lease, one of which was to build several houses on the land (*q*) ; a covenant by lessee for himself, his executors and assigns not to have persons to work in a mill to be erected on the demised premises who were settled in other parishes without a parish certificate (*r*) ; and a covenant to pay taxes payable in respect of premises other than those demised (*s*).

Personal Covenants, not running with Land.

Boxes in Theatre.

Where the lessee of a theatre agreed to repay money lent to him by the plaintiff on a day certain, and that until payment the plaintiff and such persons as he might appoint should have the free use of two boxes (not specified) and afterwards assigned his interest, it was held that this was a mere personal contract, and that no action could be maintained against the assignee for refusing to permit the plaintiff to use the boxes (*t*).

Personal Chattels.

If sheep or other things personal be demised, a covenant by the lessee for himself and his assigns to deliver them up at the end of the term will not bind the assigns (*u*), and the same rule applies to a covenant to deliver up mere utensils and other things not fixed to the demised premises (*x*).

Condition for Re-entry.

It may be added here that a condition for re-entry in case the lessee or his assigns become bankrupt runs with the land (*y*), but a condition for re-entry in case the lessee or his assigns be convicted of any offence against the game laws does not (*z*).

Operation of Conveyancing Act.

By the Conveyancing Act, ss. 10 and 11 (*a*), both the rent and the benefit of every covenant both of lessee and lessor, "having reference

(*k*) *Gorton* v. *Gregory*, 3 B. & S. 90 ; 31 L. J., Q. B. 302. Such a covenant would bind executors in their representative capacity.

(*l*) Ib. per Willes, J.

(*m*) *Collison* v. *Lettsom*, 6 Taunt. 224.

(*n*) *Lybbe* v. *Hart*, 54 L. J., Ch. 860, per Baggallay, L.J.

(*o*) *Thomas* v. *Hayward*, L. R., 4 Ex. 311 ; 38 L. J., Ex. 175.

(*p*) *Webb* v. *Russell*, 3 T. R. 393 ; 1 R. R. 725 ; *Stokes* v. *Russell*, Id. 678 ; *Russell* v. *Stokes* (in error), 1 H. Blac. 562 ; 1 R. R. 732.

(*q*) *Doughty* v. *Bowman*, 11 Q. B. 444.

(*r*) *Mayor, &c., of Congleton* v. *Pattison*, 10 East, 130 ; indirectly confirmed by *Walsh* v. *Fussell*, 6 Bing. 163.

(*s*) *Gower* v. *Postmaster-General*, 57 L. T. 527 (assigns named).

(*t*) *Flight* v. *Glossop*, 2 B. N. C. 125.

(*u*) *Spencer's case*, 1 Sm. L. C.

(*x*) *Williams* v. *Earle*, L. R., 3 Q. B. 739 ; 37 L. J., Q. B. 231.

(*y*) *Roe* v. *Galliers*, 2 T. R. 133 ; 1 R. R. 445.

(*z*) *Stevens* v. *Copp*, L. R., 4 Ex. 20 ; 38 L. J., Ex. 175.

(*a*) See these sections at length, Chap VII., Sect. 4, post.

to the subject-matter of the lease," run with the reversion. By the same act, s. 58 :—

"(1.) A covenant relating to land of inheritance, or devolving on the heir as special occupant, shall be deemed to be made with the covenantee, his heirs and assigns, and shall have effect as if heirs and assigns were expressed.

Heirs, executors, &c., bound though not named.

"(2.) A covenant relating to land not of inheritance, or not devolving on the heir as special occupant, shall be deemed to be made with the covenantee, his executors, administrators and assigns, and shall have effect as if executors, administrators and assigns were expressed.

Conv. Act, 1881, s. 81.

"(3.) This section applies only to covenants made after the commencement of this act."

(c) *Covenants whether Dependent or Independent.*

General Rule with respect to such Covenants.

As to what covenants shall be construed to be conditions precedent or not, it has been laid down that the dependence or independence of covenants must be collected from the sense and meaning of the parties to be deduced from the whole instrument, and not merely from any technical words (*b*) ; and that in whatever order covenants may stand in a deed, their precedency must depend on the order of time in which the intent of the transaction requires their performance (*c*). No precise technical words therefore are required in a deed to make a stipulation a condition precedent or subsequent ; neither does it depend on the circumstance whether the clause is placed prior or posterior in the deed : the merits therefore of a question of this kind must depend on the nature of the contract, and the acts to be performed by the contracting parties, and any subsequent facts disclosed which have happened in consequence of the contract (*d*). Where a covenant is part only of the consideration on one side, it is an independent covenant, and not a condition precedent (*e*). If one party covenant to do one thing, the other party doing another, it is not a condition precedent, but a mutual covenant (*f*). If the contract be to grant a lease upon payment of 1,440*l*. by certain instalments at stated times, the granting of such lease is not a condition precedent to a right to recover the 1,440*l*. (*g*). It is a general rule that covenants are to be treated as independent rather than as conditions precedent, especially where some benefit has been derived by the covenantor (*h*).

Conditional Covenant to Repair.

A covenant to keep a house in repair, from and after the lessor has repaired it, is conditional ; and it cannot be assigned as a

(*b*) *Roberts* v. *Brett*, 11 H. L. Cas. 337 ; 34 L. J., Ch. 241.

(*c*) *Jones* v. *Barkley*, 2 Doug. 684.

(*d*) *Hotham* v. *East India Co.*, 1 T. R. 645 ; 1 R. R. 333 ; *Newson* v. *Smythies*, 3 H. & N. 840 ; 28 L. J., Ex. 97.

(*e*) *Carpenter* v. *Creswell*, 4 Bing. 409 ; 6 L. J., C. P. 27 ; 29 R. R. 587.

(*f*) *Boone* v. *Eyre*, 2 W. Blac. 1312 ; 2 R. R. 768 ; *Pordage* v. *Cole*, 1 Wms. Saund. 319 b, 320 c ; *Newson* v. *Smythies*, 3 H. & N. 840 ; 28 L. J., Ex. 97 ; 1 F. & F. 477 ; *Mackintosh* v. *Midland Counties R. Co.*, 14 M. & W. 548 ; *London Gaslight Co.* v. *Chelsea Vestry*, 8 C. B., N. S. 215.

(*g*) *Baggallay* v. *Pettit*, 5 C. B., N. S. 637 ; 28 L. J., C. P. 169.

(*h*) *Newson v. Smythies*, 3 H. & N. 843.

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breach that it was in good repair at the time of the demise, and that the lessee suffered it to decay; for the lessor must repair before the lessee is liable (*i*). Where the plaintiff let to the defendant a messuage, barn, stable, and buildings, and the defendant agreed to repair the said messuage, buildings, and premises, *the same being first put into repair by the plaintiff:* it was held, that the repair by the plaintiff was a condition precedent to the obligation on the defendant to keep in repair; that that condition precedent could not be divided: and that the plaintiff was not entitled to recover for the non-repair of any part of the premises without having first repaired the whole (*k*).

Conditional Covenants for Repair.

So if a lessee covenant to repair, "provided always, and it is agreed that the lessor shall find great timber," &c., this makes a covenant on the part of the lessor to find great timber by the word "agreed," and is not to be a qualification of the covenant of the lessee (*l*): but where the words were, "he the said lessor finding, allowing and assigning timber sufficient for such reparations during the said term, to be cut and carried by the lessee;" it was held not to be a covenant to provide timber, but a mere qualification of the covenant to repair (*m*), and where the lessee agreed to repair and the lessor to find timber for repairs, Kay, J., decided that the lessee could not recover damages from the lessor who had neglected to find materials for an injury caused by non-repair (*n*).

Allowance of Timber by Lessor.

Where a lease for lives contained a covenant by the lessee at his own expense to keep the demised premises in proper repair, "having or taking in and upon the said demised premises competent and sufficient house-bote, hedge-bote, fire-bote, plough-bote and gate-bote for the doing thereof, without committing any waste or spoil:" it was held in an action for not repairing, that the covenant for repair was absolute, with a licence to the lessee to take competent and sufficient house-bote, &c.: and that the finding such house-bote, &c., was not a condition precedent to the liability of the lessee to repair (*o*). Where the lessee covenants to put and keep the demised premises in repair, "being allowed rough timber but not on the stem upon the demised premises, the timber to be fetched and carried at the expense of the lessee:" In an action of covenant for not repairing, it is sufficient to allege that the lessor was *ready and willing* to allow and provide sufficient rough timber not on the stem, without stating that he did actually furnish it (*p*).

(*i*) *Slater* v. *Stone*, Cro. Jac. 645.

(*k*) *Neale* v. *Ratcliff*, 15 Q. B. 916; 20 L. J., Q. B. 130; *Hunt* v. *Bishop*, 8 Exch. 675; 22 L. J., Ex. 337; *Hutchinson* v. *Read*, 4 Exch. 761; *Coward* v. *Gregory*, L. R., 2 C. P. 153, 172; post, Chap. XVI., Sect. 1 (a).

(*l*) Bac. Abr. tit. *Covenant* (A).

(*m*) *Thomas* v. *Cadwallader*, Willes, 496.

(*n*) *Tucker* v. *Linger*, 21 Ch. D. 18.

(*o*) *Dean and C. of Bristol* v. *Jones*, 1 E. & E. 484; 28 L. J., Q. B. 201.

(*p*) *Martyn* v. *Clue*, 18 Q. B. 661; 22 L. J., Q. B. 147.

For Repairs—*contd.*

Where a lessee covenanted to repair a house before the 1st of June, 5,000 slates being found by the lessor towards the repair, and afterwards to keep in repair during the term; it was held, that finding the slates was not a condition precedent to the covenant to keep in repair, but only to the covenant for putting the premises in repair before the 1st of June (*q*). In a farming lease the lessee covenanted with the lessor that the lessee should at all times during the term repair and glaze the windows and also trim the hedges, &c., when necessary, "the said farmhouse and buildings being previously put in repair and kept in repair by the lessor;" the latter clause was held to amount to an absolute and independent covenant on the part of the lessor to put the premises in repair (*r*). The words "and the whole of which is agreed to be left to the superintendence of the lessee and the lessor's son," annexed to a covenant by the lessor to do certain work, are neither a condition precedent to, nor concurrent with, the covenant (*s*). The covenant to repair generally, and to repair within three months after notice in writing, are independent covenants (*t*); and where a lessee covenanted to leave premises in repair at the expiration of the term, and also that the lessors might direct the lessees to complete the repairs by giving six months' notice in writing, it was held, that these were two distinct and separate covenants, the former of which was not qualified by the latter (*u*); but where a lease contained a covenant by the lessee to repair the premises at all times (as often as need or occasion should require) and "at farthest within three months after notice," it was held to be one entire covenant, the former part of which was qualified by the latter (*x*). Where there was an agreement that the lessee should spend 200*l.* in repairs to be inspected and approved of by the lessor, and to be done in a substantial manner, and the lessee was to be allowed to retain the money out of the first year's rent of the premises, it was held, that the lessor's approval was not a condition precedent to the lessee retaining the rent (*y*). Where a lessee covenanted to expend a certain sum in substantial and beneficial improvements, under the direction or with the approbation of some competent surveyors to be named by the lessor, the appointment of the surveyors was held to be a condition precedent to the lessee's liability to expend the money (*z*). Where the lessor covenanted to

Expenditure by Lessee on Repairs to be approved by Lessor.

(*q*) *Muccleston* v. *Thomas*, Willes, 146.
(*r*) *Cannock* v. *Jones*, 3 Exch. 233.
(*s*) *Jones* v. *Cannock*, 3 H. L. Cas. 700; 5 Exch. 713; *Smith* v. *Durrant*, 9 H. L. Cas. 192.
(*t*) *Doe* d. *Morecraft* v. *Meux*, 4 B. & C. 606; 1 C. & P. 346; *Wood* v. *Day*, 7 Taunt. 646; *Baylis* v. *Le Gros*, 4 C. B., N. S. 537, 552; *Cornish* v. *Cleife*, 3 H. & C. 446; 13 W. R. 389; *Few* v. *Perkins*, 36 L. J., Ex. 62; 15 W. R. 713.
(*u*) *Wood* v. *Day*, supra.
(*x*) *Horsefell* v. *Testar*, 7 Taunt. 385; cited 4 C. B., N. S. 551.
(*y*) *Dallman* v. *King*, 4 Bing. N. C. 105, recognized in *Stadhart* v. *Lee*, 3 B. & S. 364, 371.
(*z*) *Coombe* v. *Greene*, 11 M. & W. 480

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pay the lessee for the manure, &c., at the end of the term, upon the lessee delivering up the farm, *if* in the meantime he cultivated it on the four-course system and performed and kept all and singular other his covenants in the lease: it was held, that the delivery up of a certain agreement pursuant to a covenant in the lease was not a condition precedent to the tenant's right to recover for the manure &c. (*a*). Where by deed reciting an agreement to let copyhold premises, A. covenanted that as soon as he had procured a licence from the lord of the manor he would lease them to B. for the then residue of a term of years from a certain day, and B. covenanted that he would repair during the term so to be granted, it was held that B. was liable on this covenant after having occupied the premises for the whole term, though no licence had been procured from the lord nor any lease ever made (*b*).

Option to determine Term, &c.

Where in a lease for seven years, containing the usual covenants that the lessee should pay the rent, keep the premises in repair, &c., there was a proviso that the lessee might determine the term at the end of the first three or five years, giving six months' previous notice, and that then, from and after the expiration of such notice, and payment of all rents and duties to be paid by the lessee, and performance of all his covenants until the end of the three or five years, the indenture should cease and be utterly void, it was held, that the payment of rent and performance of the other covenants were conditions precedent to the lessee's determination of the term at the end of the first three years, and that his merely giving six months' notice, expiring within the first three years, was not sufficient for that purpose (*c*). A mining lease contained numerous covenants by the lessees, and also a proviso that if they should desire to quit the premises at the end of the first eight years, and should give eighteen months' notice thereof to the lessor, then, all arrears of rent being paid, and all and singular the covenants and agreements on the part of the lessees having been observed and performed, the lease should at the expiration of the eighth year be utterly void; but, nevertheless, without prejudice to any claim or remedy which any of the parties might then be entitled to for breach of any of the covenants; it was held, in error, that the performance of all the covenants by the lessees was a condition precedent to their right to determine the lease (*d*). Another Court of Error, however, appears to have entertained a different opinion (*e*). A lease con-

2 Dowl., N. S. 1023; *Cannock* v. *Jones*, 3 Exch. 233; 5 Id. 713; 3 H. L. Cas. 700; *Hunt* v. *Bishop*, 8 Exch. 675.

(*a*) *Newson* v. *Smythies*, 3 H. & N. 840; 28 L. J., Ex. 97; 1 F. & F. 477.

(*b*) *Pistor* v. *Cater*, 9 M. & W. 315.

(*c*) *Porter* v. *Shephard*, 6 T. R. 655; 3 R. R. 305.

(*d*) *Friar* v. *Grey*, 5 Exch. 584, 597; 4 H. L. Cas. 565.

(*e*) *Grey* v. *Friar*, 15 Q. B. 901.

tained a proviso, that if the lessor should give notice for the delivery up of the land to him, the lessee covenanted to surrender it up, and that the lessor might take possession of it, paying the lessee compensation for money expended thereon: it was held, that the proviso did not operate as a mere covenant by the lessee to give up on notice, but expressly gave the lessor power to take possession: and that he might do so without having first paid compensation (*f*).

Covenant to Build.

So where it was agreed that the lessor should within eighteen months from the date of the lease build a cattle-shed, the whole to be left to the superintendence of the lessee and her son; it was held, that this latter provision was not a condition precedent to or concurrent with the lessor's covenant to build (*g*).

Covenant for Employment of particular Person, &c.

On a lease of some coal mines, the lessees covenanted that the lessor should, when he thought fit, employ a fit and proper person to weigh the coals and keep the accounts, the person so weighing and keeping the accounts to be paid by the lessees; but in case such person did not duly attend to his duties, the lessees were authorized to discharge him. It was held, that the appointment of a fit and proper person was a condition precedent to the liability of the lessees to pay the wages, and that therefore they were not bound to pay the wages though they had not dismissed him (*h*). An assignee of a term in coal mines covenanted with the lessee that he would, so long as he should be in receipt of the rents of premises, pay to the lessors the rent payable by the original lease—and would keep the lessee harmless and indemnified against the rents and covenants of the lease: it was held, that the words "so long as he should be in the receipt of the rents" did not extend to the covenant to indemnify (*i*). A covenant in a farming lease provided that the tenant should consume and convert into manure, and spread on the premises, all the turnips, &c., grown thereon; but that in case he should sell off any part thereof, which he was at liberty to do, then that he should for every ton of turnips, &c., so sold off, bring back and spread thereon one ton of manure within three months after. In an action on this covenant the plaintiff set out the first part only, and assigned for breach that the defendant carried away fourteen acres of turnips, without converting the same into manure and spreading the same: it was held that the covenant was an alternative one, and that the plaintiff should have negatived the bringing back, within the time limited, an equivalent in manure (*k*).

(*f*) *Doe* d. *Gardner* v. *Kennard*, 12 Q. B. 244.
(*g*) *Cannock* v. *Joncs*, 3 Exch. 233; 5 Id. 713; 3 H. L. Cas. 700.
(*h*) *Lawton* v. *Sutton*, 9 M. & W. 795.
(*i*) *Crossfield* v. *Morrison*, 7 C. B. 286.
(*k*) *Richards* v. *Bluck*, 6 C. B. 437; 7 D. & L. 325.

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*Express Covenants (How discharged).*

(d) *How discharged.*

Before Breach by Deed.

Covenants cannot be discharged *before breach* otherwise than by deed; therefore a parol licence or agreement, dispensing with or changing the terms of such an obligation, could not before the Judicature Act be pleaded in bar to an action of covenant (*l*); and it does not seem that that act has made any difference.

By the Operation of Acts of Parliament.

With respect to the operation of acts of parliament in discharging the obligation of a covenant there is this difference; viz., that where a man covenants not to do an act or thing which it was lawful to do, and an act of parliament is made afterwards and compels him to do it, the statute discharges the covenant. So, if a man covenant to do a thing which is lawful, and an act of parliament comes in and hinders him from doing it, the covenant is discharged (*m*). But if a man covenant not to do a thing which at the time was unlawful, and a subsequent statute makes the action lawful, such statute does not discharge the covenant (*n*); and if the covenant be to do that which is afterwards made unlawful in part only, it must be performed so far as it continues lawful (*o*). If there be a covenant to do a thing which is unlawful by statute, the covenant will not be made lawful by the repeal of the statute, because the covenant was bad ab initio; although it would be otherwise, if the covenant had been originally lawful but had been made unlawful by a statute which was itself afterwards repealed (*p*).

Discharge of Covenant not to Build, &c.

In accordance with these principles, it has been held that a covenant to build a workhouse on the land demised was discharged by the operation of the Poor Law Amendment Act, 1834 (*q*); and a covenant not to assign without licence (*r*), and a covenant not to permit assigns to build (*s*) by a compulsory assignment to a company under the Lands Clauses Consolidation Act, 1845.

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SECT. 9.—*Implied Covenants and Agreements.*

(a) *Generally.*

Covenants in Law, when implied.

An implied covenant or covenant in law is one which the law intends and implies from the nature of the transaction, although not expressed by words in the deed. "A covenant in law, properly

(*l*) *Thompson* v. *Brown*, 7 Taunt. 656; *Harris* v. *Goodwin*, 2 M. & G. 405; *West* v. *Blakeway*, 2 M. & G. 729, 752; 9 Dowl. 846.

(*m*) *Brewster* v. *Kitchell*, 1 Salk. 198; *Doe* d. *Marquis of Anglesea* v. *Rugeley*, 6 Q. B. 107, 114; *Brown* v. *Mayor, &c., of London*, 9 C. B., N. S. 726; 13 Id. 828; Bac. Abr. tit. *Conditions* (Q. 2); Com. Dig. tit. *Conditions* (L. 1).

(*n*) *Brewster* v. *Kitchell*, 1 Salk. 198.

(*o*) 2 Eq. Ca. Abr. 26.

(*p*) *Jaeques* v. *Withy*, 1 H. Blac. 65.

(*q*) *Doe* d. *Anglesea* (*Lord*) v. *Rugeley* (*Churchwardens*), 6 Q. B. 107.

(*r*) *Slipper* v. *Tottenham and Hampstead Junction R. Co.*, L. R., 4 Eq. 112; 36 L. J., Ch. 841.

(*s*) *Baily* v. *De Crespigny*, L. R., 4 Q. B. 180; 38 L. J., Q. B. 98.

speaking, is an agreement which the law infers or implies from the use of certain words having a known legal operation in the creation of an estate; so that, after they have had their primary operation in creating the estate, the law gives them a secondary force, by implying an agreement on the part of the grantor to protect and preserve the estate so by these words already created; as if a man by deed demise lands for years, covenant lies upon the word 'demise,' which imports or makes a covenant in law for quiet enjoyment" (*t*). That the word "demise" in a lease for years imports and makes a covenant in law for quiet enjoyment, at least during the continuance of the estate out of which the lease is granted, is clear from all the authorities (*u*). By the Real Property Act, 1845, 8 & 9 Vict. c. 106, s. 4, the word "give" or the word "grant" in a deed executed after the 1st of October, 1845, "shall not imply any covenant in law in respect of any tenements or hereditaments, except so far as the word 'give' or the word 'grant' may, by force of any act of parliament, imply a covenant" (*x*). Where a renewed lease of a mill was granted to a bleacher for the purpose of carrying on therein his business, parol evidence was held admissible to explain the special circumstances under which the lease was granted, and from which an implied grant to use the stream for the purpose of the business might be inferred (*y*).

Upon a Demise.

A covenant in law in a demise ceases with the estate of the lessor, and does not necessarily continue during the whole term expressed to be granted. Therefore, if a tenant for life demise by indenture for fifteen years, without any express covenant for quiet enjoyment, upon his death during the term the covenant in law implied from the word "demise" will cease (*z*). But an express covenant, or one to be implied by construction of words used in the deed by way of warranty or contract, would continue in force to the end of the term expressed to be granted, and not merely during the actual continuance of such term (*a*). A covenant in law goes to the assignee of the term, and he has advantage of it during the actual continuance of the term (*b*). But the executors or administrators of the lessor are not liable where the term ceases on his death, and the lessee is subsequently evicted (*c*).

When an implied Covenant ceases.

(*t*) *Williams* v. *Burrell*, 1 C. B. 429.

(*u*) *Adams* v. *Gibney*, 6 Bing. 656, 666; 8 L. J., C. P. 243; 32 R. R. 514; *Nokes' case*, 4 Co. R. 80 b; *Holder* v. *Taylor*, Hob. 12; *Fraser* v. *Skey*, 2 Chit. R. 646; *Iggulden* v. *May*, 9 Ves. 325. And see the cases as to "Quiet Enjoyment" further discussed, post, Chap. XVII., Sect. 8.

(*x*) As in conveyances to railway companies, &c.

(*y*) *Hall* v. *Lund*, 1 H. & C. 676; 32 L. J., Ex. 113.

(*z*) *Swan* v. *Stransham*, Dyer, 257 a; 1 Leon. 179; Owen, 105; *S. C.*, cited 6 Bing. 666; *Adams* v. *Gibney*, 6 Bing. 656; 8 L. J., C. P. 243; 32 R. R. 514; *Penfold* v. *Abbott*, 32 L. J., Q. B. 67.

(*a*) *Williams* v. *Burrell*, 1 C. B. 402; *Bragg* v. *Wiseman*, Brownlow & G. 22.

(*b*) Bac. Abr. tit. *Covenant* (E. 5); *Vyvyan* v. *Arthur*, 1 B. & C. 410; 25 R. R. 437.

(*c*) See note (*z*) supra.

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*Implied Covenants and Agreements.*

No implied Covenant by Lessor that Premises fit for Occupation.

In general, there is no implied covenant by the lessor of a house or of land that it is reasonably fit for habitation, occupation, or cultivation (*d*); nor that the house will endure during the term; nor that the lessor will do any repairs whatever (*e*). And if the landlord is bound to do repairs, there is no implied condition that if not done the tenant may quit (*f*); that should be the subject of an express stipulation (*g*) in the contract of tenancy itself: an oral statement on the subject will usually be construed as an innocent representation, and not as a warranty (*h*).

### (b) *By Lessor of Furnished House.*

Furnished House.

*Smith* v. *Marrable.*

*Wilson* v. *Finch-Hatton.*

Infection by measles.

In letting a furnished house, the lessor impliedly promises that it is fit for occupation. So it was held in *Smith* v. *Marrable* (*i*), where a tenant for five or six weeks was held justified in quitting without notice on the ground of the house being infested with bugs; and this case, although shortly afterwards doubted by more than one member of the same court which decided it (*k*), was, in 1877, affirmed in *Wilson* v. *Finch-Hatton* (*l*), where its principle was held applicable to defective drainage, in the case of a house in London let from the 7th May to the 31st July, and although the drains were repaired by the landlord, and the house tendered in a wholesome condition on the 26th of May, the tenant (who had at once declined to occupy) was held neither liable for the agreed rent nor for use and occupation. The principle of these cases has also been applied to the case of infection by measles (*m*).

(*d*) *Hart* v. *Windsor*, 12 M. & W. 68; *Sutton* v. *Temple*, Id. 52, overruling nisi prius decisions in *Edwards* v. *Etherington*, Ry. & M. 268; 7 D. & R. 117; *Collins* v. *Barrow*, 1 Moo. & R. 112; *Salisbury* v. *Marshal*, 4 C. & P. 65.

(*e*) *Arden* v. *Pullen*, 10 M. & W. 321; *Gott* v. *Gandy*, 2 E. & B. 845; *Keates* v. *Earl Cadogan*, 10 C. B. 591.

(*f*) *Surplice* v. *Farnsworth*, 7 M. & G. 576; 8 Scott, N. R. 307.

(*g*) As in *Furnivall* v. *Grove*, 8 C. B., N. S. 400; 30 L. J., C. P. 3.

(*h*) See *Green* v. *Symons*, 13 T. L. R. 301; *Longman* v. *Blount*, 12 T. L. R. 520; *Kennard* v. *Ashman*, 10 T. L. R. 213.

(*i*) *Smith* v. *Marrable*, 11 M. & W. 5; 12 L. J., Ex. 223. And see *Campbell* v. *Wenlock*, 4 F. & F. 716.

(*k*) See, especially, per Parke, B., in *Hart* v. *Windsor*, ubi supra. It was, however, expressly approved of by Lord Abinger in *Sutton* v. *Temple*, ubi supra.

(*l*) *Wilson* v. *Finch-Hatton*, 2 Ex. D. 336; 36 L. T. 473; 46 L. J., Ex. 489; 25 W. R. 537. The distinction between a furnished and an unfurnished house (which was not *expressly* drawn in *Smith* v. *Marrable*) was expressly approved of in *Wilson* v. *Finch-Hatton*. The case, although re-argued before three judges, Kelly, C.B., Pollock, B., and Huddleston, B., on account of its importance, was ultimately decided without hesitation. In *Powell* v. *Chester*, 52 L. T. 732, Bacon, V.-C. (where specific performance of an agreement for lease of a partly-furnished house, resisted on the ground of insufficient water supply, was refused for want of evidence), said that *Smith* v. *Marrable* was only an authority for the proposition that in taking furnished apartments at the seaside, or for temporary occupation only, there is the implied warranty; but it is submitted that this view of *Smith* v. *Marrable* is incorrect, and that both on principle and on the authority of *Wilson* v. *Finch-Hatton*, as far as it goes (for Kelly, C.B., appears to have grounded his judgment at least partly upon the brevity of occupation), the duration of the tenancy is immaterial, on the ground—if on no other—that a furnished house is far less easily examined than an unfurnished one.

(*m*) *Bird* v. *Lord Grevile*, C. & E. 317, per Field, J.

It is no excuse on the part of the landlord that he honestly believed the house to be habitable if it turn out in fact not to be so (*n*).

Bonâ fide belief.

But there is no implied warranty that the furnished house will continue fit for habitation during the tenancy, or even that furnished lodgings will continue so, or that a resident landlord of such lodgings will inform the tenant of the fact of their having become insanitary (*o*).

No warranty of continuance of fitness.

### (c) *By Lessor of Unfurnished House at Low Rent.*

Another important exception to the rule that there is no implied condition of fitness in letting a house, is contained in s. 75 of the Consolidating Housing of the Working Classes Act, 1890, 53 & 54 Vict. c. 70. This enactment (which applies to lettings at certain low rents only) re-enacts s. 14 of the Housing of the Working Classes Act, 1885, 48 & 49 Vict. c. 72 (repealed by s. 102), in the following terms :—

Implied Condition of fitness, on letting unfurnished house at low rent.

In any contract made after the 14th day of August, 1885, [that being the date of the passing of the Act of 1885] for letting for habitation by persons of the working classes a house or part of a house, there shall be implied a condition that the house is at the commencement of the holding in all respects reasonably fit for human habitation. In this section the expression "letting for habitation by persons of the working classes" means the letting for habitation of a house or part of a house at a rent not exceeding in England the sum named as the limit for the composition of rates by sect. 3 of the Poor Rate Assessment and Collection Act, 1869 [*i.e.* in the metropolis 20*l.*, in Liverpool 13*l.*, in Manchester or Birmingham 10*l.*, and elsewhere 8*l.*] and in Scotland or Ireland 4*l.*

Housing of Working Classes Act, 1890, s. 75.

This section may, it is submitted, be "contracted out of" by express stipulation excluding its operation.

"Contracting out."

The effect of the section is not only that a tenant may quit the house without paying rent if the condition be broken, but may also, as was held in a case where plaster from a ceiling fell and injured the tenant's wife (*p*), sue the landlord for damages.

Action for damages.

### (d) *By Lessor not to derogate from Grant.*

Where a landlord demises part of his property for carrying on a particular business he is bound to abstain from doing anything on the remaining portion which would render the demised premises

(*n*) *Charsley* v. *Jones*, 53 J. P. 280, per Manisty, J.

(*o*) *Sarson* v. *Roberts*, [1895] 2 Q. B. 395 ; 65 L. J., Q. B. 37 ; 73 L. T. 174 ; 43 W. R. 690; 14 R. 616—C. A. In this case a grandchild of the defendant took a fever, with which the plaintiff's wife and child became infected.

For penalty for falsely answering questions of negotiator for hire as to dangerous infectious disorder within six weeks previously, see s. 129 of the Public Health Act, 1875, and see, too, s. 7 of the adoptive Infectious Diseases Prevention Act, 1890, and s. 65 of the Public Health (London) Act, 1891, post, Chap. XXIII., s. 2.

(*p*) *Walker and Wife* v. *Hobbs*, 23 Q. B. D. 458 ; 59 L. J., Q. B. 93 ; 61 L. T. 688 ; 38 W. R. 63, decided on the Act of 1885, but as will have been seen, equally applicable to the Act of 1890, the words of the two Acts being exactly the same.

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unfit for carrying on such business in the way in which it is ordinarily carried on. This was laid down by Stirling, J., in *Aldin* v. *Clark* (*q*), in which land was demised for a timber merchant's business to a lessee who covenanted to carry on such business, and the lessee was held entitled to damages from the assigns of the lessor for having erected, upon adjoining property acquired by them from him, buildings which obstructed the passage of air to drying sheds of the lessee.

Covenant by Lessor not to derogate from Grant.

*Grosvenor Hotel Co.* v. *Hamilton* (*r*) appears to have been decided on the same principle. There the lessor destroyed a demised house by vibration resulting from engines, and to a counterclaim for nuisance in an action for rent set up the defence that the house both at the time of the destruction and at the time of the demise was in a weak and unstable condition, and that a house in an ordinary condition would not have been destroyed. The Court of Appeal held that the lessor was estopped from setting up such a defence as being a derogation from his own grant; that he was liable for damages as a tort-feasor; and that the measure of damages was not only the value of the lease but also all loss fairly attributable to the tort.

### (e) *By Lessee for tenantlike User.*

Implied Covenants by Lessee.

In the absence of any express covenant on the subject, a covenant or promise is implied on the part of the lessee that he will use the buildings in a tenantable and proper manner (*s*); and that he will manage and cultivate the lands in a good and husbandlike manner, according to the custom of the country (*t*); but not that he will make a certain quantity of fallow, and spend a certain quantity of manure thereon, and keep the buildings in repair, or any other stipulation not arising out of the bare relation of landlord and tenant (*u*). Only the prevailing course of good husbandry and management in the neighbourhood need be proved (*x*), and will be considered applicable to all tenancies in whatever way created, whether verbal or in writing, unless expressly or impliedly excluded by the terms actually agreed on (*y*).

Covenants, when implied from express Words in other Covenants.

Where a lessee covenanted to plough, sow, manure, and cultivate the demised premises (except the rabbit-warren and sheep-walk) in a due course of husbandry, it was held that it amounted to a covenant

(*q*) *Aldin* v. *Clarke*, [1894] 2 Ch. 437; 63 L. J., Ch. 601; 71 L. T. 119; 42 W. R. 553; 8 R. 252, per Stirling, J.

(*r*) *Grosvenor Hotel Co.* v. *Hamilton*, [1894] 2 Q. B. 836; 63 L. J., Q. B. 836; 71 L. T. 362; 42 W. R. 626; 9 R. 819—C. A.

(*s*) *Horsefall* v. *Mather*, Holt, N. P. C. 7; *Leach* v. *Thomas*, 7 C. & P. 327; *Harnett* v. *Maitland*, 16 M. & W. 257.

(*t*) *Powley* v. *Walker*, 5 T. R. 373; 2 R. R. 619; *Legh* v. *Hewitt*, 4 East, 154; 7 R. R. 545; *Hallifax* v. *Chambers*, 4 M. & W. 662; *Martin* v. *Gilham*, 7 A. & E. 450; *Wilkins* v. *Wood*, 17 L. J., Q. B. 319.

(*u*) *Brown* v. *Crump*, 6 Taunt. 300.

(*x*) *Legh* v. *Hewitt*, 4 East, 154; 7 R. R. 545.

(*y*) *Wigglesworth* v. *Dallison*, 1 Doug. 190; 1 Smith L. C.; *Senior* v. *Armytage*, Holt, N. P. C. 197; 16 R. R. 627; *Hutton* v. *Warren*, 1 M. & W. 466.

not to plough the sheep-walk (*z*). Where a lessee covenanted that he would, at all times and seasons of burning lime, supply the lessor and his tenants with lime at a stipulated price, for the improvement of their lands and repair of their houses: it was held, that this was an implied covenant also that he would burn lime at all such seasons; and that it was not a good defence to plead that there was no lime burned on the premises out of which the lessor could be supplied (*a*). So a covenant by a lessee to pen and fold his flock of sheep, which he should keep upon the premises, upon such parts where the same had been usually folded, was held to amount by implication to a covenant to keep a flock of sheep (*b*). A landlord having accepted the offer of a tenant, whose term was expiring, to continue tenant, provided he could not find any other tenant at the rent it appeared to him to be worth by a certain day, it was held to be an implied condition, that the tenant should allow persons applying for the farm to go over it, and that, the condition not having been performed, the contract was at an end (*c*). On the demise of a brewery, with the exclusive privilege of supplying ale, it would seem that no covenant can be implied with respect to such a privilege from the word "demised" (*d*). Where in an agreement for a lease from the plaintiff to the defendant of certain works, the plaintiff agreed to supply to the defendant the whole of the chlorine still waste as it came from the still, at a given rate per cwt., and not to part with any of the still waste, except to the defendant, it was held, that the defendant was bound to take the whole of the waste which, during his occupancy, came from the plaintiff's still (*e*). In *Newton* v. *Wilmott* a demise was made of a mansion-house and land, with the sole licence of sporting over all other lands of the lessor's, and the lessor covenanted that if any of his tenants should obstruct the lessee in the enjoyment of his licence, then the lessor would, on the requisition of the lessee, give the tenant notice to quit, and would enforce such notice. The court held that there was no breach of this covenant by the lessor subsequently demising some of his lands for a term of years, without any clause to prevent the tenant from obstructing the person having the licence of sporting to enjoy his licence, and without reserving a power to give notice to quit if he did (*f*).

Flock of Sheep.

Brewery.

Right of Sporting.

In *The Earl of Glasgow* v. *Hurlet Alum Company*, a lease of alum mines gave the lessee the right to obtain alum from certain coal

Mining Lease.

(*z*) *Duke of St. Albans* v. *Ellis*, 16 East, 352; 14 R. R. 361.

(*a*) *Earl of Shrewsbury* v. *Gould*, 2 B. & A. 487.

(*b*) *Webb* v. *Plummer*, 2 B. & A. 746.

(*c*) *Doe* d. *Marquis of Hertford* v. *Hunt*, 1 M. & W. 690.

(*d*) *Hinde* v. *Gray*, 1 M. & G. 195; 1 Scott, N. R. 123.

(*e*) *Bealey* v. *Stuart*, 7 H. & N. 753; 31 L. J., Ex. 281.

(*f*) *Newton* v. *Wilmott*, 8 M. & W. 711.

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In Mining Leases.

wastes. A subsequent lease of the coal mines provided that nothing thereby granted should injure the rights of the parties who held the alum mines. The alum existed in the coal wastes. The coal lessees could not thoroughly work the coal without removing the pillars which supported the roof; but by doing this the alum would be rendered impossible to be reached: it was held by the House of Lords that the coal pillars could not be removed (*g*). A covenant will not be implied in a lease of mines for the lessees to sink a pit or shaft, although various provisions of the lease cannot be carried into effect without their doing so (*h*).

The tendency of modern decisions is not to imply covenants or stipulations which might and ought to have been expressed if intended (*i*).

Implied Covenants from Recitals.

A recital in a deed may amount to a covenant where it appears to be the intention of the parties that it should do so (*k*), and upon such implied covenant an action of covenant may be maintained (*l*).

## SECT. 10.—*Of Exceptions and Reservations.*

Distinction between Exception and Reservation.

An exception relates to some existing component part of the thing demised, which is capable of being severed or distinguished from it: but a reservation is properly of some right or profit to arise from the subject of the demise, which had previously no separate existence. A right of way reserved to the lessor by the lease, over the lands demised, is not strictly an exception or a reservation, being neither parcel of the thing demised nor issuing out of it, but is in strictness of law an easement newly created by way of grant from the lessee (*m*). But where a lease was made of lands, except and always reserved out of the demise unto the lessor all timber trees, &c., and also except and reserved all *royalties* whatsoever to the premises belonging or in anywise appertaining, it was held, that this was an exception or reservation, and was not pleadable as a grant (*n*).

Exception usually construed in favour of Lessee.

An exception, being the act and words of the lessor, is usually taken strictly against him (*o*). But where a lease contained an exception in

(*g*) *Earl of Glasgow* v. *Hurlet Alum Co.*, 3 H. L. Cas. 25.

(*h*) *James* v. *Cochrane*, 7 Exch. 170; 8 Id. 556. See also, as to mining leases, *Rowbotham* v. *Wilson*, 8 H. L. Cas. 348; *Dugdale* v. *Robertson*, 3 K. & J. 695; *Smith* v. *Darby*, 42 L. J., Q. B. 140; *Eadon* v. *Jeffcock*, 42 L. J., Ex. 36; in the last of which cases it was held that when the owner of surface and minerals beneath grants a lease of the minerals, there is not, outside the contract, an implied reservation of any right to have the surface supported by the minerals.

(*i*) *Aspin* v. *Austin*, 5 Q. B. 671; *Dunn* v. *Sayles*, Id. 685; *Doe* d. *Marquis of Bute* v. *Guest*, 15 M. & W. 160; *Smith* v. *Mayor, &c., of Harwich*, 2 C. B., N. S. 651; *Sharp* v. *Waterhouse*, 7 E. & B. 816.

(*k*) *Lay* v. *Mottram*, 19 C. B., N. S. 479.

(*l*) *Sampson* v. *Easterby*, 9 B. & C. 505; *S. C.*, in error, 6 Bing. 644; 1 C. & J. 105; *Saltoun* v. *Houstoun*, 1 Bing. 433; 25 R. R. 665; *Farrall* v. *Hilditch*, 5 C. B., N. S. 840.

(*m*) *Durham and Sunderland R. Co.* v. *Walker*, 2 Q. B. 940.

(*n*) *Pannell* v. *Mill*, 3 C. B. 625.

(*o*) Shep. Touch. 77.

favour of the lessor of the mines and quarries under the demised property, with full power to win and work, and also with free way-leave and passage to, from, and along the same; and the lessor covenanted in using the excepted rights to do as little damage to the soil as possible: it was held, that the lessor was entitled to the absolute use of an underground right of way and not merely to a right restricted to the purpose of working the mines under the demised premises; but that he was not entitled so to work the reserved mines as to let down the surface (*p*). Where a railway company excepted and reserved out of a demise of land a patent slip therein, and the machinery connected therewith, with free access thereto "for themselves, their successors and assigns, officers, servants and workmen:" it was held that a licensee of the company might justify using the slip (*q*). It has been held, too, in a suit for specific performance of an agreement for a lease, where a rector agreed to let a farm, except thirty-seven acres (not saying which), that the rector had the right to select which thirty-seven acres should not be included in the lease (*r*).

What things must concur in an Exception.

"In every good exception," it is said in Sheppard's Touchstone, "these things must always concur: 1, the exception must be by apt words 'saving and excepting,' or the like (*s*): 2, it must be a part of the thing demised, and not of some other thing: 3, it must be only part of the thing, and not all: 4, it must be such a thing as is severable from the premises demised, and not of an inseparable incident: 5, it must be of such a thing as he who doth accept may have, and which properly belongs to him: 6, it must be certainly or sufficiently described and set down" (*t*).

If a man be possessed of a new house and an old house, and make a lease with an exception of the new house for the use of the lessor when he pleases to reside there, and at other times for the use of the lessee, the new house is well excepted; and such exception is not avoided by the words "at all times to be used by the lessee, when the lessor doth not dwell there:" for that sentence doth not enure as an exception out of an exception (which sets the matter at large), but only as a declaration of the lessor's intention in making the exception;—the latter words, however, make the lessee tenant at will (*u*). So, if a man lease his houses, excepting his new house, *during the term*, this exception is good: but if he except it *during*

(*p*) *Proud* v. *Bates*, 34 L. J., Ch. 406; 11 Jur., N. S. 441.

(*q*) *Metcalfe* v. *Westaway*, 17 C. B., N. S. 658; 34 L. J., C. P. 114.

(*r*) *Jenkins* v. *Green*, 27 Beav. 437, 28 L. J., Ch. 817, per Romilly, M.R. Sed quære; see *Dann* v. *Spurrier*, 3 B. & P. 399; 7 R. R. 797; and ante, p. 165.

(*s*) Co. Lit. 47 a.

(*t*) Shep. Touch. (7th ed.), by Preston, p. 78; *Dorrell* v. *Collins*, Cro. Eliz. 6.

(*u*) *Cudlip* v. *Rundall*, 3 Salk. 156.

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*life*, it is void; for the words "during life" qualify the exception, and show his intent that the house shall not be excepted during the whole term, and so it is void.

Exception of Trees.

A clause in a lease purporting to reserve underwoods and underground produce, enures not as a reservation, but as an exception (*x*). A lease of lands excepted all timber, timber trees and other trees, &c., bushes and thorns, other than such bushes and thorns as should be necessary for the repairs of the fences; the lessee covenanted to keep fences in repair, and the lessor covenanted to find and provide, if growing on the premises, rough timber, stakes and bushes: it was held, that the provision as to bushes and thorns necessary for repairs was not an exception out of an exception, but that all trees, bushes and thorns were excepted out of the demise, whether part of a fence or not, or whether necessary for repairs or not (*y*). An exception of "all the wood" will be an exception of the soil whereon the wood grows (*z*). In like manner, if all the underwood and copse wood be excepted, the land will also be excepted, unless it clearly appear that it was merely the intention of the parties to except only the wood itself (*a*). But where "timber trees" are excepted, the soil in which they grow will not be covered by the exception (*b*), nor will it where a tenement described as "all timber trees, wood, underwood, &c.," are excepted (*c*). It will be usually not difficult to collect from the words used whether the exception was intended to extend to the soil or only to the trees, the more generic expressions pointing to the soil, and the more specific to the trees. A parol demise of land, reserving to the landlord "all the hedges, trees, thorn bushes, fences, with lop and top," operates as a licence to enter the land for the purpose of cutting and carrying away the trees (*d*). Where a lessee for life made a lease for years, excepting the wood, underwood and trees growing upon the land, it was held a good exception, although he had no interest in them but as lessee; because he remained always tenant, and was chargeable in waste—wherefore to prevent it he might make the exception: but if a lessee for years assign over his term with such an exception, it is a void exception (*e*). An exception of "all trees, woods, coppice-wood grounds, of what kind or growth soever" (*f*), or of "all timber trees and other trees, but not the annual fruit thereof," does not include apple-trees (*g*).

Apple-trees.

(*x*) *Doe* d. *Douglas* v. *Lock*, 2 A. & E. 705.
(*y*) *Jenney* v. *Brook*, 6 Q. B. 323.
(*z*) *Ive* v. *Sams*, Cro. Eliz. 521; *Whistler* v. *Paslow*, Cro. Jac. 487.
(*a*) *Whistler* v. *Paslow*, supra; *Pincomb* v. *Thomas*, Cro. Jac. 524.
(*b*) *Whistler* v. *Paslow*, Cro. Jac. 487.
(*c*) *Leigh* v. *Heald*, 1 B. & Ad. 622.
(*d*) *Hewitt* v. *Isham*, 7 Exch. 77; *Liford's case*, 11 Co. R. 51 b.
(*e*) *Bacon* v. *Gyrling*, Cro. Jac. 296.
(*f*) *London* v. *Southwell*, Hob. 304; *Wyndham* v. *Way*, 4 Taunt. 316.
(*g*) *Bullen* v. *Denning*, 5 B. & C. 842.

"Reservation" of Game.

A clause purporting to reserve and except to the lessor the power of hunting, &c., over the demised premises, enures as a grant from the lessee to the lessor—a grant of a *profit à prendre*. It is not *in law* either a reservation or exception (*h*). A demise of lands, excepting and reserving all *royalties*, with a clause for the lessor to be allowed to prosecute actions against persons trespassing for the purpose of hunting, &c., does not amount to a grant by the lessee of a liberty for the lessor to enter for the purpose of pursuing, killing, and taking birds of warren (*i*). In a demise of a mansion-house and land, with the sole licence of sporting over all other lands of the lessor's, subject to the liberty for each tenant on his *farm* to kill rabbits thereon, the exception extends not only to farms existing at the time of the demise, but also to other lands, as plantations, subsequently let as farms (*k*).

Exception of Minerals.

An exception of minerals includes stones got from quarries (*l*), and also everything that is necessary for working the mines or quarries, including way-leave for carrying away the stone or minerals (*m*); but a reservation of "all mines and minerals, sand, quarries of stone, brick-earth, and gravel pits," in a farming lease does not prevent the lessee from selling, in accordance with a custom of the country, flints turned up by the lessee in the course of ploughing (*n*).

Flints.

The reservation of a full power to work mines does not include the power of working so as to let down the surface (*o*).

Meaning of "Mines and Minerals." *Hext* v. *Gill*.

The legal meaning of the expression "mines and minerals," is "every substance which can be got from underneath the surface of the earth for the purpose of profit, unless there be something in the context or in the nature of the transaction between the parties to give it a more limited meaning" (*p*).

Right of Building-lessee to take Brick-earth.

It seems that a building-lessee, notwithstanding a reservation of minerals so framed as to include brick-earth, may dig foundations and convert the brick-earth for the purpose of building, but for the purpose of building only, and not for the purpose of carrying on the trade of brick-making (*q*).

Exception of Water.

Where there was a lease of certain lands, together with all houses, water-courses, &c., excepting a "water-course flowing or descending from" a certain spot, through a meadow, it was held in the particular

(*h*) *Doe* d. *Douglas* v. *Lock*, 2 A. & E. 705, 743; *Wickham* v. *Hawker*, 7 M. & W. 103; *Ewart* v. *Graham*, 7 H. L. Cas. 333; Hall on Profits à Prendre, p. 324. And see post, Chap. XVIII., Sect. 6, "Game," &c.

(*i*) *Pannell* v. *Mill*, 3 C. B. 625.

(*k*) *Newton* v. *Wilmott*, 8 M. & W. 711.

(*l*) *Micklethwait* v. *Winter*, 6 Ex. 644; 20 L. J., Ex. 315.

(*m*) *Cardigan* v. *Armitage*, 2 B. & C. 197.

(*n*) *Tucker* v. *Linger*, 8 App. Cas. 588; 52 L. J., Ch. 941; 49 L. T. 373; 32 W. R. 40, affirming decisions below, 21 Ch. D. 18.

(*o*) *Jeffryes* v. *Evans*, 34 L. J., C. P. 261; 19 C. B., N. S. 246.

(*p*) *Hext* v. *Gill*, L. R., 7 Ch. 699; 41 L. J., Ch. 761; 27 L. T. 291; 20 W. R. 957.

(*q*) *Robinson* v. *Milne*, 53 L. J., Ch. 1070, per North, J.

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case to be an exception of the water itself, not of the channel through which it flowed (*r*). Where there was a demise of a mill and a stream of water, except so much of the water as should be sufficient for the supply of persons whom the lessor had already contracted with or thereafter should contract to supply, provided that such a quantity should be left as should be sufficient to supply the mill for twelve hours a day: it was held, that this was not an absolute undertaking to supply water to work the mill twelve hours a day, but that it was a demise of the mill as the water was flowing at the time of the demise (*s*).

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## SECT. 11.—*Provisoes and Conditions.*

Nature of Conditions.

The terms "proviso" and "condition" are synonymous, and signify some quality annexed to a real estate, by virtue of which it may be defeated, enlarged or created upon an uncertain event. Such qualities annexed to personal contracts and agreements are generally called conditions (*t*). A proviso or condition of re-entry may be inserted in an agreement for a lease not under seal (*u*). It will even form part of a new implied tenancy from year to year upon the terms of a previous lease or agreement (*x*), and could be taken advantage of in case of entry and payment of rent upon the ordinary agreement for a lease.

Conditions precedent or subsequent.

Conditions are either precedent or subsequent. Where a condition must be performed before the estate can commence, it is called "a condition precedent;" but where the effect of the condition is either to enlarge or defeat an estate already created, it is then called "a condition subsequent" (*y*).

Construction of Conditions.

Conditions as well as covenants are to be construed according to the real intentions of the parties (*z*). What is or is not a condition precedent depends merely not on technical words, but upon the plain intention of the parties, to be deduced from the whole instrument (*a*). The court will not decide as to the meaning of an insensible condition or proviso for re-entry (*b*).

By what Instrument they may be made.

A condition may be contained in the same deed or indorsed upon the deed; or may be contained in another deed executed the same day (*c*); a condition indorsed upon a lease before the sealing and delivery is of equal force with a condition written within the deed (*d*).

(*r*) *Doe* d. *Earl of Egremont* v. *Williams*, 11 Q. B. 688.
(*s*) *Blatchford* v. *Mayor, &c., of Plymouth*, 3 Bing. N. C. 691.
(*t*) Bac. Abr. tit. *Condition*.
(*u*) *Hayne* v. *Cummings*, 16 C. B., N. S. 421; 10 L. T. 341.
(*x*) *Thomas* v. *Packer*, 1 H. & N. 669.
(*y*) Cruise's Dig. XII. tit. 1, s. 6; 1 Inst. 16 a, 237 a, n. 1.
(*z*) Cole Ejec. 407.
(*a*) *Roberts* v. *Brett*, 11 H. L. Cas. 337; 34 L. J., Ch. 241.
(*b*) *Doe* d. *Wyndham* v. *Carew*, 2 Q. B. 317; *Doe* d. *Burke* v. *Bowditch*, 8 Q. B. 973.
(*c*) Com. Dig. tit. *Condition* (A. 9).
(*d*) *Griffin* v. *Stanhope*, Cro. Jac. 456; *Goodright* d. *Nicholls* v. *Mark*, 4 M. & S. 30.

By what Words they may be created.

Conditions are most properly created by using the word "condition," or the words "on condition;" but the word commonly and as effectually made use of, is, that of "provided" (*e*). The words "covenant" and "condition," when used in an agreement, do not necessarily mean a covenant under seal, or a condition in the strict legal sense of the word, but may, in order to effectuate the intention of the parties, be construed to mean "contract or stipulation" (*f*). If a proviso or condition have dependence upon another clause of the deed, or if the words of the lease be to compel the lessor to do something, then it is not a condition, but a covenant only; as if there be in the deed a covenant that the lessee should scour the ditches, and then these words follow, "provided that the lessor should carry away the earth." If the words run thus: "provided always, and the lessee, &c., doth covenant, &c., that neither he nor his heirs shall do such an act;" this is both a condition and a covenant (*g*); so if the words are "provided always, and it is covenanted and agreed between the parties, that the lessee shall not alien," this is both a condition and a covenant; for it is a condition by force of the proviso, and a covenant by force of the other words (*h*). A covenant by the lessor for quiet enjoyment by the lessee, his executors, administrators and assigns, during the term, he or they paying the rent thereby reserved and performing the covenants on his and their part contained, is not a covenant subject to a condition precedent (*i*).

Condition or Covenant.

Where in an agreement to demise lands for a term of years at a certain annual rent, in which there was no clause of re-entry, there was a stipulation "that in case the said lessor should want any part of the said land to build or otherwise, or cause to be built, then the lessee shall give up that part of the said land as should be requested by the lessor, by his making an abatement in proportion to the rent charged; and also to pay for so much of the fence at a fair valuation, as he should have occasion from time to time to take away, by his giving or leaving six months' notice of what he intended to do;" it was held, that this was merely a covenant, and not a condition (*k*). But where a proviso in a lease was, that in case the lessor at any time shall be desirous of having any part of the land delivered up to him and shall sign three months' notice, the lessee covenants to give it up, and that the lessor shall and may take peaceable and quiet possession, paying a fair compensation, and the rent being reduced at a certain rate per acre, it was held not to be a covenant merely (*l*). By an agreement

(*e*) Shep. Touch. 122; Co. Lit. 146.
(*f*) *Hayne* v. *Cummings*, 16 C. B., N. S. 421; 10 L. T. 341.
(*g*) Shep. Touch. 122; Co. Lit. 146.
(*h*) Co. Lit. 103 b.
(*i*) *Dawson* v. *Dyer, Bart.*, 5 B. & Adol. 584, post, Chap. XVII., Sect. 8 b: and see *Lock* v. *Furze*, 19 C. B., N. S. 96; L. R., 1 C. P. 441.
(*k*) *Doe d. Wilson* v. *Phillips*, 2 Bing. 13; 9 Moo. 46; 2 L. J., C. P. 103; 27 R. R. 539; *Doe* d. *Wilson* v. *Abel*, 2 M. & S. 541; 15 R. R. 343.
(*l*) *Doe* d. *Gardner* v. *Kennard*, 12 Q. B. 244.

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for a lease it was *stipulated and conditioned*, that A. should not assign, transfer or underlet any of the premises, otherwise than to his wife, child or children: it was held, that by such clause a condition was created for the breach of which the lessor might maintain an ejectment (*m*). But mere words of agreement, such as "the tenant hereby agrees that he will not underlet the premises without the consent in writing of the landlord" (*n*), do not constitute such a condition (*o*).

A condition that assignments should be left with the solicitor of the ground landlord has been held to be a covenant (*p*).

"Running with the Land."

A condition which does not concern the thing demised, but is only collateral, does not run with the land, nor with the reversion; and an assignee of the lessor cannot sue for any breach of it (*q*).

## SECT. 12.—*Schedules, Indorsements, &c.*

Schedule of Fixtures, Furniture, &c.

When a house is let, together with fixtures, furniture or other articles therein, it is usual to make a schedule or inventory of them, with a covenant or promise from the lessee to re-deliver them at the end of the term. Such covenant or promise will give the landlord a better remedy (with clearer evidence) than he would otherwise have (*r*). The schedule or inventory is generally written at the foot or end of the lease, or it is indorsed thereon, or annexed thereto.

When Schedule not annexed, by mistake.

Sometimes by oversight or mistake a schedule referred to in a deed as annexed thereto is not in fact annexed when the deed is executed. In such case the deed will operate and take effect, so far as may be, without the assistance of the schedule (*s*). But sometimes it is insensible and inoperative as to part without the aid of the schedule (*t*).

How the Articles should be described in Schedule.

The articles comprised in the schedule should be specified in such a manner as to prevent all doubt as to what was intended to be included (*u*). When they are numerous and comprise items of small value, the description of the property should be general enough to include all the items, after which may be added "the principal articles whereof are particularly enumerated and described in the schedule hereunder written, or hereunto annexed," or to that effect (*x*). But

(*m*) *Doe* d. *Henniker* v. *Watt*, 8 B. & C. 308.
(*n*) *Shaw* v. *Coffin*, 14 C. B., N. S. 372.
(*o*) *Crawley* v. *Price*, L. R., 10 Q. B. 302; 33 L. T. 203; 23 W. R. 874.
(*p*) *Brooks* v. *Drysdale*, 3 C. P. D. 52; 37 L. T. 467; see ante, p. 129.
(*q*) *Stevens* v. *Copp*, L. R., 4 Ex. 20; and see p. 176, ante.
(*r*) *Dampier* v. *Pole*, 4 Exch. 678.
(*s*) *Dyer* v. *Green*, 1 Exch. 71; *Dames* v. *Heath*, 3 C. B. 938; *Dampier* v. *Pole*, 4 Exch. 678.
(*t*) *Weeks* v. *Maillardet*, 14 East, 568; *Sellin* v. *Price*, L. R., 2 Ex. 189; 36 L. J., Ex. 93.
(*u*) *Wood* v. *Rowcliffe*, 6 Exch. 407; *Cort* v. *Sagar*, 3 H. & N. 370; *Hutchinson* v. *Kay*, 23 Beav. 413; cited 3 H. & N. 372; *Baker* v. *Richardson*, 6 W. R. 663; *Walsh* v. *Trevanion*, 15 Q. B. 733; *Barton* v. *Dawes*, 10 C. B. 261.
(*x*) *Dyer* v. *Green*, 1 Exch. 71.

sometimes the schedule may be referred to in such a manner as to exclude anything not therein specified (*y*).

Indorsements.

When a fine or premium is paid, a receipt for the amount should be indorsed on the lease. It may be concisely expressed thus:—"Received of Mr. C. D. the sum of pounds as within mentioned." No receipt stamp is necessary in addition to the lease stamp.

Receipt for Consideration.

Attestation, though legally unnecessary, unless the lease be under a power (*z*), is not unusual, and where there is attestation, the usual attestation clause should not be omitted, especially when the lease is granted in pursuance of a power (*z*). Alterations in the deed should be specially mentioned in the attestation, or marked in the margin with the initials of the attesting witnesses.

Attestation.

It sometimes happens that after a deed has been engrossed, but before it is executed, some additional covenant or stipulation is agreed on, which cannot be conveniently interlined. In such case it may be *indorsed* on the lease, and referred to in the proper place thus:—"See back (A)." Memorandums indorsed upon leases, if made previously to the execution of the lease, are considered in construction and effect as part of the instrument, although they add to or change the provisions of the deed (*a*). An indorsement upon a deed or other alteration therein is taken to have been made before the execution of the deed and to be parcel of it, in the absence of proof to the contrary (*b*). It is no objection to a lease that an alteration therein was made and signed, after the lease was signed, but before it was sealed and delivered (*c*).

Alterations indorsed before the Lease is executed.

A memorandum indorsed upon an instrument subsequently to its execution, although it refers thereto, is to all intents a new instrument, and must be executed and stamped accordingly (*d*).

Where made after Execution.

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## Sect. 13.—*Stamp.*

### (a) *Generally.*

The stamping of leases and agreements for leases, which was, before the 1st January, 1871, regulated by a number of complicated enactments, was from that date regulated by the consolidating Stamp Act, 1870 (33 & 34 Vict. c. 97), as amended by the Inland Revenue

Stamp Act, 1870.

(*y*) *Wood* v. *Rowcliffe*, 6 Ex. 407; *Baker* v. *Richardson*, 6 W. R. 663, *contra*.

(*z*) See Law of Property Amendment Act, 1859, 22 & 23 Vict. c. 35, s. 12.

(*a*) *Griffin* v. *Stanhope*, Cro. Jac. 456; *Goodright* d. *Nicholls* v. *Mark*, 4 M. & S. 30; *Frogley* v. *Earl Lovelace*, 1 Johns. 333.

(*b*) *Brewster* v. *Kidgell*, Carth. 438; *Flint* v. *Brandon*, 1 Bos. & P., N. R. 73; *Doe* d. *Tatum* v. *Catamore*, 16 Q. B. 745.

(*c*) *Lyburn* v. *Warrington*, 1 Stark. R. 162.

(*d*) *Reed* v. *Deere*, 7 B. & C. 261; 2 C. & P. 624; 31 R. R. 190; *Hill* v. *Patton*, 8 East, 373; 9 R. R. 469; *French* v. *Patten*, 9 East, 351; 9 R. R. 571.

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Act, 1876, 39 & 40 Vict. c. 16, s. 11, and the Customs and Inland Revenue Act, 1888, 51 Vict. c. 8, s. 18, which latter enactment first made it an offence not to stamp, *the penalty being imposed on the lessee*. In 1891 the Stamp Acts were once more consolidated by the Stamp Act, 1891, 54 & 55 Vict. c. 39, the acts relating to the sale of stamps and the allowance for spoiled stamps being consolidated in the same year by the Stamp Duties Management Act, 1891, 54 & 55 Vict. c. 38. Extracts from the Stamp Act are set out at length hereafter (*e*).

Stamp Act, 1891.

"Impressed" Stamp.

The stamp must, by s. 2 of the Stamp Act, 1891, be an "impressed" one as a general rule, but to the rule there are, by s. 78, exceptions for the lease of a house for not more than a year at the rate of not more than 10*l*. a year (where the duty is one penny) and of a furnished house or apartments, at any rent exceeding 25*l*. for less than a year (where the duty is 2*s*. 6*d*.)—in either of which cases the duty may be denoted by an *adhesive* stamp "which is to be cancelled by the person by whom the instrument is first executed."

Adhesive Stamp.

Amount of Stamp.

Careful reference must be made to the schedule tit. Lease (post, Appendix A.), to discover the amount of the Stamp Duty in each case; but it may be mentioned here that it is ordinarily an ad valorem duty rising (1) with the amount of the rent and (2) with the length of the term if it exceeds 35 years.

Stamp on Counterpart.

The stamp duty on the counterpart or instrument executed by the lessee and handed to the lessor is by the schedule to the act tit. "Duplicate or Counterpart" the same duty as that chargeable on the lease if such duty does not amount to 5*s*., and 5*s*. in any other case; and by s. 72, *if* the counterpart is executed by the lessor, it must be either stamped as the lease itself, or else with a denoting stamp, showing that the lease was properly stamped.

Stamp depends on actual Consideration.

Prior to the Stamp Act, 1870, the ad valorem stamp duty on a lease, or agreement for a lease, was to be regulated by the consideration appearing on the face of it, although it might not be that which was actually paid (*f*), and the ad valorem duty applied only to the considerations passing between the lessor and lessee (*g*); but both these rules were abrogated by the terms of the schedule to the Act of 1870, tit. "Lease," which are repeated in the schedule to the Act of 1891.

Separate Rents.

If two distinct rents be reserved, one for the house and land, and another for the furniture and fixtures, the stamp must be sufficient to cover both (*h*). Where the plaintiff demised a slate pit at S. and stone quarries at M. to the defendant to hold the one from Lady-

(*e*) See post, Appendix A.
(*f*) *Duck* v. *Braddyll*, M'Clel. 217; 13 Price, 455.
(*g*) *Boone* v. *Mitchell*, 1 B. & C. 18.
(*h*) *Coster* v. *Cowling*, 7 Bing. 456.

day, 1815, and the other from Michaelmas, 1817, for the several terms of fourteen years from the respective dates thereof, at the yearly rent of 70*l.* for the slate pit and 130*l.* for the quarries: it was held, that one ad valorem stamp on the aggregate amount was sufficient, as the letting must be considered as one transaction, there being no evidence of an intent by the parties to defraud the revenue (*i*). Again, where a lease contained a demise of two separate farms, with two habendums differing from each other, a reservation of a separate rent in respect to each farm, and separate covenants, some applying to one farm and some to the other: it was held, that one ad valorem stamp for the amount of both rents was sufficient (*k*).

New Stipulation after Signature.

If a contract, which is signed by one party, have, previously to the signature of the other, inserted in it a new stipulation, it is entire, and requires but one stamp (*l*); and where an instrument contained in its general terms a written contract or demise to several different tenants for different estates at different rents, set against each signature, and one stamp only appeared on the paper; the court held, that it was matter of circumstantial evidence to which contract such stamp should be applied (*m*).

Description of Stamp.

It was formerly the law that if a lease in writing contained a contract for the purchase of goods, it could not be given in evidence to prove the sale of the goods, unless it had a lease stamp (*n*). The 97th section of the Act of 1870 provided for this case, by the enactment that where part of the consideration consists of goods, the value of the goods is to be deemed a consideration in respect of which the lease is chargeable with duty, and this enactment is repeated in s. 76 of the Act of 1891.

Option to Purchase.

A lease with option for lessee to purchase requires but one stamp as a lease (*o*).

When Stamp necessary in Evidence.

The draft of an agreement for letting premises in which alterations were made, and which was finally agreed to by the solicitors on both sides, but was never signed, is not admissible as evidence of an express contract without a stamp (*p*). So a rough imperfect memorandum of an agreement to become surety for rent must be stamped, and will exclude oral evidence of such agreement (*q*). Where a proposal was made in writing by A. to let a piece of land to B. on certain terms contained in a written agreement between B. and C., and A. afterwards agreed, by parol, that B. should have the land upon the terms proposed; it was held, in an action for a breach of

(*i*) *Boase* v. *Jackson*, 3 B. & B. 185.
(*k*) *Blount* v. *Pearman*, 1 Bing. N. C. 408; 1 Scott, 55; and see *Parry* v. *Deare*, 5 A. & E. 551.
(*l*) *Knight* v. *Crockford*, 1 Esp. 189; 5 R. R. 729.
(*m*) *Doe* d. *Copley* v. *Day*, 13 East, 241
(*n*) *Stone* v. *Rogers*, 2 M. & W. 443.
(*o*) *Worthington* v. *Warrington*, 5 C. B. 636.
(*p*) *Chadwick* v. *Clarke*, 1 C. B. 700.
(*q*) *Glover* v. *Halkett*, 2 H. & N. 487.

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the agreement, that the original proposal was receivable in evidence without a stamp (*r*). A written paper, signed by an auctioneer, and delivered to a bidder, to whom lands were let by auction, containing the description of the lands, the term for which they were let to the bidder, and the rent payable, but not the lessor's name, was held necessary to be stamped (*s*) : but a similar paper not signed by the auctioneer, or any of the parties, was held not to be such a minute of the agreement as was required to be stamped, nor such a writing as would exclude parol evidence (*t*). Where there was a parol agreement to demise certain premises upon the terms and conditions contained in a lease of the same premises granted by the lessor to another person ; it was held, that in an action by the lessor against the lessee for rent and non-repairs, the lease could not be read in evidence unless it was stamped (*u*). Though an oral lease for three years may be good, yet if it be reduced into writing it must be stamped, or it will not be receivable in evidence (*x*).

Objection to Stamp at Trial by the Opposite Party.

Where a document is offered in evidence, and it is objected to by the opposite party on the ground that it is not sufficiently stamped, proof of that lies on the party who makes the objection, it being a fact. The objection is one of a preliminary nature to be decided by the judge (not by the jury), who will, immediately upon the objection being taken, permit evidence to be interposed, and arguments adduced, to prove or disprove the sufficiency of the stamp.

Objection to Stamp at Trial by the Court.

Under s. 16 of the Stamp Act, 1870, reproducing s. 28 of the Common Law Procedure Act, 1854, it was the duty of the *officer of the court* whose duty it was to read any instrument to call the attention of the court to any omission or insufficiency of the stamp thereon ; but by s. 14 of the Stamp Act, 1891 (54 & 55 Vict. c. 39), "notice shall be taken by *the judge*, arbitrator or referee," as the case may be, of any such omission or insufficiency, whereupon, on payment to the officer of the court whose duty it is to read the instrument, of certain penalties, it may be received in evidence.

No new Trial on Stamp, objection.

By R. S. C. Ord. XXXIX., rule 8 (taken from s. 15 of the Common Law Procedure Act, 1854), "a new trial shall not be granted by reason of the ruling of any judge that the stamp upon any document is sufficient, or that the document does not require a stamp."

The decision of the judge, however, against the sufficiency or in favour of the requirement of a stamp may be reviewed (*y*).

(*r*) *Drant* v. *Brown*, 3 B. & C. 665.
(*s*) *Ramsbottom* v. *Mortley*, 2 M. & S. 445 ; 15 R. R. 304.
(*t*) *Ramsbottom* v. *Tunbridge*, 5 M. & S. 434 ; 15 R. R. 302.
(*u*) *Turner* v. *Power*, 7 B. & C. 625 ; 1 Moo. & M. 131.
(*x*) *Prosser* v. *Phillips*, Bull. N. P. 269.
(*y*) *Siordet* v. *Kuczynski*, 17 C. B. 251 ; 25 L. J., C. P. 2.

(b) *Stamping after Execution, or for purposes of Evidence.*

Stamping after Execution.

By the Stamp Act, 1891, s. 15 (re-enacting s. 15 of the Act of 1870), an unstamped or insufficiently stamped instrument may be stamped after execution, on payment of the unpaid duty and a penalty of 10*l.*, and, in case the duty exceeds 10*l.*, of 5 per cent. interest on the unpaid duty from the day of execution up to the time when the interest is equal to the unpaid duty. Where an instrument is not required by law to be stamped within a particular time after its execution, the court, upon its being offered in evidence, will not inquire when the stamp was affixed, nor, if a penalty was incurred, whether the proper penalty was paid on the stamping (*z*): and if an instrument has been originally unstamped, but has been stamped on payment of the penalty, it is admissible in evidence, though the receipt for the penalty has been erased; provided it be proved that such receipt has been indorsed on it; it is not necessary to prove the commissioners' signature to such a receipt (*a*).

Stamping for Purposes of Evidence.

By s. 14 of the Stamp Act, 1891 (re-enacting s. 14 of the Act of 1870), an unstamped lease (amongst other documents), if tendered in evidence in any Court of Civil Judicature in England, may be received in evidence on payment to the officer of the court of the amount of unpaid duty, and the penalty payable on stamping the same, and a further sum of one pound.

Lease before Alteration of Law is stamped according to Law at Time of Execution.

Under prior Stamp Acts it had been held (*b*), that in a case of stamping after execution, the proper stamp to be applied was that which was necessary at the time the stamp was actually fixed. But the Stamp Act, 1870, s. 17, expressly enacted that "save as aforesaid" [*i.e.*, save as in ss. 15, 16, mentioned], "no instrument executed in any part of the United Kingdom shall, except in criminal proceedings, be pleaded or given in evidence, or admitted to be good, useful or available, in law or equity, unless it is duly stamped *in accordance with the law in force at the time when it was first executed*" (*c*), and this enactment is repeated in s. 14, sub-s. 4, of the Stamp Act, 1891.

(c) *Stamping to escape Penalty.*

No express penalty for *not* stamping, before Act of 1888.

The 15th section of the Stamp Act, 1891, re-enacting the 18th section of the Customs and Inland Revenue Act, 1888, 51 & 52 Vict. c. 8, contains provisions of the utmost importance in respect to the stamping of leases or agreements for leases executed after the passing of the Act, *i.e.* on or after the 16th of May, 1888. Prior to the Act

(*z*) *Rex* v. *Preston*, 5 B. & Ad. 1028.

(*a*) *Apothecaries' Co.* v. *Fernyhough*, 2 C. & P. 438.

(*b*) *Buckworth* v. *Simpson*, 1 C. M. & R. 834; *Deacon* v. *Penniall*, 2 Exch. 320.

(*c*) See this enactment acted on in *Clarke* v. *Roche*, 3 Q. B. D. 170.

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of 1888, although a debt for the stamp duty accrued to the crown upon the execution of these documents, and although, as we have seen, they could only have been stamped after execution on payment of certain penalties, there was no express penalty for not stamping them, and neither omission to stamp, nor insufficient stamping, appears to have constituted any offence in law.

The express penalty for *not* stamping, under the Act of 1891.

The 15th section of the Stamp Act, 1891 (*d*), re-enacting the 18th section of the Act of 1888, creates the offence of not stamping a lease by the provisions that unless it is written on duly stamped material it must, in ordinary cases, be properly stamped within thirty days after execution, otherwise the *lessee* incurs a fine of ten pounds, and further enacts, that in addition to the penalty payable on stamping it, there shall be paid a further penalty equivalent to the stamp duty, unless a reasonable excuse for the delay in stamping, &c., be afforded to the satisfaction of the Inland Revenue Commissioners, or of the court, judge, arbitrator, or referee before whom it is produced. It is, however, also provided, amongst other things, that the Commissioners of Inland Revenue may, if they think fit, at any time within three months after the first execution of the lease, mitigate or remit any penalty payable on stamping.

The 15th and other material sections of the Stamp Act, 1891, are printed at length in Appendix A., post.

## SECT. 14.—*Execution of Lease.*

Sealing is essential to Execution of Lease by Deed.

Where a lease is by deed, the respective parties should seal and deliver it, for an instrument not under seal is no deed (*e*). One piece of wax may be the seal of several persons, but it must appear by the deed and profess to be the seal of each (*f*). It is not, however, absolutely essential that there should be either wax or wafer; it seems to be enough that there should be an impression on the parchment or paper, with the intent of sealing (*g*). The method of our Saxon ancestors was for such as could write to subscribe their names, and, whether they could write or not, to affix the sign of the cross, which custom illiterate persons for the most part to this day keep up by signing a cross for their mark, when unable to write their names. A deed is well executed by an illiterate person, if it be signed by a third person at his request and in his presence, and sealed and delivered by him. It need not be read over to him, unless he requires it (*h*).

(*d*) See the section at length, with extracts from the schedule, post, App. A.
(*e*) 1 Steph. Com. 492.
(*f*) *Cooch* v. *Goodman*, 2 Q. B. 580.
(*g*) See *Reg.* v. *Trustees of Covent Garden*, 7 Q. B. D. 238, n.
(*h*) *Rex* v. *Lonynor*, 1 N. & M. 577.

It is a point on which authorities are at variance, whether the Statute of Frauds, 29 Car. 2, c. 3 (*i*), requires leases by deed to be signed (*k*). The preponderance of authority (*l*) seems to be in favour of the signature not being necessary.

Whether Lease by Deed must be signed.

A lessee entering and holding under a lease not executed by his landlord is not estopped, in an action by the assignee of the lessor, from showing such want of execution by the lessor (*m*). Where a lease for a term, containing a covenant to repair *during the term*, although executed by the lessee, is not executed by the lessor, the lessee is not bound *by the covenant*, for the lease being void he has not had the consideration for his covenant (*n*). And it seems that such lessee would not be bound by such a covenant by the fact of his having enjoyed the premises for a period of years equal to those which the term would have comprised, if it had been granted, if he was not bound during its continuance (*o*). But he may be liable upon an implied tenancy on the like terms and conditions as those expressed in the lease.

Failure of Lessor to execute.

The lease must also be *delivered* either by the parties themselves or by their attorney authorized by a power, for merely sealing does not make a deed: the delivery is also expressed in their attestation "sealed and *delivered*," for delivery makes it a lease. Almost any manifestation, however, of the party's intention to deliver, if accompanied by an act importing the same, will constitute a delivery. But when it is intended that the lease shall not take effect as a demise until something is done by the lessee—*e.g.* payment of the premium or of the expenses—the lease should be delivered only as an escrow, *i.e.*, conditionally to take effect as a lease upon the performance of what is so to be done (*p*). Although sealed and delivered and attested in the usual manner, parol evidence is admissible to show that it was only to operate as an escrow, until, &c. (*q*). Whether it was intended to operate as a deed, or only as an escrow, is a question of fact for the jury (*r*).

Delivery.

Escrow.

An attorney or agent to execute a deed in the absence of his principal must be authorized by deed (*s*), and he must execute it in the

By Attorney.

(*i*) Ante, p. 135.

(*k*) *Cooch* v. *Goodman*, 2 Q. B. 580; *Aveline* v. *Whisson*, 4 M. & G. 801.

(*l*) Williams on Real Property, p. 142; Leake on Contracts, p. 77.

(*m*) *Cardwell* v. *Lucas*, 2 M. & W. 111; *Soprani* v. *Skurro*, Yelv. 19; *Rose* v. *Poulton*, 2 B. & Ad. 822.

(*n*) Com. Dig. tit. *Covenant* (F.); *Soprani* v. *Skurro*, Yelv. 18; *Waller* v. *Dean and C. of Norwich*, Owen, 136; *Knipe* v. *Palmer*, 2 Wils. 132; *Pitman* v. *Woodbury*, 3 Exch. 4; *Swatman* v. *Ambler*, 8 Exch. 72.

(*o*) *Pitman* v. *Woodbury* and *Swatman* v. *Ambler*, supra.

(*p*) Shep. Touch. 58, 59.

(*q*) See *Gudyen* v. *Bessett*, 6 E. & B. 986; *Bowker* v. *Burdekin*, 11 M. & W. 129; *Furness* v. *Meek*, 27 L. J., Ex. 34; *Millership* v. *Brookes*, 5 H. & N. 797; 29 L. J., Ex. 369; *Murray* v. *Earl of Stair*, 2 B. & C. 82; 26 R. R. 282; *Davies* v. *Jones*, 17 C. B. 625, 634.

(*r*) *Ponsford* v. *Walton*, L. R., 3 C. P. 167, 174.

(*s*) *Harrison* v. *Jackson*, 7 T. R. 207; 4 R. R. 422; *Berkeley* v. *Hardy*, 5 B. & C. 355.

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name of his principal, or in his own name, adding such words as show that he acts solely as the agent of his principal (*t*). If an unauthorized person seal and deliver a deed in the name and on behalf of one of the parties, and the party himself deliver it afterwards, he thereby adopts the sealing, and makes it his own deed (*u*).

Date.

Every deed is taken to be delivered on the day it bears date, unless the contrary be proved (*x*); and if proved, it operates only from the time of execution (*y*): but if the date be false or impossible, the delivery ascertains the time of it (*z*). Parol evidence is admissible to show that a written contract which has no date was not intended to operate from its delivery, but from a future uncertain period (*a*).

Attestation by Witnesses.

The last requisite is the attestation or execution of the lease in the presence of witnesses, though this is generally necessary rather for the preservation of the evidence, than to constitute the essence of the deed. But if the lease be made in pursuance of a power, it must be executed and attested as required by the power, or by the Law of Property Amendment Act, 1859, 22 & 23 Vict. c. 35, s. 12 (*b*). And when it requires to be registered in Middlesex or Yorkshire (infra, Sect. 15), the "memorial" required by s. 5 of the Yorkshire Registries Act, 1884, must, by s. 6 of that act, be attested by one witness or more, "one of whom at least," by s. 6 of the act, "shall have been a witness to the execution." In the North Riding two witnesses were necessary prior to the act of 1884 (*c*).

## SECT. 15.—*Registration of certain Leases in Middlesex, Yorkshire and Bedford Levels.*

In Middlesex.

If the demised premises be situate in Middlesex, Yorkshire, or the Bedford Levels, and if the lease be not at a rack rent or for more than 21 years in Middlesex, or for more than 21 years in Yorkshire, or for more than 7 years in the "Bedford Levels," registration will be necessary to give it force against subsequent purchasers or mortgagees. This registration is provided for in Middlesex by the Middlesex Registry Act, 1708, 7 Ann. c. 20, s. 17 of which is as follows:—

Leases, &c., which do not require to be registered.

This act shall not extend to any *copyhold* estates, or to *leases at a rack rent* (*d*), or to *any lease not exceeding one-and-twenty years, where the actual*

(*t*) *M'Ardle* v. *Irish Iodine Co.*, 15 Ir. Com. L. R. 146.

(*u*) *Tupper* v. *Foulkes*, 9 C. B., N. S. 797.

(*x*) Co. Lit. 36; 2 Blac. Com. 307.

(*y*) *Cooper* v. *Robinson*, 10 M. & W. 694; *Shaw* v. *Kay*, 1 Exch. 412; *Bird* v. *Baker*, 1 E. & E. 12; 28 L. J., Q. B. 7; *Jeron* v. *Tomkinson*, 1 H. & N. 196, 206; *Steele* v. *Mart*, 4 B. & C. 272; 28 R. R. 256; *Browne* v. *Burton*, 5 D. & L. 289.

(*z*) *Murray* v. *Earl Stair*, 2 B. & C. 82; *Bowker* v. *Burdekin*, 11 M. & W. 128; *Doe* d. *Garnons* v. *Knight*, 5 B. & C. 671; *Hare* v. *Horton*, 5 B. & Ad. 715; *Goodright* v. *Gregory*, Lofft, 339; *Goodright* d. *Carter* v. *Straphan*, Cowp. 201; Lofft, 763.

(*a*) *Davis* v. *Jones*, 17 C. B. 625.

(*b*) Post, Sect. 19.

(*c*) Post, Sect. 15.

(*d*) *I.e.* a rent of the full annual value of the thing demised.

*possession and occupation goeth along with the lease*, or to any of the chambers in Serjeants' Inn, the Inns of Court or Inns of Chancery; anything in this act contained to the contrary thereof in anywise notwithstanding.

Leases not comprised in this very extensive exception may be registered in such manner as is directed by the act, as amended by the First Schedule of the Land Registry (Middlesex Deeds) Act, 1891, 54 & 55 Vict. c. 64, and also in accordance with the Land Registry (Middlesex Deeds) Rules, 1892; and every such lease "shall be adjudged fraudulent and void" (*e*), against any subsequent purchaser or mortgagee for valuable consideration, unless a memorial thereof be registered as by the act is directed before the registering of the memorial of the deed or conveyance under which such subsequent purchaser or mortgagee shall claim.

Yorkshire.

The Yorkshire Registry Act, 1884, 47 & 48 Vict. c. 54, consolidating and amending 2 & 3 Ann. c. 4; 5 & 6 Ann. c. 18, and 6 Ann. c. 35, s. 34 (West Riding), 6 Ann. c. 35 (East Riding), and 8 Geo. 2, c. 6 (North Riding), contains similar enactments with respect to hereditaments in Yorkshire.

The excepting clause, s. 28, is as follows:—

"Nothing in this act contained shall be deemed to extend to any copyhold hereditaments, nor to any lease not exceeding twenty-one years, or any assignment thereof where accompanied by actual possession, from the making of such lease or assignment."

Registry Offices in Yorkshire.

By s. 31 of the act the registry offices are, as under the repealed acts, at Northallerton for the North Riding, at Beverley for the East Riding, and at Wakefield for the West Riding.

In the Bedford Level.

By 15 Car. 2, c. 17, s. 8, no lease out of or upon ninety-five thousand acres [of the Bedford Level], *except leases for seven years or under in possession*, is of any force but from the time it is entered with the registrar, as thereby directed.

Cases decided upon the Middlesex, Yorkshire and Bedford Level Registry Acts.

A lessee of land in the Bedford Level cannot object to an action by his landlord for a breach of covenant in not repairing, that the lease was void by statute for want of being registered, as the act does not avoid it *as between the parties themselves*, but only postpones its priority with respect to subsequent incumbrancers registering their title before (*f*). All leases by deed for a valuable consideration not expressly excepted are subject to the provisions of the Middlesex and Yorkshire acts. Therefore, where lands within a register county are demised by way of mortgage, the mortgagor to enjoy the same until default in payment of the principal and interest, the deed requires registration (*g*). But a deposit of a lease with or

(*e*) See *Wormald* v. *Maitland*, 35 L. J., Ch. 69; 13 W. R. 832.

(*f*) *Hodson* v. *Sharpe*, 10 East, 350; 10 R. R. 324.

(*g*) Rigge on Registration, 88, n. (*o*); Wilson on Registration, 29.

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In Middlesex and Yorkshire —*contd.*

without a memorandum in writing, by way of equitable mortgage of lands in Middlesex, need not be registered, not being a "deed or conveyance" within the meaning of the Middlesex Registry Act, 7 Ann. c. 20 (*h*), although actual or constructive notice thereof will in equity affect a subsequent purchaser (*i*). A further charge which is not registered will be postponed to a subsequent mortgage which is registered (*k*). The mere receipt of rent would not, it seems, be deemed an actual possession and occupation within the registry acts (*l*). A lease within the exception of these acts will so continue, notwithstanding it may afterwards become a valuable and saleable interest (*m*). Registering an assignment is not registering the lease (*n*). In registering an assignment of a lease, the parcels ought to be inserted in full, and it is not enough to refer to them as being described in the lease (*o*). A memorial of an assignment of lease indorsed on the lease was tendered for registration to the registrar for Middlesex, under the Middlesex Registry Act, 1708, 7 Ann. c. 20, in the following form: "An indenture of assignment." Then followed a statement of the date and parties to the assignment, "assigning all that brick messuage," &c. (specifying the premises and giving a full description of them as to locality and occupation), "by the description of the messuage or tenement, out-offices and premises, comprised in and demised by the within-written indenture of lease, with the appurtenances." The memorial did not state the date of the lease itself or the parties to it. It appeared on affidavit, in support of a rule for a mandamus to the registrar to register this memorial, that the full description of the premises was taken from the lease: it was held, that the memorial did not comply with the requirements of the Middlesex Registry Act, 1708, 7 Ann. c. 20, s. 6, as it did not show that the premises were described in such manner as the same were expressed in the deed to be registered, or in the lease thereby referred to. It was also held, that where the deed, of which a memorial is to be registered, is indorsed on an earlier deed, it is not sufficient to describe the premises by such memorial in the terms used in the earlier deed, without express reference to it, if the deed to be registered describes the premises simply by reference to the earlier deed (*p*). Where there were two assignments of the same lease of certain premises in Middlesex, and the last executed was

(*h*) *Sumpter* v. *Cooper*, 2 B. & Adol. 223; *Wright* v. *Stansfield*, 27 Beav.; 28 L. J., Ch. 183. But see *Neve* v. *Pennell*, and *Hunt* v. *Neve*, 33 L. J., Ch. 19; 2 Hem. & M. 170; *Wormald* v. *Maitland*, 35 L. J., Ch. 69; 13 W. R. 832.

(*i*) *Wormald* v. *Maitland*, supra.

(*k*) *Moore* v. *Culverhouse*, 27 Beav. 639; 29 L. J., Ch. 419; *Neve* v. *Pennell*, and *Hunt* v. *Neve*, contra.

(*l*) *Fury* v. *Smith*, 1 Huds. & Br. 735, 751.

(*m*) Wilson on Registration, 29.

(*n*) *Honeycomb* d. *Halpen* v. *Waldron*, 2 Stra. 1064; *Fleming* v. *Neville*, Hayes, 23; *Fury* v. *Smith*, 1 Huds. & Br. 735, 755.

(*o*) Sug. V. & P. 731 (14th ed.).

(*p*) *Reg.* v. *Registrar of Middlesex*, 15 Q. B. 976.

registered first, it was held that at law the deed last registered must be considered as fraudulent and void, under the statute 7 Ann. c. 20, s. 1; although the party claiming under the second assignment knew, when it was executed, of the prior execution of the first assignment (*q*). So a mortgage of leaseholds in Middlesex, which is registered there before a prior judgment obtained against the mortgagor, and registered in the Common Pleas (but not in Middlesex until after the mortgage), will take precedence of the judgment and any elegit thereon (*r*). The enrolment of a lease granted by the Duke of Cornwall is evidence in the same manner as if it had been granted by the crown, when there was no Duke of Cornwall (*s*).

Registration generally. Land Registry Acts.

Elaborate provisions have been made by the Land Registry Act of 1862 (25 & 26 Vict. c. 53), and subsequently by the Land Registry Act of 1875 (38 & 39 Vict. c. 87), which supersedes it, for the registration of titles generally; but these acts, unlike the particular acts above referred to, are simply permissive. The Middlesex and Yorkshire Registration Acts do not apply to land registered under either of the general acts (*t*). Leasehold land may not be registered under the act of 1875, unless it be held under a lease which is either immediately or mediately derived out of land of freehold tenure (sect. 2). Sects. 11—16 refer specially to the registration of leasehold land, and sect. 11 appears to allow registration of leases for lives or for a term of which more than 21 years are unexpired. The same section provides that—"Leasehold land containing an absolute prohibition against alienation shall not be registered in pursuance of this act; and leasehold land held under a lease containing a prohibition against alienation without the licence of some other person shall not be registered under the Act until and unless provision is made in the prescribed manner for preventing alienation without such licence by entry on the register of a restriction to that effect, or otherwise." Sects. 34—39 refer to the transfer of leases, and sects. 50, 51 to notice of leases.

Land Transfer Act, 1897. Permissive Registration.

The Land Transfer Act, 1897, 60 & 61 Vict. c. 65, by s. 18 and sched. I., provides that a sublease shall and a term created for mortgage purposes shall not, be deemed a lease within the meaning of sect. 11 of the Act of 1875.

Compulsory Registration.

The 20th section of the Act of 1897 enables Her Majesty the Queen by Order in Council to require as to any administrative

(*q*) *Doe* d. *Robinson* v. *Allsop*, 5 B. & A. 142; *Elsey* v. *Lutyens*, 8 Hare. 159; *Warburton* v. *Loveland*, 3 Dow. & Cl. 480; *Carlisle* v. *Whaley*, L. R., 2 H. L. Cas. 391.

(*r*) *Westbrook* v. *Blyth*, 3 E. & B. 737; 23 L. J., Q. B. 386.

(*s*) *Rowe* v. *Brenton*, 8 B. & C. 755. In the Duchy of Lancaster, see *Kinnersley* v. *Orpe*, 1 Doug. 56. As to registration of conveyances, see *Le Neve* v. *Le Neve*, 3 Atk. 651; Ambl. 436; *Hine* v. *Dodd*, 2 Atk. 275; *Jolland* v. *Stainbridge*, 3 Ves. 478; *Morecock* v. *Dickens*, Ambl. 678.

(*t*) Act of 1862, s. 104; Act of 1875, s. 127.

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county or a part thereof that registration of title to land is to be compulsory on sale, and the 22nd section allows general rules to be made (*inter alia*) for adapting to the registration of proprietors of leasehold land the provisions of the Act of 1875 as to absolute and possessory titles, and as to land certificates; but the 24th section provides that nothing in the Act (and therefore nothing in such rules) shall render compulsory the registration of the title to a lease having less than 40 years to run or two lives yet to fall in.

## SECT. 16.—*Costs of Lease and Counterpart.*

### (a) *By whom payable.*

Costs of Lease,

The lease and counterpart are usually prepared by the lessor's solicitor on behalf of both parties; but frequently the draft lease is settled and approved of by the lessee's own solicitor; who sometimes claims the right to engross the counterpart (*u*), which however seems unusual and improper. The costs of surveyor's charges and counsel's fees for advising on title, &c., will not be allowed as part of the costs of the lease (*x*). In the absence of any express stipulation to the contrary, the expense of the lease falls upon the lessee, and of the counterpart upon the lessor (*y*), but the lessee frequently agrees to pay all the expenses of both lease and counterpart.

and Counterpart.

By whom Solicitor employed.

The lessor's solicitor, when he acts for both parties, should in the first instance, take care to be *employed by the lessee to act on his behalf*, so that he may recover the amount of his charges from him, whether the negotiation for a lease goes off or is completed. Slight evidence of such employment is generally sufficient (*z*). If the solicitor of the lessor, who is not the solicitor for the lessee, nor employed by him on the particular occasion, prepares the lease and counterpart, he must look to his own client, the lessor, for payment of his charges; and the lessor, having paid them, may *sometimes* recover the amount from the lessee, under the special agreement entered into between

(*u*) *Forster* v. *Rowland*, 7 H. & N. 103; 30 L. J., Ex. 396.

(*x*) *Lock* v. *Furze*, 19 C. B., N. S. 96; L. R., 1 C. P. 441; 35 L. J., C. P. 141.

(*y*) *Jennings* v. *Major*, 8 C. & P. 61.

In 1885 (see Law Society's Digest of Cases on the Solicitors' Remuneration Order) the Council of the Law Society gave an opinion that in the absence of custom, *the lessee* is bound to pay the lessor's costs for the lease *and counterpart*, and that a written contract, silent as to the costs of the lease, does not displace the usual custom. The first part of this opinion is inconsistent with *Jennings* v. *Major*, and is, it is supposed, founded on the initial sentence of Part II. of Sched. 1 of the Order, which treats the counterpart as an essential document. But it is submitted that the Order merely limits the charges of solicitors, and does not alter the law as to the person by whom those charges are to be paid. Indeed, if any intention to alter the law could be inferred from the Order, this intention would seem to be to throw the expense of both lease and counterpart on the *lessor*, inasmuch as *his* solicitor is fixed with the preparation of both.

(*z*) *Webb* v. *Rhodes*, 3 Bing. N. C. 732; *Smith* v. *Clegg*, 27 L. J., Ex. 300.

them, or as money paid to his use at his request (*a*). When a proposed lease goes off, it is sometimes very important to ascertain correctly who is directly liable to the solicitor, because such party, after paying the amount, may have no remedy over against the other, by reason that the failure of the negotiation was attributable to him rather than to the other party; or that there was not a contract in writing sufficient to satisfy the Statute of Frauds (*b*). It is a question of fact by whom the solicitor was employed (*c*). Sometimes the charges of the lessor's solicitor may be taxed at the instance of the lessee, even after they have been paid (*d*).

(b) *Scale of Solicitor's Charges.*

Solicitors' Remuneration Order.

The Solicitors' Remuneration Order, 1882, of which so much as applies to leases and agreements for leases, is set out in the Appendix to this work (*e*), prescribes a scale of remuneration to solicitors (*f*) for (see Rule 2) "business connected with" preparing, settling, and completing lease and counterpart. By this scale, if the lease be at a rack rent, the charges are limited to 7*l.* 10*s.* on a rental not exceeding 100*l.* (but not less in any case than 5*l.*), and on a rental exceeding 100*l.* to 7*l.* 10*s.* on the first 100*l.*, and 2*l.* 10*s.* more on each additional 100*l.*, and on a rental exceeding 500*l.* to 7*l.* 10*s.* on the first 100*l.* and 2*l.* 10*s.* more on each additional 100*l.* up to 500*l.* and 1*l.* more on each additional 100*l.* The lessee's solicitor may charge one-half the above. A solicitor concerned for both parties "is to charge the lessor's solicitor's charges, and one-half of that (*sic*) of the lessee's solicitor."

Stamps and Disbursements.

The above scale "is not to include stamps, counsel's fees, or other disbursements reasonably and properly paid" (*g*). It applies only to completed transactions (*h*).

Fee, not Percentage fee.

The scale fee is not a percentage fee, and is only payable in respect of each full 100*l.* of rent, so that the proper fee in respect of a rental of 350*l.* is 12*l.* 10*s.* and not 13*l.* 15*s.*, as no charge can be made in respect of the odd 50*l.* (*i*).

Negotiations.

Negotiations are not provided for expressly either in the Order or the Scale. They are part of the "business connected with" the lease,

(*a*) *Grissell* v. *Robinson*, 3 Bing. N. C. 10, 16; *Baker* v. *Merryweather*, 2 C. & K. 737.

(*b*) 29 Car. 2, c. 3, s. 4; *Forster* v. *Rowland*, 30 L. J., Ex. 396.

(*c*) *Wilkinson* v. *Grant*, 18 C. B. 319, 320; *Smith* v. *Clegg*, 27 L. J., Ex. 300.

(*d*) *In re Newman*, L. R., 2 Ch. 707; 36 L. J., Ch. 843.

(*e*) See post, Appendix A., sect. 8. As to agreements for leases, see also Chap. IV., Sect. 8, ante.

(*f*) By s. 44 of the Stamp Act, 1891, every person, not being a barrister, solicitor, or conveyancer, &c., who for reward "draws or prepares any instrument relating to real or personal estate, shall incur a fine of 50*l.*," but by par. 2 b of the same section it is provided that the term "instrument" in the section does not include "an agreement under hand only."

(*g*) Rule 4.

(*h*) Rule 2 b.

(*i*) *McGarel, In re*, [1897] 1 Ch. 400; 66 L. J., Ch. 185; 76 L. T. 70; 45 W. R. 321—C. A.

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Solicitors' Charges—*contd.*

*Field, In re.*

and the charges for them are included in the scale charge, which covers the whole transaction. This was held by the Court of Appeal in *Field, In re* (*k*), in which charges up to 16*l.* 5*s.* 2*d.* for negotiations for a renewed lease of a house including one journey to see the house and another to procure the execution of the lease were disallowed by the master upon a bill in which the scale charge for preparing, &c., amounted to 13*l.* 2*s.* 6*d.* But negotiations carried on by the solicitor as to the letting of a property with persons other than the person to whom the lease is ultimately granted are not covered by the scale charge. The solicitor is entitled to remuneration for such negotiations as business "which is not in fact completed" under Rule 2 (c) of the General Remuneration Order (*l*).

Premium.

In the case of a lease both for rent and premium, the lessor's solicitor is not entitled to charge, in addition to the scale fee on the rent and the fee for deducing title in respect of the premium, a further fee for negotiation (*m*).

Agreement for Lease.

*Emanuel and Simmons, In re.*

It has also been held by the Court of Appeal in *Emanuel and Simmons, In re*, that preparation of a prior agreement for a lease is also part of the "business," and that where the agreement provided that the lessor should do certain repairs before a certain day and then deliver possession, whereupon the lessor should grant and the lessee accept a lease in the form annexed, such agreement could not be separately charged for (*n*) ; and this case was, after having been to some extent doubted in the House of Lords (*o*), unanimously approved by the House in *Savery* v. *Enfield Local Board* (*p*), where it was held that no fee in addition to the scale fee would be charged in respect of the negotiations which lead up to or for the preparation and completion of the agreement which precedes the lease.

Lease or Agreement for Lease.

An agreement for less than three years' tenancy is either a lease or an agreement for a lease (*q*).

Third Party.

Where a solicitor's bill includes charges for services in respect of which a third party taxing it is not liable, a corresponding deduction

(*k*) *Field, In re*, 29 Ch. D. 608 ; 54 L. J., Ch. 661 ; 52 L. T. 480 ; 33 W. R. 553—C. A., aff. Chitty, J., and approved in *Savery* v. *Enfield Local Board*, [1893] A. C. 218 and infra.

(*l*) *Martin (A Lunatic), In re*, 41 Ch. D. 381 ; 58 L. J., Ch. 478 ; 60 L. T. 555 ; 37 W. R. 497.—C. A., per Cotton and Lindley, L. JJ.

(*m*) *Horn and Francis, In re*, [1896] 2 Ch. 797 ; 66 L. J., Ch. 15 ; 75 L. T. 370 ; 45 W. R. 72, per Chitty, J.

(*n*) *Emanuel and Simmons, In re*, 33 Ch. D. 40 ; 55 L. J., Ch. 710 ; 55 L. T. 79 ; 34 W. R. 613—C. A., aff. Pearson, J., and approved in *Savery* v. *Enfield Local Board*, infra.

(*o*) In *Parker* v. *Blenkorn*, 14 App. Cas. 1 ; 58 L. J., Q. B. 209 ; 59 L. T. 906 ; 37 W. R. 401, reversing decision of C. A., in which Court the opinion had been expressed that there is no distinction to be found in the Remuneration Order between the treatment of business connected with sales and the treatment of business connected with leases ; commented on in Solicitors' Journal for Dec. 8th, 1888 ; and see per North, J., in *Faulkner, In re*, 36 Ch. D. 566.

(*p*) *Savery* v. *Enfield Local Board*, [1893] A. C. 218 ; 62 L. J., Ch. 674 ; 68 L. T. 722 ; 42 W. R. 33 ; 1 R. 160.

(*q*) *Negus, In re*, [1895] 1 Ch. 73 ; 64 L. J., Ch. 79 ; 71 L. T. 716 ; 43 W. R. 68 ; 13 R. 85, per Chitty, J.

must be made as between the solicitor and such third party from the amount of the scale fee chargeable on the whole transaction (*r*).

Election of Solicitor to charge otherwise than by scale.

By rule 6 of the Order a solicitor "may, before undertaking any business, by writing under his hand communicated to the client, elect that his remuneration shall be according to the present system" [*i.e.*, the system in use before 1882] "as altered by Schedule II." of the Order. This election must be made as soon as the retainer is accepted, and a solicitor after doing any part of the business covered by the retainer may not turn round and say that the scale fee will not remunerate him (*s*); nor can he claim remuneration partly based on the one system and partly on the other (*t*). Where under a lease with power of renewal, assigns are liable to pay the costs of a new lease, notice of election to the assigns is not necessary, they not being "clients" within the meaning of the Order (*u*). Where a building agreement was entered into and the form of the lease settled before the act, the lessor's solicitor may not charge the scale fee under the act, though the lease as settled does not contain the names of the parties, the parcels, the plan, or the terms of a restrictive covenant (*x*).

Premium.

By rule 5, where the lease is at a money payment or premium as well as at a rent, a further charge may be made in respect of the money payment or premium. This rule applies, though no abstract of the lessor's title has been furnished to the lessee (*y*), but does not apply where a lessor, leasing to a company, takes a number of its shares by way of premium in addition to the rent (*z*). In the case of a lease both for rent and premium, the lessor's solicitor is not entitled to charge a registration fee (*a*), but he is entitled to the scale remuneration, carrying a minimum fee of 5*l.* or 3*l.* as the case may be, in respect of the premium, in addition to the scale remuneration in respect of the rent (*b*).

Sale by way of Sublease.

A sale by way of sublease for the residue of a long term less three days is not a conveyance or lease within rule 5, so as to entitle the solicitor to the further charge (*c*).

## Sect. 17.—*Entry of Lessee.*

*Interesse Termini.*

Before entry a lessee for years has at common law only an *interesse termini* (an interest of a term), and no possession. He cannot before

(*r*) Ib.
(*s*) *Allen, In re*, 34 Ch. D. 433; 56 L. J., Ch. 487; 35 W. R. 130—C. A., aff. Kay, J.
(*t*) *Hickley, In re*, 54 L. J., Ch. 608; 52 L. T. 89; 33 W. R. 320.
(*u*) Ib., per Kay, J.
(*x*) *Wellby* v. *Still*, [1895] 1 Ch. 524; 64 L. J., Ch. 495; 72 L. T. 108; 13 R. 165, per Kekewich, J.
(*y*) *Robson, In re*, 45 Ch. D. 71; 59 L. J., Ch. 627; 63 L. T. 372; 38 W. R. 556.
(*z*) *Hastics and Crawfurd, In re*, 36 W. R. 572, per North, J.
(*a*) *Horn and Francis, In re*, ante, p. 208.
(*b*) *Hellard and Bewes, In re*, [1896] 2 Ch. 229; 65 L. J., Ch. 550; 74 L. T. 457; 44 W. R. 475, per North, J.
(*c*) *Webb, In re, Still* v. *Webb*, [1897] 1 Ch. 144; 66 L. J., Ch. 163; 75 L. T. 478; 45 W. R. 170, per Stirling, J.

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*Entry of Lessee.*

entry maintain an action of trespass (*d*); or for breach of the covenant for quiet enjoyment (*e*) or for damages (*f*); but he may maintain ejectment (*g*), or he may assign his interest, and his assignee may enter, or maintain ejectment (*h*). The *interesse termini* is in the lessee, whether the lease be made to commence immediately or at a future day (*i*). If a lease be so framed as to be a bargain and sale under the Statute of Uses, the possession is immediately executed in the lessee, without actual entry (*k*).

Failure to obtain possession of part of Demised Premises.

In *Neale* v. *Mackenzie* 100 acres were demised by parol for a year. The lessee accepted the lease, and, by virtue of the demise, entered upon the demised land. Before the demise, eight acres included in it had been demised to a third party, in whose possession they were, so that the lessee could not, and did not, enter upon them. It was held that the latter demise was void as to the eight acres, and that the rent was not apportionable, and could not be distrained for, the impediment to the lessee taking possession not being analogous to an eviction by an elder title (*l*). So where the tenant could not obtain possession of part of the premises demised, it was held that an action of covenant could not be maintained by the lessor against the lessee for the rent, as in such an action it could not be apportioned (*m*).

## SECT. 18.—*Void or Voidable.*

"Void" means at the Election of the Lessor.

*Davenport* v. *The Queen.*

When a lease contains a proviso or condition that on breach of any of the covenants, the lease "shall cease, determine, and be utterly void, to all intents and purposes whatsoever," such words will be construed to mean *void at the election of the lessor* (*n*). This has been held in a series of cases, affirmed by the Judicial Committee of the Privy Council in *Davenport* v. *The Queen* (*o*). The lessee will not be allowed to take advantage of his own wrongful act or omission, and to say that thereby the lease has become void (*p*). The lessee must do some

(*d*) Co. Lit. 296 b; *Wheeler* v. *Montefiore*, 2 Q. B. 133, 156; *Turner* v. *Cameron's Steam Coalbrook Coal Co.*, 5 Ex. 932; *Litchfield* v. *Ready*, Id. 939; *Lowe* v. *Ross*, Id. 553; *Harrison* v. *Blackburn*, 17 C. B., N. S. 678; Cole Ejec. 287.

(*e*) *Wallis* v. *Hands*, [1893] 2 Ch. 75; 62 L. J., Ch. 586; 41 W. R. 471; 5 R. 370, per Chitty, J.

(*f*) Ib.

(*g*) Cole Ejec. 72, 287, 459; *Doe* d. *Parsley* v. *Day*, 2 Q. B. 156; *Ryan* v. *Clark*, 14 Q. B. 73; 7 D. & L. 8. The contrary opinion expressed in Platt on Leases, i., 23, is, it is submitted, at variance with authority and principle.

(*h*) 8 & 9 Vict. c. 106, s. 6.

(*i*) Com. Dig. tit. *Estate* (G. 14); *Lock* v. *Furze*, 19 C. B., N. S. 96, 103, 105; L. R., 1 C. P. 441; 34 L. J., C. P. 210; 35 Id. 141.

(*k*) 2 Blac. Com. 270.

(*l*) *Neale* v. *Mackenzie*, 1 M. & W. 747, reversing the considered judgment of the Court of Exchequer, 2 C. M. & R. 84.

(*m*) *Holgate* v. *Kay*, 1 C. & K. 341.

(*n*) *Roberts* v. *Davey*, 4 B. & Ad. 667; *Pennington* v. *Cardale*, 3 H. & N. 656; *Hughes* v. *Palmer*, 19 C. B., N. S. 393, 404, 407; Cole Ejec. 408.

(*o*) *Davenport* v. *The Queen*, L. R., 3 App. Ca. at p. 128.

(*p*) *Rede* v. *Farr*, 6 M. & S. 121; 18 R. R. 329; *Doe* d. *Bryan* v. *Bancks*, 4 B. & A. 401; *Arnsby* v. *Woodward*, 6 B. & C. 519; *Roberts* v. *Davey*, 4 B. & Ad. 664; *Doe* d. *Nash* v. *Birch*, 1 M. & W. 402; *Reid* v. *Parsons*, 2 Chit. R. 247.

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act evidencing his intention to enter for the forfeiture and determine the lease (*q*), and the lease will be *avoided from that time only*; but previous arrears of rent may be sued for, although upon re-entry the lessor is to have the premises again "as if the said indenture had never been made" (*r*). The subject of forfeiture is further considered hereafter (Chap. VIII., Sect. 5).

Fraud.

Where a lease was granted to a man on his fraudulent representation that he intended to use the premises for carrying on a lawful trade, he intending at the time to use them, and afterwards using them, as a brothel, the representation being collateral to the agreement, was held not to avoid the lease (*s*).

Illegality.

Use as brothel.

Where a lessee intending to assign knew that the intended assignee took the premises for the purpose of using them as a brothel (notwithstanding an express covenant therein contained not so to use them), the transaction was held void so as to prevent the lessee, who had paid for dilapidations to the lessor, from recovering the money so paid from the assignee under the indemnity clause of the assignment, and it was said that no rent or damages for breaches of covenant would have been recoverable upon an underlease executed before the assignment (*t*).

Infringement of Statute.

In covenant for rent it was held a good defence that the premises were demised by the plaintiff to the defendant for the express purpose of being used for boiling oil and tar, contrary to the provisions of the Building Act (*u*).

What avoids a Lease.

Erasure, &c.

A lease by deed may be avoided by matter ex post facto, as by erasure, interlineation or other alteration in any material part (*x*). The same rule extends to a lease not by deed, and it has been held that the addition by a stranger of a seal to a written instrument will avoid it (*y*). A deed executed with blanks in material parts, whereby it is incapable of having any operation, and afterwards filled up and delivered by another person, in the absence of the party who has executed, and unauthorized by instrument under seal, is invalid (*z*). If a deed be altered by a stranger in a point not material, the deed is not avoided; but it is otherwise if it be altered by a stranger

(*q*) *Roberts* v. *Davey*, 4 B. & Ad. 667; *Arnsby* v. *Woodward*, 6 B. & C. 519; *Fenn* d. *Matthews* v. *Smart*, 12 East, 444, 451; *Baylis* v. *Le Gros*, 4 C. B., N. S. 537.

(*r*) *Hartshorne* v. *Watson*, 4 Bing. N. C. 178; *Load* v. *Green*, 15 M. & W. 216, 223; *Selby* v. *Browne*, 7 Q. B. 620; *Franklin* v. *Carter*, 1 C. B. 750; 3 D. & L. 213; *Johns* v. *Whiteley*, 3 Wils. 127; *Att.-Gen.* v. *Cox*, 3 H. L. Cas. 240.

(*s*) *Feret* v. *Hill*, 15 C. B. 207. As to plea of fraud to an action for not granting a lease, see *Calvaleiro* v. *Paget*, 4 F. & F. 537; and as to plea of illegality, see *Cowan* v. *Milbourn*, L. R., 2 Ex. 230; 36 L. J., Ex. 124, in which case it was held to be a defence that rooms agreed to be let were intended to be used for blasphemous lectures.

(*t*) *Smith* v. *White*, L. R., 1 Eq. 626; 35 L. J., Ch. 454. See also *Jennings* v. *Throgmorton*, Ry. & Mood. 251, and post, Chap. VI., Sect. 3.

(*u*) *Gas Light Co.* v. *Turner*, 7 Scott, 779; 8 Id. 609; 5 Bing. N. C. 666; 6 Id. 324.

(*x*) *Pigot's case*, 11 Co. R. 27; Bull, N. P. 267; 2 Blac. Com. 308; *Davidson* v. *Cooper*, 13 M. & W. 352 (Exch.).

(*y*) *Davidson* v. *Cooper*, supra.

(*z*) *Hibblewhite* v. *M'Morine*, 6 M. & W. 200; 8 Dowl. 802. But see *Eagleton* v. *Gutteridge*, 11 M. & W. 465; 2 Dowl., N. S. 1053.

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in a point material; for the witnesses cannot prove it to be the act of the party where there is any material difference: an immaterial alteration, however, does not change the deed, and consequently the witnesses may attest it without danger of perjury; but if the deed be altered by the party himself, though in a point not material, yet it avoids it, for the law takes every man's act most strongly against himself.

Altered Deed may be good as Evidence.

It is material to observe that an altered deed, although the covenants in it cannot be sued upon, may be good evidence to show the estate which passed by it, and which was not divested by these alterations (*a*). Where, by agreement between plaintiff and defendant, a house, No. 38, was let to the plaintiff, and after the agreement was executed and delivered to the plaintiff the number was altered to 35, but it did not appear by whom, No. 35 being in fact the house let; it was held that the agreement might be given in evidence in an action for an excessive distress, in which the demise was admitted, to show the terms of the holding (*b*).

Cancellation.

It has been held that the cancelling of a lease by the mutual consent of both parties does not destroy the term vested in the lessee, and that, therefore, notwithstanding such cancellation, the lessor may maintain an action *of debt* on the demise for the recovery of the rent (*c*), and the deed may be given in evidence to show that the estate passed (*d*).

## SECT. 19.—*Leases under Powers* (*e*).

### (a) *Generally.*

Construction of Powers.

The rules for the construction of powers of leasing settled land have been variously laid down by different judges, who have severally declared that they must be construed strictly (*f*), liberally (*g*), indifferently, without leaning to either side (*h*); equitably in favour of the donee (*i*), favourably for the donee (*k*); strictly for the tenant

(*a*) *Davidson* v. *Cooper*, 11 M. & W. at p. 800; *Stewart* v. *Aston*, 8 Ir. Com. L. R., N. S. 35; *Doe* d. *Courtail* v. *Thomas*, 9 B. & C. 288; *West* v. *Steward*, 14 M. & W. 47.

(*b*) *Hutchins* v. *Scott*, 2 M. & W. 809; *Stewart* v. *Aston*, 8 Ir. Com. L. R., N. S. 35.

(*c*) *Lord Ward* v. *Lumley*, 5 H. & N. 87, 656; 29 L. J., Ex. 322.

(*d*) *The Agricultural Cattle Insurance Co.* v. *Fitzgerald*, 16 Q. B. 432; *Stewart* v. *Aston*, supra; *Roe* d. *Earl of Berkeley* v. *Archb. of York*, 6 East, 86; 8 R. R. 413.

(*e*) See Sugden (Lord St. Leonards) on Powers, 711—835 (8th ed.), A.D. 1861, and see also Farwell on Powers (2nd. ed.), A.D. 1893.

(*f*) *Fitzwilliam's case*, 6 Rep. 32; *Taylor* d. *Atkyns* v. *Horde*, 2 Smith, L. C. 495.

(*g*) *Right* d. *Bassett* v. *Thomas*, 3 Burr. 1441; 1 W. Blac. 446; and cases cited arguendo in *Vivian* v. *Jeyon*, L. R., 3 H. L. Cas. at p. 288.

(*h*) *Goodtitle* d. *Clarges* v. *Funucan*, 2 Doug. 573; *Doe* d. *Earl of Jersey* v. *Smith*, 7 Price, 313; 21 R. R. 577, 767.

(*i*) *Ward* v. *Hartpole*, 3 Bligh. 470, 845.

(*k*) O. Bridgm. by Bann. 90, 93.

for life, and liberally for the remainderman (*l*). It seems, however, to be agreed that powers must be construed according to the intention of the parties (*m*); and so that the estate itself, which is subjected to the power, shall not be destroyed by the exercise of it (*n*). It is the duty of the court to support a power, if possible, and to give effect to its execution, if it is not exercised from improper motives or for improper objects (*o*).

Statutes as to Powers.

Many formal defects in leases under powers have been remedied by the Leases Act, 1849 (12 & 13 Vict. c. 26), as amended by the Leases Act, 1850 (13 & 14 Vict. c. 17) (*p*); and a substantial alteration of the law of leasing settled land has been effected by the Settled Land Act, 1882 (45 & 46 Vict. c. 38), which by conferring detailed powers of leasing upon a tenant for life independently of his trustees, has greatly diminished the importance of the cases decided before it came into operation.

Settled Land Act, 1882.

The Settled Land Act, 1882, the purport and object of which is to grant to a tenant for life large powers for his own benefit (*q*), is by s. 2 retrospective, that is, it applies whether a settlement of the land were made before or after the commencement of the act (although of course a bad lease made before the commencement of the act does not become good by virtue of the act through having anticipated its provisions); and by ss. 50 and 51 a contract by a tenant for life not to exercise the powers of the act is void, and so is any prohibition or limitation in the settlement to a similar effect. What the leasing powers of a tenant for life under the act are, we have already seen (*r*): and it need only be added here, that by s. 54, a lessee dealing in good faith with the tenant for life is as against all remaindermen conclusively taken to have given the best rent that could reasonably be obtained; that by s. 56 the powers of the act are cumulative, but prevail over the powers of a settlement in any case of conflict between them; that by s. 57, a settlor may confer either on a tenant for life or trustees any powers additional to or larger than those conferred by the act; and that by sect. 60, the powers under the act of an infant tenant for life are exercisable by the trustees or his guardian (*s*).

Cases as to Powers prior to Settled Land Act.

Prior to the Settled Land Act, it was held in *Vivian* v. *Jegon* (*t*) that a general power to a tenant for life to lease mines did not imply a power to lease beyond the life; but that powers to lease for lives or

(*l*) *Orby* v. *Mohun*, Gilb. Eq. Rep. 58; *Taylor* d. *Atkyns* v. *Horde*, 1 Burr. 60, 125; 2 Smith, L. C.

(*m*) *Goodtitle* v. *Funucan*, 2 Doug. 573, 574; *Hawkins* v. *Kemp*, 3 East, 441; *Doe* v. *Rendle*, 3 M. & S. 99; 15 R. R. 426; 1 Platt on Leases, 397, 398.

(*n*) Powell on Powers, 407; Sug. Pow. 736; *Winter* v. *Loveday*, Carth. 428.

(*o*) *Carver* v. *Richards*, 29 L. J., Ch. 357; 6 Jur., N. S. 410.

(*p*) See post, sub-s. (*g*).

(*q*) See per Pearson, J., in *Duke of Newcastle's Estates, In re*, infra.

(*r*) Ante, Chap. I., Sect. 4.

(*s*) See *Duke of Newcastle's Estates, In re*, 24 Ch. D. 129.

(*t*) *Vivian* v. *Jegon*, L. R., 3 H. L. 285.

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years might be executed by a lease, either absolutely for certain lives, or a certain number of years; or conditionally for a number of years determinable upon a life or lives (*u*). Where an estate was settled on several tenants for life in succession, with remainders in tail, with power to every tenant for life to make leases of all or any part of the demesne lands for not more than twenty-one years, or for one, two, or three life or lives: it was held, first, that the power only authorized either a chattel lease not exceeding twenty-one years, or a freehold lease not exceeding three lives: and that a lease by a tenant for life for ninety-nine years determinable on lives, as it might exceed twenty-one years, was void at law, and was not even good pro tanto for the twenty-one years (*x*). Where by a marriage settlement the husband had the wife's estate for life, with a power to grant leases for twenty-one years, but no longer: and in breach of the power he granted a lease to A. for ninety-nine years, determinable upon lives; and the wife survived him, and conveyed the fee to B.: and in the conveyance was recited the lease to A., who was recognised as being then tenant in possession of the estate, at the yearly rent reserved: on an action of ejectment brought by B. against the assignee of the lease, it was held that the lease was void, and the recital only matter of description (*y*).

Lease for 999 years. "Reasonable and Proper" Leases.

Under a power to lease for years or lives, with or without covenants for renewals, leases for 999 years were held valid (*z*), and in *Mostyn* v. *Lancaster* (*a*), a power to grant such mining leases as should seem "reasonable and proper" was held to authorize a lease of mines for ninety-nine years at a peppercorn rent by way of mortgage to secure an advance to the tenant for life.

Lease for less Term than that authorized. *Isherwood* v. *Oldknow.*

A man having a power may do less than such power enables him to do. A lease for fourteen years is warranted by a power to lease for twenty-one years (*b*). A power to lease for any term or number of years certain, not exceeding twenty-one years, will warrant a lease for twenty-one years determinable at the option of the lessee at the end of the first seven or fourteen years (*c*). A power to lease for three lives may be executed by a lease for two lives (*d*). A power to lease for any term not exceeding three lives *and* forty-one years will warrant a lease for three lives and forty-one years to commence from

(*u*) *Commons* v. *Marshall*, 6 Bro. P. C. 168; Sug. Pow. 109, 737.

(*x*) *Roe* d. *Brune* v. *Prideaux*, 10 East, 158; 10 R. R. 258.

(*y*) *Doe* d. *Briggs* v. *White*, 2 D. & R. 716.

(*z*) *Sheehy* v. *Lord Muskerry*, 1 H. L. Cas. 576.

(*a*) *Mostyn* v. *Lancaster*, 23 Ch. D. 583; 52 L. J., Ch. 848; 48 L. T. 715; 31 W. R. 686—C. A., affirming Bacon, V.-C.

(*b*) *Isherwood* v. *Oldknow*, 3 M. & S. 382; 16 R. R. 305; *Easton* v. *Pratt*, 2 H. & C. 676; 33 L. J., Ex. 233.

(*c*) *Edwards* v. *Millbank*, 4 Drew. 606; 29 L. J., Ch. 45; Sug. Pow. 742.

(*d*) Sug. Pow. 746, pl. 26.

the 1st of November preceding the day of the death of the survivor of the cestuis que vie (*e*).

Building and Repairing Leases.

A tenant for life, having a power to grant building leases for sixty-one years, reserving the best improved ground rent, granted a lease for that term, which was not expressed to be a building lease, but which contained a covenant by the lessee to keep in repair the premises demised (old houses) or such other "house as should be built during the term:" it was held that this was not a building lease within the power, and that such a lease being granted by tenant for life, who had a bare naked power without any legal interest, was void, and not capable of being confirmed by acceptance of rent by the remainderman (*f*). So a power to grant long leases "for the purpose of new building or effectually rebuilding *and* repairing any messuage, &c., being or to be on the premises," was held to be not well executed by a lease containing a covenant *effectually to repair*, as it is not equivalent to a covenant *effectually to rebuild and repair* (*g*). But a power to grant leases for twenty-one years, or building or repairing leases for sixty-one years, is well executed by a lease for forty years containing the usual covenants to repair and keep in repair the demised premises, and so to leave them at the end of the term (*h*). Upon a power to grant building leases, such a lease expressly exempting the lessee from rebuilding in case of fire, and by another clause enabling him to surrender the lease upon notice, could not be sustained (*i*).

Sporting Rights.

A power to demise lands or any part of them is not well executed by a demise of part with liberty of shooting over the whole (*k*). But the right to shoot and fish over the lands demised may be excepted and reserved to the lessor and his assigns (*l*).

Effect of Charges.

If a tenant for life with a power to grant leases in possession for twenty-one years at the best rent, convey his life estates to trustees to pay an annuity for his life, and the surplus to himself, the power is not thereby extinguished, but he may still grant a lease agreeable to the terms thereof (*m*). If a man having a power annexed to his estate, charge his estate, and afterwards execute his power, the estate which rises by the execution of the power is subject to the charge during the estate: as if a tenant for life, with power to make leases, grant a rent-charge, and afterwards make a lease, the lessee takes subject to the rent-charge during the life of the lessor (*n*).

(*c*) *Re Crommellin Estate*, 1 Ir. Com. L. R., N. S. 182; Sug. Pow. 746.

(*f*) *Jones* d. *Cowper* v. *Verney*, Willes, 169; Sug. Pow. 738.

(*g*) *Doe* d. *Dymoke* v. *Withers*, 2 B. & Ad. 896.

(*h*) *Easton* v. *Pratt*, 2 H. & C. 676; 33 L. J., Ex. 233.

(*i*) Sug. Pow. 743; *Stiles* v. *Cowper*, 3 Atk. 692.

(*k*) *Dayrell* v. *Hoare*, 12 A. & E. 356.

(*l*) *Goodtitle* v. *Funucan*, 2 Doug. 566.

(*m*) *Ren* d. *Hall* v. *Bulkeley*, 1 Doug. 292, 565.

(*n*) *Sabbarton* v. *Sabbarton*, Cas. temp. Hardw. 415.

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*Leases under Powers.*

In whom Powers may vest.

If the power be to a man and his assigns to make leases, &c., it may be exercised toties quoties (*o*), and will run with the estate to the assignee in deed or in law, and go to his executor, or to the assignee of the executor (*p*); or to his heir, together with the estate (*q*). It is no objection to a lease under a power, that it is in trust for him who executes the power; provided the legal tenant be bound during the term in all requisite covenants and conditions (*r*). But where by a marriage settlement a power was given to the wife, after the death of her husband, to grant leases for twenty-one years, reserving the best rent, &c., it was held that a lease by the wife to a second husband was not a good execution of the power (*s*). Where the heir of a surviving trustee is the proper party to demise, a lease granted by the executors of such trustee is void, and not cured by the Leases Act, 1849, 12 & 13 Vict. c. 26 (*t*).

(b) *In Possession or Reversion.*

Leases in Possession or Reversion.

The Settled Land Act, 1882 (s. 7, subsect. 6), provides that leases by a tenant for life under that act shall be made to take effect in possession not later than twelve months after date.

In all well-drawn powers of leasing, where it was intended that a lease in reversion may be granted, it was always expressly declared so: and if a reversionary lease was not to be granted, it was expressly declared that the lease shall be made to take effect in possession, and not in reversion, or by way of future interest (*u*). Upon a general power to make leases, without saying more, the law adjudged that the leases ought to be leases in possession, and not leases in reversion, or in futuro (*x*). Under a power to make leases to one, two or three persons, the donee of the power cannot make a lease for the life of the first (unborn) son of J. S. (*y*).

On what Land they attach.

If there be a power to make leases expressly stated to be in possession, which attaches upon an estate, part of which is in possession and part in reversion at the creation of the power; the donee of the power may immediately make leases in possession of the estate in reversion, as well as of that in possession; for in such case the word "possession" in the power refers to the lease, and not to the land (*z*): but it seems, that if a power enable any one to make

(*o*) Sug. Pow. 718.

(*p*) *How* v. *Whitfield*, 1 Ventr. 340; Freeman, 476.

(*q*) *Ex parte Cooper, Re North London R. Co.*, 34 L. J., Ch. 373.

(*r*) *Taylor* d. *Atkyns* v. *Horde*, 1 Burr. 124; 2 Smith, L. C.; *Widow* v. *Sewell*, 1 W. Blac. 617; 4 Burr. 1975; *Beeston* v. *Habgood*, 1 Johns. & H. 222; 30 L. J., Ch. 107.

(*s*) *Doe* d. *Hartridge* v. *Gilbert*, 5 Q. B. 123.

(*t*) *Ex parte Cooper, Re North London R. Co.*, 34 L. J., Ch. 373.

(*u*) Sug. Pow. 747.

(*x*) *Shercomb* v. *Hawkins*, Cro. Jac. 318; Yelv. 222; Brownl. 148; *Countess of Sussex* v. *Wroth*, Cro. Eliz. 5.

(*y*) *Snow* v. *Cutler*, T. Raym. 163.

(*z*) Powell on Powers, 425; Bac. Abr. tit. *Leases* (L.); *Fox* v. *Prickwood*, Cro. Jac. 347; 2 Bulstr. 210; 2 Roll. Abr. 260, pl. 5; Sug. Pow. 755.

leases in reversion as well as in possession and some parts of the land subject to the power be in possession, and other part of it in reversion, he cannot make a lease in possession and another lease in reversion of the same land; but his power to make leases in reversion will be confined to such land as was not then in possession (*a*).

What is a Lease in Reversion.

Where there is a power to grant leases in possession only, the lease in possession is not contrary to the power, although the estate at the time of granting the lease was held by tenants at will, if, at the time, they receive directions from the lessor to pay their rent to the lessee, to which they assent (*b*). Where a tenancy from year to year has expired, but the outgoing tenant has a customary right over part till a future day, a lease in possession may be granted (*c*). Where one under a power to lease for twenty-one years in possession, but not in reversion, granted a lease to his only daughter for twenty-one years, "to commence *from* the day of the date:" it was adjudged a good lease, as the word "from" may mean either inclusive or exclusive, according to the context and subject-matter, and the court will construe it so as to effectuate the deeds of parties, and not to destroy them (*d*). But if made to commence only a day after the execution of the lease, it was not good at common law or in equity as a lease in possession (*e*). Any such defect would now be cured by the Leases Act, 1849, 12 & 13 Vict. c. 26, s. 4, if the lessor lived till the day appointed for the commencement of the term. Under a power to demise for twenty-one years in possession, and not in reversion, a lease dated 17th February, 1802, to hold from the 25th of March next ensuing the date thereof, is good, if not executed and delivered till after the 25th of March, for it then takes effect as a lease in possession, with reference back to the date actually expressed (*f*); but under a power to lease in possession and not in reversion, a lease for years executed on the 29th of March to the then tenant in possession, to hold as to the arable land from the 13th of February preceding, and as to the pasture from the 5th of April then next, under a yearly rent payable quarterly on the 10th of July, 10th of October, 10th of January and 10th of April, was held void for the whole; though such lease were according to the custom of the country, and the same had been before granted by the person creating the power (*g*). But now any such defect would be cured by the Leases Act, 1849,

(*a*) Bac. Abr. tit. *Leases* (I. 11).

(*b*) *Goodtitle* d. *Clarges* v. *Funucan*, 2 Doug. 565; Bac. Abr. tit. *Leases* (I. 11); Sug. Pow. 762.

(*c*) *Dow* v. *Snowden*, 2 W. Blac. 1224; *Doe* v. *Calvert*, 2 East, 376; 11 R. R. 745.

(*d*) *Pugh* v. *Duke of Leeds*, Cowp. 714; *Freeman* v. *West*, 2 Wils. 165; *Denn* v. *Fearnside*, 1 Wils. 176; *Att.-Gen.* v. *Countess of Portland*, Cowp. 723.

(*e*) *Pollard* v. *Greenvil*, 1 Ch. Cas. 10; 1 Ch. Rep. 184; *Doe* d. *Allan* v. *Calvert*, 2 East, 375; 6 R. R. 451; *Bowes* v. *East London W. W. Co.*, Jacob, 374.

(*f*) *Doe* d. *Cox* v. *Day*, 10 East, 427; 10 R. R. 345; Sug. Pow. 761, pl. 43.

(*g*) *Doe* d. *Allan* v. *Calvert*, 2 East, 376; 6 R. R. 451.

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s. 4, provided the lessor were living on the 5th of April, and then competent to grant such a lease.

Effect of existing Leases.

The circumstance of a second lease for years being granted to the same lessee who holds under a former lease (*h*), to commence after the expiration of such former lease, does not operate to make the latter a continuation of the former lease, where the terms are granted by different deeds; although the residue of the time to come after the former lease, together with the period for which the latter lease is granted, do not in length of time exceed the limits fixed by the power; for the latter will notwithstanding be considered as a reversionary lease, as much as if it had been granted to a reversionary lessee (*i*).

### (c) *Usual Covenants.*

What are usual Covenants within such Powers.

What are *usual covenants* in a lease, under a power requiring such covenants is a question of fact for the jury, and not for the court (*k*). It depends on what are the usual and customary covenants of the neighbourhood (*l*); but it has been held, that what are the "usual and reasonable covenants" must depend on the leases of the same land in existence at the time of the creation of the power (*m*). Where a power to lease was given upon reserving the ancient, usual and accustomed rents, heriots, boons, and services, a covenant "to keep in repair" was held to be "an ancient boon," and the omission of it was deemed fatal (*n*). Where there was a power to tenant for life to lease for years, with the usual covenants, &c., it was held, that a lease made by him, containing a proviso, that in case the premises were blown down, or burned, the lessor should rebuild, otherwise the rent should cease, was void, the jury finding such covenant to be unusual (*o*). Where the settlement creating the power does not require the usual covenants to be inserted in the leases, any covenants may be inserted or omitted, as agreed on, provided they do not amount to a fraud on the power (*p*).

Ways, &c.

A private act of parliament enabled a tenant for life to grant building leases, and "to lay out and appropriate any part of the land authorized to be leased as and for a way or ways, street or streets, avenue or avenues, square or squares, passage or passages, sewer or

(*h*) As to the effect of a new lease operating as a surrender of a former lease, see post, Chap. VIII., Sect. 3 (b).

(*i*) *Doe* d. *Pulteney* v. *Lady Cavan*, 5 T. R. 567; *Smith* v. *Day*, 2 M. & W. 684.

(*k*) *Goodtitle* d. *Clarges* v. *Funucan*, 2 Doug. 565; *Bennett* v. *Womack*, 3 C. & P. 96; 7 B. & C. 627; Powell on Powers, 578.

(*l*) *Boardman* v. *Mostyn*, 6 Ves. 467, 471.

(*m*) *Doe* d. *Earl of Egremont* v. *Stephens*, 6 Q. B. 208; *Smith* d. *Doe* v. *Earl of Jersey*, 7 Price, 281; 3 Bligh, 290; 2 B. & B. 474; 21 R. R. 767; *Doe* d. *Earl of Egremont* v. *Williams*, 11 Q. B. 688.

(*n*) *Earl of Cardigan* v. *Montague*, Sug. Pow. 918 (8th ed.).

(*o*) *Doe* d. *Ellis* v. *Sandham*, 1 T. R. 705; 1 R. R. 369; *Yellowly* v. *Gower*, 11 Exch. 274.

(*p*) *Goodtitle* v. *Funucan*, 2 Doug. 575.

sewers, or other conveniences for the general improvement of the estate and the accommodation of the tenants thereof." A tenant for life having appropriated certain land, and laid it out for a way for the general improvement of the estate, in exercise of the powers of the act, by deed granted rights of way over it to two several tenants: held, that tenants under other leases granted in pursuance of the act, but containing no grant by deed of a right to use the way, were not entitled by the provisions of the act to use it (*q*).

### (d) *Proviso for Re-entry.*

Power to grant Leases with a Proviso for Re-entry.

A power to tenants for life to grant leases, provided that a right of re-entry is reserved for non-payment of rent, is well executed by a lease, providing a re-entry in case the rent remains in arrear fifteen days, *and there is no sufficient distress upon the premises*, the conditional proviso being the usual form in leases (*r*). Where a power of leasing required the insertion in the leases of a clause of re-entry for non-payment of rent, and a lease was made with a proviso for re-entry if the rent should be *forty-two* days in arrear, it was held such a lease was valid (*s*). But a lease with a proviso for re-entry, if the tenant should suffer the premises to be out of repair, and should not repair the same *within six months next after notice*, was held bad, the clause as to notice not being usual (*t*).

### (e) *Lands usually let.*

What included in "Lands usually let."

Prior to the Settled Land Act, although the power of leasing usually extended to all the hereditaments therein comprised, it was competent to the settlor expressly to except the mansion-house or any other part (generally on the ground of not having usually let. The Settled Land Acts now allow of no such exception but that for the mansion-house, &c., allowed by the 10th section of the Settled Land Act, 1890 (see ante, Chap. I., Sect. 4), not intended to be let. Where leases were granted under powers to lease lands "usually demised," it had to be shown by old leases or other satisfactory evidence that the lands have usually been demised; otherwise they could not be supported (*u*). Lands not demised for the space of twenty years before the execution of a power to demise at the rent then usually reserved and paid, could not be leased under such a power (*x*). Where the power was to

(*q*) *White* v. *Leeson*, 5 H. & N. 53; 29 L. J., Ex. 105.

(*r*) *Smith* v. *Doe* d. *Earl of Jersey*, 7 Price, 281; 3 Bligh, 290; 2 Brod. & B. 473; 5 M. & S. 467; 21 R. R. 767; *Lord Tankerville* v. *Wingfield*, 7 Price, 343; 2 Brod. & B. 498, n.; 22 R. R. 39, n.

(*s*) *Rutland* d. *Doe* v. *Wythe*, 5 M. & W. 688; 12 Id. 355; 10 Cl. & F. 419.

(*t*) *Doe* d. *Earl of Egremont* v. *Burrough*, 6 Q. B. 229.

(*u*) Id. 735; *Earl Cardigan* v. *Montague*, Id. 918.

(*x*) *Tristan* d. *Gore* v. *Boltinglas*, Vaugh. 28; T. Jon. 27; Sug. Pow. 728, 729.

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extend to land usually demised, it was held, that land settled for years, determinable on lives, by a family settlement, came within that description (*y*); so lands which have been previously let two or three times (*z*), but not lands let only once for a short term (*z*); but that a covenant to stand seised might amount to a sufficient demise (*a*).

### (f) *Mode of Execution.*

22 & 23 Vict. c. 35, s. 12.

By the Law of Property Amendment Act, 1859, 22 & 23 Vict. c. 35, s. 12, "a deed hereafter executed in the presence of and attested by two or more witnesses in the manner in which deeds are ordinarily executed and attested (*b*), shall, as far as respects the execution and attestation thereof, be a valid execution of a power of appointment by deed or by any instrument in writing not testamentary (*c*), notwithstanding it shall have been expressly required that a deed or instrument in writing made in exercise of such power should be executed or attested with some additional or other form of execution or attestation or solemnity: provided always, that this provision shall not operate to defeat any direction in the instrument creating the power that the consent of any particular person shall be necessary to a valid execution (*d*), or that any act shall be performed (*e*), in order to give validity to any appointment, having no relation to the mode of executing and attesting the instrument; and nothing herein contained shall prevent the donee of a power from executing it conformably to the power by writing or otherwise than by an instrument executed and attested as an ordinary deed, and to any such execution of a power this provision shall not extend."

It is to be observed that if the power prescribes less than the statute, it is sufficient to comply with the terms of the power, but if the power prescribes more than the statute, it is sufficient to comply with the statute.

### (g) *Defects in—how cured.*

12 & 13 Vict. c. 26. Invalid Leases good as Contracts for Leases.

By the Leases Act, 1849, 12 & 13 Vict. c. 26 (*f*), a lease invalid by reason of any deviation from the terms of a power, is, after entry thereunder, considered in equity as a contract for a grant in respect of a valid lease under the power to the like effect as such invalid lease save so far as any variation may be necessary in order to comply with the power; and by sect. 4 of the same act, where a

(*y*) *Right* d. *Basset* v. *Thomas*, 1 W. Black. 446; 3 Burr. 1441, 1448.

(*z*) 2 Roll. Abr. 261; Sug. Pow. 728, 730.

(*a*) *Right* d. *Basset* v. *Thomas*, 3 Burr. 1441, 1447; 1 W. Blac. 446.

(*b*) *In re Rickett*, 1 Johns. & H. 70; 29 L. J., Ch. 712.

(*c*) They are provided for by the Wills Act, 1837, 1 Vict. c. 26, s. 10.

(*d*) *Freshfield* v. *Reed*, 9 M. & W. 404.

(*e*) As to the execution of a counterpart by the lessee, see *Fryer* v. *Coombs*, 11 A. & E. 403.

(*f*) Amended by the Leases Act, 1850, 13 & 14 Vict. c. 17, infra.

lease granted in the intended exercise of power of leasing is invalid by reason that the person granting the same could not lawfully grant such lease, but the estate of such person in the hereditaments comprised in such lease has continued, then the lease takes effect, and is as valid as if the same had been granted at the time when it could have been lawfully granted.

Invalid Leases cured by Continuance of Lessor's Estate.

By the Leases Act, 1850, 13 & 14 Vict. c. 17, where upon or before acceptance of rent under an invalid lease, any receipt, &c., confirming such lease is signed by the person accepting such rent, or his agent, the acceptance, as against the person so accepting such rent, is deemed a confirmation of the lease.

Confirmation of invalid Leases by Writing and Acceptance of Rent.

It is to be observed that an invalid lease under a power may be confirmed by the remainderman or reversioner by a mere memorandum or note in writing coupled with acceptance of rent; but not by acceptance of rent only, without any intention of thereby confirming the lease. The mere acceptance of rent by a remainderman may create a new implied tenancy from year to year as between him and the lessee, which tenancy must be determined by notice to quit, or otherwise, before the tenant can be turned out of possession (*g*).

The above acts do not apply to leases granted by a mere stranger to the leasing power; as where a lease is granted by the executors of a surviving trustee instead of by his heir (*h*), or by the heir instead of the executors (*i*).

## Sect. 20.—*Leases in Reversion.*

What are Leases in Reversion.

All leases which are not to take effect in possession immediately, but *from a future day*, are considered as reversionary leases, within the meaning of powers to grant leases in possession and not in reversion (*k*). In legal acceptance a lease for years in reversion, and a future interest for years, are one and the same: a future lease and a lease in reversion are synonymous (*l*). But strictly speaking a reversionary lease is one granted for a term which is to commence from or after the expiration or other determination of a previous lease. It does not create any term or estate, but only an interesse termini, until entry thereunder after the time appointed for its commencement (*m*). The granting of a reversionary lease does not disentitle the landlord to distrain for rent under a subsisting lease (*n*).

(*g*) *Doe* d. *Martin* v. *Watts*, 7 T. R. 83; 4 R. R. 387; *Doe* d. *Tucker* v. *Morse*, 1 B. & Adol. 365; *Doe* d. *Pennington* v. *Taniere*, 12 Q. B. 998.

(*h*) *Ex parte Cooper*, *Re North London R. Co.*, 34 L. J., Ch. 373.

(*i*) *Robson* v. *Flight*, 34 L. J., Ch. 226.

(*k*) *Winter* v. *Loveday*, Comyn, 39; 2 Salk. 537; 1 Ld. Raym. 267; *Goodtitle* d. *Clarges* v. *Funucan*, 2 Doug. 565. See also as to "interesse termini," p. 209, ante.

(*l*) Carth. 14, 15.

(*m*) *Smith* v. *Day*, 2 M. & W. 684.

(*n*) See Id. 684, 694, 699; *Doe* d. *Rawlings* v. *Walker*, 5 B. & C. 111; 4 L. J., K. B. 93; 29 R. R. 184; *Blatchford*, app.,

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If a man make a lease for life, and afterwards grants the lands to another for twenty-one years after the death of the tenant for life; these words (without the word "demise") are sufficient to pass a reversionary interest by way of future lease (*o*). If the reversionary lease be expressed to begin from the end of the "term" of the subsisting lease, and the subsisting lease be afterwards determined by surrender or forfeiture, the reversionary lease will begin at once; but if it be expressed to begin after the end of twenty-one years, it will not begin upon the surrender, forfeiture or other determination of the first term till the twenty-one years have actually run out (*p*). Where a lease for years was made, and during the term the lessor granted a lease in reversion of part of the premises to an underlessee, who was in possession of them, to commence on the day the original lease determined; it was held that the reversionary lease took effect in possession immediately on the determination of the first lease (*q*).

## SECT. 21.—*Concurrent Leases.*

Nature of concurrent Leases.

A concurrent lease is one granted for a term which is to commence *before* the expiration or other determination of a previous lease of the same premises to another person. If under seal it operates as an assignment of part of the reversion during the continuance of such previous lease, and from thenceforth as a lease in possession during the residue of the time therein expressed to be granted. It entitles the lessee, as assignee of part of the reversion, to the rent reserved in the previous lease, and to the benefit of the covenants therein contained, which are to be respectively paid and performed during the then residue of the term granted by the first lease, and the continuance of the concurrent lease (*r*). Formerly a concurrent lease was inoperative to pass any estate during the prior term, unless the attornment of the previous tenant could be obtained, when it would operate as an assignment of the reversion, &c. (*s*). Now no attornment of the tenant in possession is necessary (*t*); but until he has notice of such assignment he may safely continue to pay his rent to the lessor (*u*), who will, however, be liable over to the second lessee for so much money had and received for his use (*x*). If a concurrent

*Cole*, resp., 5 C. B., N. S. 514; 28 L. J., C. P. 140.

(*o*) Bac. Abr. tit. *Leases* (K.).

(*p*) Bac. Abr. tit. *Leases* (L. 1).

(*q*) *Hinchcliffe* v. *Earl of Kinnoul*, 5 Bing. N. C. 1; 6 Scott, 650.

(*r*) *Harmer* v. *Bean*, 3 C. & K. 307.

(*s*) Bac. Abr. tit. *Leases* (N.).

(*t*) 4 Ann. c. 16, s. 9; post, Chap. VII., Sect. 6, "Attornment;" *Doe* d. *Agar* v. *Brown*, 2 E. & B. 331, 348. *Edwards* v. *Wickwar*, L. R., 1 Eq. 403; 14 W. R. 79, 363, contra—in which there is no reference to 4 Ann. c. 16, s. 9—would seem to be incorrect.

(*u*) 4 Ann. c. 16, s. 10; *Cook* v. *Moylan*, 1 Exch. 67; 5 D. & L. 101.

(*x*) *Smith* v. *Jones*, 1 Dowl., N. S. 526; *Watson* v. *Mclean*, E. B. & E. 75; *Neate* v. *Harding*, 6 Exch. 349.

lease be granted to and accepted by the *same lessee*, it will operate as an implied surrender by him of his previous term, and take effect as a lease in possession for the term thereby granted (*y*). The reason is that the same person cannot be, at the same time, both tenant and reversioner of the same premises. So where a party entitled to a remainder in tail expectant upon the determination of a life estate, grants a term of years to commence immediately, the grantee, without entry, takes an immediate vested *estate* carved out of the remainder, and not a mere interesse termini; and no attornment is necessary to complete such grant, the stat. 4 Ann. c. 16, s. 9, having rendered attornment necessary (*z*). A devisee for life, with power to make leases for twenty-one years, whereon the old accustomed rent should be reserved, made a lease for twenty-one years under the old rent, &c., and a year before the expiration of that lease he made a lease to another for twenty-one years to begin presently; the last was considered to be good within his power as a concurrent lease, because it was no charge upon the reversion, nor was there any more than twenty-one years in the whole against the reversioner; but this power would not warrant the making of leases in reversion, for then he might charge the inheritance ad infinitum (*a*). One who has a power to grant a concurrent lease within seven years of the expiration of the old one, may grant a lease at any time on the surrender of the old one (*b*). If a power enables a tenant for life to make leases for years, determinable upon one, two, or three lives in possession, of such part and parts, and so much only of the lands of the creator of the power as are then demised or granted for any such time, &c., no lands can be demised under such a power, but what are at the time of the execution of the power under lease, for one, two, or three concurrent lives; or for any term of years, determinable upon one, two, or three concurrent lives; the meaning of such restriction is, in figurative language, that the candles shall be all burning at the same time (*c*).

## Sect. 22.—*Estoppel.*

Nature and Use of Estoppels.

Indentures of lease for years sometimes enure by way of *estoppel*, which word signifies an impediment or bar to a man's invalidating his own solemn act (*d*). Estoppels in general are not favoured (*e*);

(*y*) Post, Chap. VIII., Sect. 3 (b).
(*z*) *Doe* d. *Agar* v. *Brown*, 2 E. & B. 331, 348.
(*a*) Powell on Powers, 428; Bac. Abr. tit. *Leases* (L.).
(*b*) Com. Dig. tit. *Estates* (G. 13).
(*c*) Powell on Powers, 541; *Doe* d. *Wyndham* v. *Halcombe*, 7 T. R. 713.
(*d*) *Lyon* v. *Reed*, 13 M. & W. 285.
(*e*) Co. Lit. 353, n. 1; *Rex* v. *Lubbenham*, 4 T. R. 254; Com. Dig. tit. *Estates* (K. 8); Bac. Abr. tit. *Joint Tenants and Tenants in Common* (H. 1).

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they continue no longer on either party than during the lease (*f*), or during any renewed tenancy (*g*) : unless they be mutual, neither party is bound by them (*h*).

Effect of Estoppels on the Lessor.

A lessor by deed is clearly estopped by the lease from denying that he had any estate in the land at the time the lease was executed by him, or that he had no right to dispose of the possession during the term thereby expressed to be granted (*i*) ; and a sublease by deed has a similar effect (*k*) ; and it is submitted that the law is the same in this respect, whether the lease be by writing under hand, or by word of mouth. Upon the execution of a lease which operates by estoppel, there is in contemplation of law, created in the lessor, a reversion in fee simple by estoppel, which passes by descent to his heir, and by purchase to his assignee or devisee, who may sue on the covenants in the lease (*l*). If a man make a lease for years by indenture of lands wherein he has nothing at the time of such lease made, and afterwards purchase those lands, this makes his lease as good and unavoidable, as if he had been in the actual possession and seisin thereof at the time of such lease made (*m*).

Estoppel in case of Mortgage.

Where a lessee for years made an underlease by way of mortgage, and afterwards another sublease by indenture for a short term, it was held that the latter sublease, though originally a lease by estoppel, was convertible into a lease in interest by a reconveyance by the mortgagees, so as to give a right of action to the assignee of the lessee (*n*). But where a mortgagor made a lease after the mortgage, a subsequent purchaser of the legal estate from the mortgagee and of the equitable estate from the mortgagor, the latter joining in the conveyance of the legal estate, was not before the Conveyancing Act (*o*) bound by the lease of the mortgagor (*p*). A lessor is estopped from contending that he had merely an equitable estate when he granted the lease (*q*). But where the lease stated that the lessors were *owners* subject to a mortgage, and that they *demised* the land to the lessee, it was held that neither party was estopped from denying that the lessors had a legal reversion, but that they were estopped from asserting it (*r*).

(*f*) Co. Lit. 47 ; *James* v. *Landon*, Cro. Eliz. 36.

(*g*) *London and North Western R. Co.* v. *West*, L. R., 2 C. P. 553 ; 36 L. J., C. P. 245.

(*h*) Co. Lit. 352.

(*i*) *Doe* d. *Prior* v. *Ongley*, 10 C. B. 25 ; and see *Darlington* v. *Pritchard*, 4 M. & G. 783 ; *Green* v. *James*, 6 M. & W. 656.

(*k*) *Doe* d. *Prior* v. *Ongley*, 10 C. B. 25.

(*l*) *Cuthbertson* v. *Irving*, 4 H. & N. 742 ; 6 Id. 135 ; 28 L. J., Ex. 306 ; 29 Id. 485.

(*m*) Bac. Abr. tit. *Leases* (O.) ; *Goodtitle* d. *Faulkner* v. *Morse*, 3 T. R. 371 ; 1 R. R. 719 ; *Sturgeon* v. *Wingfield*, 15 M. & W. 224.

(*n*) *Webb* v. *Austin*, 7 M. & G. 701 ; 8 Scott, N. R. 419.

(*o*) For effect of Conveyancing Act, see Chap. I., Sect. 28, ante.

(*p*) *Doe* d. *Lord Downe* v. *Thompson*, 9 Q. B. 1037.

(*q*) *Green* v. *James*, 6 M. & W. 656.

(*r*) *Paregter* v. *Harris*, 7 Q. B. 708. But see *Morton* v. *Woods*, L. R., 4 Q. B. 293, and infra.

It is one of the first principles of the law of estoppel, as applied to the relations between landlord and tenant, that a tenant is estopped from disputing the title of his landlord (*s*). In an action on a bond conditioned for the payment of the rent of certain premises recited in the condition to be demised by indenture at a certain rent, the defendant is estopped from saying that by the indenture a less rent than that mentioned in the condition was reserved (*t*). In an ejectment for mines against a member of a mining company, it was held that the defendant was estopped from disputing the title of the lessor of the plaintiff, who had leased the mines to the company, of which the lessor was a partner at the time of the action, but not at the time he granted the lease (*u*).

Tenant estopped from disputing Landlord's Title. *Cooke* v. *Loxley.*

The tenant may, however, show that his landlord's title has expired (*x*): but where a defendant in an action for use and occupation, had occupied apartments in a house belonging to a wife, and had paid rent to the husband, who subsequently, with the knowledge of the defendant, granted a lease of the whole house to the plaintiff: it was held, that having occupied with notice of the lease, he could not impeach its validity, nor controvert the plaintiff's title (*y*). Upon an information to set aside a lease of charity lands, it was held in Chancery that the lessees could not dispute the title by setting up an adverse title whilst they retained possession (*z*).

Tenant may show Landlord's Title to be expired. *Delaney* v. *Fox.*

The rule that a tenant may not dispute his landlord's title applies only to the title of the landlord who let him in; and the tenant may deny the title of a claiming assignee of a reversion by showing a title in some other person (*a*).

Tenant may show that other person than claiming Assignee of Reversion has Title.

The interests of a tenant for life and a reversioner are the same, and therefore a lessee who has paid rent to the first, cannot set up title in another person as an answer to an action by the latter after the death of the former (*b*). A lessee, by executing an indenture of lease, admits a will under which it is recited that the lease was granted (*c*). An assignee is estopped by the deed which estops his assignor (*d*); and an assignor, by executing the assignment in which

Estoppel as against Reversioner by paying Rent to Tenant for Life.

(*s*) *Cooke* v. *Loxley*, 5 T. R. 4; 2 R. R. 521; *Cuthbertson* v. *Irving*, supra, note (*l*); *Beckett* v. *Bradley*, 7 M. & G. 994; 8 Scott, N. R. 843; 2 D. & L. 586; *Langford* v. *Selmes*, 3 K. & J. 220; *Delaney* v. *Fox*, 1 C. B., N. S. 166; 2 Id. 768.

(*t*) *Lainson* v. *Tremere*, 1 A. & E. 792.

(*u*) *Francis* v. *Doe* d. *Harvey*, 4 M. & W. 331.

(*x*) *Delaney* v. *Fox*, 2 C. B., N. S. 768; *Neave* v. *Moss*, 1 Bing. 363; 2 L. J., C. P. 25; 25 R. R. 650; *Doe* d. *Strode* v. *Seaton*, 2 C., M. & R. 728; *Downs* v. *Cooper*, 2 Q. B. 256; *Claridge* v. *Mackenzie*, 4 M. & G. 143; *Doe* d. *Leeming* v. *Skirrow*, 7 A. & E. 157.

(*y*) *Rennie* v. *Robinson*, 1 Bing. 147; 1 L. J., C. P. 30; 25 R. R. 604.

(*z*) *Att.-Gen.* v. *Ld. Hotham*, 3 Russ. 415; 24 R. R. 21.

(*a*) *Carlton* v. *Bowcock*, 51 L. T. 659; and post, Chap. VII., Sect. 5.

(*b*) *Doe* d. *Colemore* v. *Whitroe*, 1 D. & Ry. 1; 25 R. R. 769.

(*c*) *Bringloe* v. *Goodson*, 5 B. N. C. 738.

(*d*) *Taylor* v. *Needham*, 2 Taunt. 278; 11 R. R. 572; *Barwick* d. *Mayor, &c., of Richmond* v. *Thompson*, 7 T. R. 488; 4 R. R. 499; *Bryan* d. *Child* v. *Winwood*, 1 Taunt. 208; 9 R. R. 751.

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the original release is recited, is precluded in an action by the assignee from calling upon him to prove the lease (*e*); so an assignee of a void lease by a tenant for life is estopped from disputing the title of the remainderman, though his assignment was after the death of the tenant for life, and payment to and acceptance of rent by the remainderman, and with notice of that fact (*f*). So where a lease was granted by A. and B. as granting parties, and reserved the rent and right of re-entry to a close, it was held that the assignee of the lessor was estopped from showing that A. had no interest in the premises (*g*). In defence of an action of ejectment, it may be shown that the parties under whom the plaintiff claims had no title when they conveyed to him, although the defendant himself claims by a conveyance from the same parties, if the latter conveyance was subject to that which the defendant seeks to impeach (*h*).

Estoppel as against Coparcener.

Where a person, entitled as coparcener to part of land lets the whole to a tenant who enters and pays rent as for the whole until the lessor's death, the tenant is estopped from denying that the heir of the lessor is entitled to the whole (*i*).

Want of Title appearing on Lease.

*Jolly* v. *Arbuthnot.*

It was at one time thought, from *Cuthbertson* v. *Irving* (*k*) and other cases, that when the document of lease showed a want of title in the landlord, there was nothing to estop the tenant from denying that title; but this doctrine has now been distinctly overruled in *Jolly* v. *Arbuthnot* (*l*), as was pointed out by the Exchequer Chamber in *Morton* v. *Woods* (*m*).

Effect of Estoppels on the Validity of the Lease.

In an action for rent, where the title to the land is not in question, the defendant is estopped from saying the lease is not a good one; for the covenant for payment of the rent is good (*n*). But he may plead a new substituted tenancy from year to year and the determination thereof by notice to quit before the rent claimed became due; and that notwithstanding he omitted so to plead in a previous action founded on the same lease or agreement (*o*). Where a tenant for life under a devise, with a leasing power, let to defendant by a lease, not noticing the power; and after the death of the lessor, a succeeding tenant for life under the same devise brought ejectment against the defendant, on the ground that the lease was not a valid execution of the power; it was held, that the defendant was not estopped from setting up an outstanding term of years in trustees created by a

(*e*) *Nash* v. *Turner*, 1 Esp. 217.
(*f*) *Johnson* v. *Mason*, 1 Esp. 89.
(*g*) *Parke* v. *M'Loughlin*, 1 Ir. Law. R., N. S. 186.
(*h*) *Doe* d. *Oliver* v. *Powell*, 1 A. & E. 531.
(*i*) *Weeks* v. *Birch*, 69 L. T. 759.
(*k*) *Cuthbertson* v. *Irving*, 29 L. J., Ex. 485; see, too, *Pargeter* v. *Harris*, 7 Q. B. 708.
(*l*) *Jolly* v. *Arbuthnot*, 4 De G. & J. 224; 28 L. J., Ch. 547.
(*m*) *Morton* v. *Woods*, L. R., 4 Q. B. 293; 38 L. J., Q. B. 81; 9 B. & S. 659; 17 W. R. 414.
(*n*) *Monroe* v. *Lord Kerry*, 1 Bro. P. C. 67.
(*o*) *Howlett* v. *Tarte*, 10 C. B., N. S. 813; 31 L. J., C. P. 146.

tenant in fee, from whom the devisor had inherited, as the lessor of the plaintiff himself denied the right of the defendant's lessor to grant the lease (*p*). Ch. V. Sec. 22. *Estoppel.*

The tenant is not estopped by the description of the lands in the lease, as "meadows," from pleading and proving that they had been converted into arable before the lease, and have been used as such ever since (*q*). Effect of Estoppels as to Description of Premises.

## Sect. 23.—*Bond for Performance of Covenant.*

Sometimes a bond is taken by the lessor from the lessee, with or without sureties, conditioned for payment of the rent and performance of the covenants in the lease (*r*), or a guarantee in writing for the due payment of the rent (*s*). Such a guarantee will cease when the tenancy is determined by due notice to quit, notwithstanding such notice is waived and a new tenancy created (*t*). Sometimes also a bond is made by a sublessor to a sublessee, conditioned to indemnify him from the rent reserved in the original lease, and from all distresses, ejectments, and other proceedings in respect thereof; or by the assignee of a lease to the assignor to indemnify him from the rent and covenants in the lease; or by the assignor to the assignee (*u*). Such bonds respectively are within the 8 & 9 Will. 3, c. 11, s. 8, and operate as securities only, and the actual damages only are recoverable (*x*). Nature of the Bond and its Effect.

## Sect. 24.—*Rectification of Erroneous Lease.*

If a lease or other deed be drawn up and executed upon terms materially different from those actually agreed on, and contrary to the real intention of both parties, a court of equity may cause it to be reformed and corrected, or set aside (*y*); but it will do so only upon very strong evidence clearly showing a mistake by *both* parties, and the onus of proof lies on the plaintiff (*z*). This strict rule does not In what Cases.

(*p*) *Doe* d. *Lord Egremont* v. *Wyndham*, 12 Q. B. 711.

(*q*) *Skipworth* v. *Green*, 1 Stra. 610; 8 Mod. 311.

(*r*) *Lainson* v. *Tremere*, 1 A. & E. 792.

(*s*) *Tayleur* v. *Wildin*, L. R., 3 Ex. 303; 37 L. J., Ex. 173.

(*t*) *Tayleur* v. *Wildin*, L. R., 3 Ex. 303; 37 L. J., Ex. 173; see this case distinguished in the very special case of *Holme* v. *Brunskill*, 3 Q. B. D. 494; 47 L. J., Q. B. 410; 38 L. T. 838—C. A.

(*u*) *Smith* v. *Day*, 2 M. & W. 684.

(*x*) 2 Chit. Pl. 320 (7th ed.); 2 Wms. Saund. 187 a, n. (*c*).

(*y*) *Murray* v. *Parker*, 19 Beav. 305; *Garrard* v. *Frankel*, 30 Beav. 445; 31 L. J., Ch. 604; *Mortimer* v. *Shortall*, 2 Dru. & W. 363; *Lister* v. *Hodgson*, L. R., 4 Eq. 30; 15 W. R. 547; *Harris* v. *Pepperell*, L. R., 5 Eq. 1.

(*z*) *Wright* v. *Goff*, 22 Beav. 207; *Sells* v. *Sells*, 1 Drew. & Sm. 43; 29 L. J., Ch. 500; *Rooke* v. *Ld. Kensington*, 2 Kay & J. 743; 8 E. & B. 257, 294; *Earl of Bradford* v. *Earl of Romney*, 30 Beav. 431; *Garrard* v. *Frankel*, 30 Beav. 445; *Price* v. *Ley*, 32 L. J., Ch. 530; *Seaton* v. *Staniland*, 4 Giff. 61; *Elwes* v. *Elwes*, 3 De Gex, F. & J. 667; *Fallon* v. *Robins*, 16 Ir. Ch. R. 422.

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seem to apply as between vendor and purchaser, or lessor and lessee, where the parties can be replaced in statu quo (*a*), and in one case of a mistake in parcels, where the mistake was partly on the side of the plaintiff, it appears to have been relaxed, and an annulment ordered unless the defendant would consent to a rectification, which he did (*b*).

Evidence.

Parol evidence is admissible (*c*). The court will not reform a deed on petition, but an action must be brought; and so long as the deed stands the court is bound to act upon it, notwithstanding it may be satisfied that the deed is at variance with the intention of the parties (*d*).

Action for Rectification must be brought in Chancery Division.

By section 34 of the Judicature Act, 1873, any action for "the rectification or setting aside or cancellation of deeds or other written instruments" must be brought in the Chancery Division of the High Court. But the 24th section of the same act gives power to any other division to treat an instrument as rectified or set aside (*e*).

Compensation for having accepted erroneous Lease.

*Besley* v. *Besley.*

In a very clear case of mistake, compensation may be awarded to a tenant for having accepted an erroneous lease, instead of rectifying the lease itself. This principle was recognized in *Besley* v. *Besley* (*f*), in which case, however, compensation was refused. The facts were these. By contract in 1861 the defendant agreed to grant to the plaintiff a sublease for the residue of his own term less ten days. In pursuance of this contract an underlease was prepared by the defendant's solicitor for twenty-three years less ten days, and the lease was executed by the lessee, who neither inspected the head lease, nor employed a solicitor. In 1877 it was discovered that the head lease had only sixteen years to run at the time of the contract, and had in fact expired, and that the sublease had, *by pure mistake*, been made for seven years longer than the lessor had power to make it. The plaintiff, who had been obliged to procure a new lease from the head landlord at a greatly increased rent, claimed compensation, but Malins, V.-C., held that he was to blame in not having inspected the head lease at the time of the contract, and applying the rule of caveat emptor, disallowed the claim; and this course was afterwards approved in the Court of Appeal (*g*).

Correction of Clerical error.

Where there is a clear case of a clerical error, it is presumed that the court will correct it, and construe the lease as if the error had not been made.

(*a*) *Harris* v. *Pepperell*, L. R., 5 Eq. 1.

(*b*) *Paget* v. *Marshall*, 54 L. J., Ch. 575; 51 L. T. 351, per *Bacon*, V.-C. In this case the plaintiff granted a lease of certain portions of three warehouses, and by mistake included a first floor. The lease was ordered to be rescinded, with an option to the defendant to take it, excluding such first floor.

(*c*) *Price* v. *Ley*, 32 L. J., Ch. 530.

(*d*) *In re Malet*, 31 L. J., Ch. 455, M.R.

(*e*) *Mostyn* v. *West Mostyn, &c., Co.*, 1 C. P. D. 145; 45 L. J., C. P. 401; 34 L. T. 325.

(*f*) *Besley* v. *Besley*, 9 Ch. D. 103; 38 L. T. 844; 27 W. R. 184.

(*g*) In *Clayton* v. *Leach*, 41 Ch. D. 103; 61 L. T. 69; 37 W. R. 664—C. A.

## Sect. 25.—*Cancellation of Lease for Fraud, Misrepresentation, or Concealment.*

If a lease has been obtained by fraud or material misrepresentation or concealment, either on the part of the lessor or lessee, it may be set aside (*h*). *Mostyn* v. *West Mostyn, &c., Co.* (*i*), is an important case on this head, being decided on the ground of concealment only. In that case the lessor knew, but did not inform the lessee, who had no means of knowing, that he had no title to part of the lands demised. It was held that the lessee might, if he pleased, be relieved of the lease altogether, that this relief might be given in an action by the lessor for the rent, and further that the lessee might, if he pleased, reject that part only to which there was no title, and keep the remainder. It is to be observed, however, that in this case the lessee does not appear to have either entered into possession or paid rent (*k*).

(*h*) See Story on Equity, ss. 191—203; Chitty on Contracts, 13th ed., Ch. XXI., sect. 4; Ch. XXII., sect. 1.

(*i*) *Mostyn* v. *West Mostyn, &c., Coal Co.*, 1 C. P. D. 145; 45 L. J., Q. B. 401.

(*k*) See the judgment of Lindley, J.

# CHAPTER VI.

## OF TENANCIES FOR LESS TERM THAN YEARS, AND OF PERMISSIONS TO OCCUPY.


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### SECT. 1.—*Tenancy from Year to Year.*

Nature of the Tenancy.

A TENANT from year to year is one who holds under a demise (express or implied) for a term (*a*), which may be determined at the end of the first or any subsequent year of the tenancy, either by the landlord or the tenant, by a regular notice to quit (*b*). He was originally spoken of as a tenant at will whose will could not be determined by either party without due notice to quit (*c*). If no such notice be given the tenancy will continue from year to year, for any number of years until surrendered, or extinguished by the Statute of Limitations, or the lessor's title ceases (*d*). The death of either party will not determine it (*e*); unless, indeed, the lessor be tenant for his own life only, and the lease is not made pursuant to any statute or power (*f*).

Lease from Year to Year gives one Time of Continuance.

"Leases from year to year," observes Mr. Preston, "give only one time of continuance. That time, however, may be confined to one year, or extended to several years, according to circumstances attending the tenancy in its progress. In the first place, the lease is for one year certain, and after the commencement of every year, or perhaps after the expiration of that part of the year in which a notice of determining the tenancy may be given, it is a lease for the second year; and in consequence of the original agreement of the parties every year of the tenancy constitutes part of the lease, and eventually becomes parcel of the term: so that a lease, which in the first instance

(*a*) *How* v. *Kennett*, 3 A. & E. at p. 662, per Littledale, J.

(*b*) Cole Ejec. 29, 441.

(*c*) *Parker* d. *Walker* v. *Constable*, 3 Wils. 25; and see the history of tenancies from year to year traced from tenancies at will, Smith L. & T. 23.

(*d*) Smith L. & T. 30, 441.

(*e*) *Maddon* v. *White*, 2 T. R. 159; 1 R. R. 453; *Doe* d. *Shore* v. *Porter*, 3 T. R. 13; 1 R. R. 626; *Mackay* v. *Mackreth*, 4 Doug. 213; 2 Chit. R. 461; 15 Ves. 241; *Doe* d. *Hull* v. *Wood*, 14 M. & W. 682; *Cattley* v. *Arnold*, 1 J. & H. 651; 28 L. J., Ch. 352; *Bootheroyd* v. *Woolley*, 5 Tyr. 522.

(*f*) *Doe* d. *Thomas* v. *Roberts*, 16 M. & W. 778; 14 & 15 Vict. c. 25, s. 1.

is only for one year certain, may in the event be a term for one hundred years or more. Under this species of tenancy the law considers the lease, with a view to the time which has elapsed, as arising from an estate for all that time, including the current year; and with a view to the time to come, as a lease from year to year. For as all the time for which the land may be held under a running lease is originally given, and in effect passes, by the same instrument or contract, the whole time is consolidated, and every year as it commences forms part of the term" (*g*).

Settlement cases.

The renting of a tenement from three months to three months, or for an indefinite period, and an occupation under it and payment of rent for a year or more, constitute a tenancy from year to year, so as to confer a settlement under the Poor Law (*h*).

Creation of Tenancy from Year to Year by express Contract.

Where parties usually agree for a tenancy "from year to year," and possession is taken, such a tenancy is thereby created, and may be determined at the end of the first or any subsequent year of the tenancy by a regular notice to quit (*i*). But where a tenancy is created "for one year, and so on from year to year" (which is frequently done by mistake), it enures as a tenancy for two years at the least, and cannot be determined at the end of the first year (*k*); though it may be determined by notice to quit at the end of the second or any subsequent year of the tenancy. A demise "for a year," or "for one year certain," does not create a tenancy from year to year, nor require any notice to quit at the end of the year (*l*).

Implied Contract by Entry under Contract for Lease or void Lease.

*Doe* v. *Bell.*

Prior to *Walsh* v. *Lonsdale*, the doctrine was firmly established, that where a person is let into possession under a mere agreement for a future lease, he becomes only a tenant at will; but it was equally well established, that when he pays, or expressly agrees to pay, any part of the annual rent thereby reserved, his tenancy at will changes into a tenancy from year to year, upon the terms of the intended lease so far as they are applicable to and not inconsistent with a yearly tenancy (*m*). That the freehold interest was, subsequent to the making of the agreement, assigned to another person, made no difference in law (*n*). The effect of *Walsh* v. *Lonsdale* (*o*)

(*g*) 3 Prest. Conv. 76, 77. And see *Tomkins* v. *Lawrence*, 8 C. & P. 729; *Cattley* v. *Arnold*, supra.

(*h*) *Rex* v. *Herstmonceaux*, 7 B. & C. 551; *Hastings Union* v. *Guardians of St. James, Clerkenwell*, L. R., 1 Q. B. 38; 35 L. J., M. C. 65.

(*i*) *Doe* d. *Clarke* v. *Smaridge*, 7 Q. B. 957; *Doe* d. *Plumer* v. *Mainby*, 10 Q. B. 472.

(*k*) *Doe* d. *Chadborn* v. *Green*, 9 A. & E. 658; *Reg.* v. *Chawton*, 1 Q. B. 247. As to meaning of the term for one year "certain," see *Thompson* v. *Maberley*, 2 Camp. 573, and p. 164 (*f*), ante.

(*l*) *Cobb* v. *Stokes*, 8 East, 358, 361; 9 R. R. 464; *Wilson* v. *Abbott*, 3 B. & C. 89; *Johnstone* v. *Hudlestone*, 4 B. & C. 937; 4 L. J. K. B. 71; 28 R. R. 505; and see *Wright* v. *Tracey*, Ir. R., 8 C. L. 478.

(*m*) *Doe* d. *Thomson* v. *Amey*, 12 A. & E. 476.

(*n*) See *Arden* v. *Sullivan*, 14 Q. B. 832; and compare *Wyatt* v. *Cole*, 36 L. T. 613.

(*o*) *Walsh* v. *Lonsdale*, 21 Ch. D. 9; and see ante, Chap. IV., Sect. 1, p. 91.

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and *Coatsworth* v. *Johnson* (*p*) upon this doctrine has already been considered, and here it only remains to point out that the doctrine applied to entry upon a void lease (*q*), as well as to entry upon an agreement for a lease, and that *Walsh* v. *Lonsdale* has no application to entry under a void lease, except so far as it may be construed as an agreement for a future lease.

Terms applicable to Yearly Tenancy. *Martin* v. *Smith.*

A stipulation for two years' notice to quit is inapplicable to a yearly tenancy within the meaning of the doctrine above stated (*r*). So is a covenant to build; or to do such material repairs as are not usually done by tenants from year to year (*s*). But a stipulation, in an agreement for a lease for more than three years, to keep the premises in good tenantable repair during the tenancy, was held applicable (*t*); as also a stipulation, in a lease not by deed, for seven years, to paint at the end of the seventh year (*u*); and a stipulation "to keep open the shop, and use the best endeavours to promote the trade of it during the tenancy" (*x*). So a stipulation that the tenant shall be paid for tillages on the expiration of his tenancy (*y*); although, perhaps, it may not apply to a new reversioner, who accepts rent in ignorance of such a stipulation (*z*). A proviso for re-entry on non-payment of rent or non-performance of covenants is applicable to an implied yearly tenancy (*a*). Such tenant is entitled to the usual notice to quit; but at the expiration of the term mentioned in the agreement the implied tenancy from year to year will cease without any notice to quit (*b*).

Rebutting of implied Terms of Holding.

The implied contract can of course be rebutted, and there must be some evidence given of it. Actual payment of rent is not always essential, although that is perhaps the clearest proof (*c*). Where the payment of the rent is allowed to stand over by mutual consent, that is sufficient (*d*). Payment of rent does not of itself create a tenancy from year to year, but is *only evidence* from which a jury may find the fact (*e*). Where payment of rent unexplained would ordinarily imply a yearly tenancy upon the previous terms, the payer or receiver of such rent may prove the circumstances under

(*p*) *Coatsworth* v. *Johnson*, 55 L. J., Q. B. 220; 54 L. T. 520.

(*q*) *Doe* d. *Rigge* v. *Bell*, 5 T. R. 471; 2 Sm. L. C.; 2 R. R. 642.

(*r*) *Tooker* v. *Smith*, 1 H. & N. 732.

(*s*) *Bowes* v. *Croll*, 6 E. & B. 264.

(*t*) *Richardson* v. *Gifford*, 1 A. & E. 52.

(*u*) *Martin* v. *Smith*, L. R., 9 Ex. 50; 43 L. J., Ex. 43; 30 L. T. 268; 22 W. R. 336.

(*x*) *Sanders* v. *Karnell*, 1 F. & F. 336.

(*y*) *Brocklington* v. *Saunders*, 13 W. R. 46, Q. B.

(*z*) *Oakley* v. *Monck*, 3 H. & C. 706; 34 L. J., Ex. 137; L. R., 1 Ex. 159; 4 H. & C. 251; 35 L. J., Ex. 84.

(*a*) *Thomas* v. *Packer*, 1 H. & N. 669.

(*b*) *Doe* d. *Tilt* v. *Stratton*, 4 Bing. 446; *Doe* d. *Bramfield* v. *Smith*, 6 East, 530; *Berry* v. *Lindley*, 3 M. & G. 498, 514; *Doe* d. *Davenish* v. *Moffatt*, 15 Q. B. 257, 265; *Tress* v. *Savage*, 4 E. & B. 36.

(*c*) *Cox* v. *Bent*, 5 Bing. 185; 7 L. J., C. P. 68; 2 M. & P. 281; 30 R. R. 566; *Vincent* v. *Godson*, 24 L. J., Ch. 122.

(*d*) *Cox* v. *Bent*, 5 Bing. 185; *Vincent* v. *Godson*, 24 L. J., Ch. 122.

(*e*) *Finley* v. *Bristol and Exeter R. Co.*, 7 Exch. 415; *Jones* v. *Shears*, 4 A. & E. 832.

which such payment was made, for the purpose of repelling such implication (*f*).

Where a tenant for a term of years holds over after the expiration of his lease, he becomes a tenant on sufferance; but when he pays, or expressly agrees to pay, any subsequent rent, at the previous rate, a new tenancy from year to year is thereby created upon the same terms and conditions as those contained in the expired lease, so far as the same are applicable to and not inconsistent with a yearly tenancy (*g*). This, however, appears to be matter of evidence rather than of law (*h*). Where the tenancy was for one year, and the tenant, holding over at the end of it, left a letter demanding rent for a new quarter unanswered, and expressed a wish to discontinue the present tenancy, Hawkins, J., who tried the case without a jury, held that there was no new tenancy, but the Court of Appeal reversed this judgment (*i*). The landlord may show that he accepted the rent from time to time under a mistake, and upon the supposition that one of the lives for which the lease was granted continued in existence (*k*); or a new reversioner may show that he knew nothing of any special terms in the original lease, and therefore ought not to be deemed to have assented to them, so as to render himself liable to such terms (*l*), or the tenant may show any facts leading to an opposite conclusion, as that the continued occupation was only provisional and in expectation of a new lease on new terms.

Where a Tenant holds over, and pays subsequent Rent.

*Hyatt* v. *Griffiths.*

In the absence, however, of any evidence one way or the other, it seems that upon a holding over and payment of rent, the jury would be directed to find a tenancy on the terms of the expired lease, and that this would be so even if there had been an assignment of the reversion prior to the holding over (*m*). Any such new tenancy (when implied) will be deemed to have commenced at the same time of the year as the original term, and notice to quit should be given accordingly (*n*). Even if the rent be increased, the tenancy will be subject to covenants or stipulations similar to those contained in the former lease, unless others are expressly agreed on (*o*). It will also be subject to the custom of the country, so far as such custom is not excluded by the terms of the expired lease (*p*). It may be

(*f*) *Doe* d. *Lord* v. *Crago*, 6 C. B. 90; *Oakley* v. *Monck*, supra (*z*).

(*g*) *Bishop* v. *Howard*, 2 B. & C. 100; *Hyatt* v. *Griffiths*, 17 Q. B. 505; 1 L. J., K. B. 243; 26 R. R. 291.

(*h*) *Mayor of Thetford* v. *Tyler*, 8 Q. B. 95.

(*i*) *Dougal* v. *McCarthy*, [1893] 1 Q. B. 736; 62 L. J., Q. B. 462; 68 L. T. 699; 41 W. R. 484; 4 R. 402; 57 J. P. 597—C. A.

(*k*) *Doe* d. *Lord* v. *Crago*, 6 C. B. 90.

(*l*) *Oakley* v. *Monck*, 3 H. & C. 706; 34 L. J., Ex. 137; L. R., 1 Ex. 159; 4 H. & C. 251; 35 L. J., Ex. 84.

(*m*) See *Wyatt* v. *Cole*, 36 L. T. 613.

(*n*) *Doe* d. *Castleton* v. *Samuel*, 5 Esp. 173; 8 R. R. 845; *Doe* d. *Spicer* v. *Lea*, 11 East, 312; *Roe* d. *Jordan* v. *Ward*, 1 H. Blac. 96; 2 R. R. 728; *Doe* d. *Martin* v. *Watts*, 7 T. R. 83; 4 R. R. 387; *Doe* d. *Tucker* v. *Morse*, 1 B. & Ad. 365.

(*o*) *Digby* v. *Atkinson*, 4 Camp. 275; 16 R. R. 792.

(*p*) *Hutton* v. *Warren*, 1 M. & W. 466.

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determined by notice at the end of the first or any subsequent year of the tenancy (*q*), or under an implied proviso for re-entry similar to that contained in the expired lease (*r*).

Acceptance of Rent by Remainderman.

If a remainderman accept money, or anything else reserved as rent in a lease granted by the previous tenant for life, which became *void* on the death of such tenant for life, he does not thereby confirm and establish the lease for the residue of the term therein expressed to be granted (without a previous memorandum in writing pursuant to 13 Vict. c. 17, s. 1), but he creates a new implied tenancy from year to year as between him and the tenant on the old terms, so far as they are applicable to and not inconsistent with a yearly tenancy, and the tenant is entitled to the usual notice to quit (*s*) : unless, indeed, the rent reserved be so grossly inadequate, with reference to the annual value of the property, that the jury ought to presume and find that no such new tenancy was intended to be created (*t*). So any special and unusual terms, of which the reversioner was ignorant when he accepted the rent, will not bind him (*u*), unless the Settled Land Act applies. Any such new tenancy will be deemed to have commenced from the same day of the year as the original term, and the notice to quit should be given accordingly (*x*).

By Attornment to a prior Mortgagee.

If a mortgagee induce or compel a *subsequent* tenant of the mortgagor to attorn to and pay him rent, that will not operate to confirm the lease for the whole term thereby granted, but will create between the mortgagee and the tenant a new tenancy from year to year (*y*) ; and such new tenancy will be subject to the terms and conditions of the lease, so far as the same are applicable to and not inconsistent with a yearly tenancy (*z*).

Not by Agreement to pay an increased Rent.

If, whilst a tenant from year to year is in possession of lands under an agreement reserving a certain rent, he agrees with his landlord to pay an increased or reduced rent, this will not have the effect of then creating a new tenancy (*a*).

Underleases by Tenants from Year to Year.

A demise by a tenant from year to year to another also to hold from year to year, is in legal operation a demise from year to year only during the continuance of the original demise to the inter-

(*q*) *Doe* d. *Clarke* v. *Smaridge*, 7 Q. B. 957 ; *Doe* d. *Plumer* v. *Mainby*, 10 Q. B. 473.

(*r*) *Thomas* v. *Packer*, 1 H. & N. 669 ; *Hayne* v. *Cummings*, 16 C. B., N. S. 421.

(*s*) *Doe* d. *Martin* v. *Watts*, 7 T. R. 85 ; 4 R. R. 387 ; *Doe* d. *Tucker* v. *Morse*, 1 B. & Adol. 365.

(*t*) *Doe* d. *Brune* v. *Prideaux*, 10 East, 158 ; *Denn* d. *Brune* v. *Rawlins*, Id. 261 ; 10 R. R. 287 ; *Doe* d. *Lord* v. *Crago*, 6 C. B. 90.

(*u*) *Oakley* v. *Monck*, 3 H. & C. 706 ; 34 L. J., Ex. 137 ; L. R., 1 Ex. 159 ; 4 H. & C. 251 ; 35 L. J., Ex. 84. As to application of Settled Land Act, see p. 6, ante.

(*x*) *Roe* d. *Jordan* v. *Ward*, 1 H. Blac. 96 ; 2 R. R. 728 ; *Doe* d. *Collins* v. *Weller*, 7 T. R. 478 ; 4 R. R. 496.

(*y*) *Doe* d. *Hughes* v. *Bucknell*, 8 C. & P. 567 ; *Doe* d. *Prior* v. *Ongley*, 10 C. B. 25 (3rd point).

(*z*) Cole Ejec. 445.

(*a*) *Doe* d. *Monck* v. *Geeckie*, 5 Q. B. 811 ; 1 C. & K. 307 ; *Clarke* v. *Moore*, 1 Jon. & Lat. 723 ; *Crowley* v. *Vitty*, 7 Exch. 319 ; *Burrowes* v. *Gradin*, 1 D. & L. 213.

mediate landlord (*b*). A tenant from year to year, underletting from year to year, has a reversion which entitles him to distrain (*c*). If a tenant from year to year make a lease for twenty-one years, such term will cease whenever the tenancy from year to year is legally determined (*d*).

Acknowledgment of Landlord's Title in Writing, effect of.

Real Prop. Lim. Act, 1833, sec. 14.

By s. 14 of the Real Property Limitation Act, 1833, 3 & 4 Will. 4, c. 27, "When any acknowledgment of the person entitled to any land or rent shall have been given to him or his agent in writing signed by the person in possession or in receipt of the profits of such land, or in receipt of such rent, then such possession or receipt of or by the person by whom such acknowledgment shall have been given shall be deemed, according to the meaning of this act, to have been the possession or receipt of or by the person to whom or to whose agent such acknowledgment shall have been given at the time of giving the same, and the right of such last-mentioned person, or any person claiming through him to make an entry or distress or bring an action to recover such land or rent shall be deemed to have accrued at and not before the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given."

Whether a writing is an acknowledgment within this section is a question of law, not of fact (*e*). The acknowledgment must be express (*f*), and may arise on a pleading (*g*), but an answer to an application for arrears of rent has been held sufficient (*h*). An acknowledgment by an agent is insufficient as not being made by the party in possession (*i*), and so it seems is an inquiry on what terms the premises would be let, even though made by the party himself (*k*).

Acquisition of fee simple, where no Lease in writing, by Statute of Limitations.

A tenant from year to year, unless he hold under a written contract of tenancy, acquires a fee simple by non-payment of rent for twelve years. Such is the effect of the Real Property Limitation Act, 1833, 3 & 4 Will. 4, c. 27, s. 8, and the Real Property Limitation Act, 1874, 37 & 38 Vict. c. 57, s. 2. By s. 2 of the act of 1874, no person may make an entry or bring an action to recover land but within twelve years next after the right to make the entry or to bring the action shall have first accrued to him or to his predecessor in title; and by s. 8 of the act of 1833, "When any person shall be in possession or in receipt of the profits of any land or in receipt of any rent, as tenant from year to year, or other period, without any lease in writing, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress, or to bring an action to recover such land or rent, shall be deemed to have first accrued at

(*b*) *Pike* v. *Eyre*, 9 B. & C. 909.
(*c*) *Curtis* v. *Wheeler*, Moo. & M. 493.
(*d*) *Mackay* v. *Mackreth*, 4 Doug. 213.
(*e*) *Doe* d. *Curzon* v. *Edwards*, 6 M. & W. 265.
(*f*) Ib.
(*g*) *Goode* v. *Job*, 28 L. J., Q. B. 1.
(*h*) *Fursden* v. *Clegg*, 10 M. & W. 572.
(*i*) *Ley* v. *Peter*, 27 L. J., Ex. 239.
(*k*) See Ib., per Bramwell, B.

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the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy shall have been received, which shall last happen."

This section applies to tenancies created before the Real Property Limitation Act, 1833, 3 & 4 Will. 4, c. 27, as well as to those created after that statute (*l*). The "lease in writing" must be effectual to pass an interest (*m*). A payment on account of something else than rent is not a payment of rent within the section (*n*). A statement by the tenant admitting payment of rent, as "I have no property in W. but what I hold of Lord S., for which I pay 100*l*. a year," is evidence of payment of rent at the time of the statement (*o*). The rendering of such services as sweeping a church and tolling the bell is equivalent to payment of rent (*p*).

By sect. 34 of the Act of 1833 the title of the prior rightful owner is extinguished at the end of the period of limitation, and not transferred to the person in possession (*q*).

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### SECT. 2.—*Tenancy for less than a Year.—Lodgings.*

Tenancy for less than a Year.

In leases of houses and apartments for an *indefinite* period less than a year, the hiring will be construed to be quarterly, monthly, or weekly, according to the circumstances of each case and the custom of the place or country. Of these circumstances the principal appears to be the payment of rent: therefore, where a tenancy was created of wharfs, warehouses, &c., at a certain rent per quarter, the tenancy to commence on the 14th June, the tenant paying a quarter's rent on that day and giving security for the payment of a quarter's rent in advance during his tenancy, it was held that he became tenant from quarter to quarter, and not from year to year (*r*). So where the tenant is "*always* to be subject to quit at three months' notice" he will be deemed a quarterly tenant (*s*). Where premises are let, not for any definite period, but the tenant is to give up possession at any time on one month's notice, that creates a tenancy from month to month (*t*). So a demise of houses or of lodgings at a monthly or weekly rent affords a presumption of a monthly or weekly tenancy (*u*).

Month means Lunar Month.

Month in any legal document means lunar month, unless calendar

(*l*) *Doe* d. *Jukes* v. *Sumner*, 14 M. & W. 39.

(*m*) *Doe* d. *Landsch* v. *Gower*, 17 Q. B. 589; 21 L. J., Q. B. 57.

(*n*) *Att.-Gen.* v. *Stephens*, 6 De G. M. & G. 111; 25 L. J., Ch. 888.

(*o*) *Doe* d. *Spencer* (*Earl*) v. *Beckett*, 4 Q. B. 601.

(*p*) *Doe* d. *Edney* v. *Benham*, 7 Q. B. 976.

(*q*) See *Tichborne* v. *Weir*, 67 L. T. 735; 4 R. 26—C. A.

(*r*) *Wilkinson* v. *Hall*, 3 Bing. N. C. 508.

(*s*) *Kemp* v. *Derrett*, 3 Camp. 510; 14 R. R. 820.

(*t*) *Doe* d. *Landsell* v. *Gower*, 17 Q. B. 589.

(*u*) *Huffell* v. *Armitstead*, 7 C. & P. 56. And see as to what notice to quit is required, post, Chap. VIII., Sect. 7.

month be specified (*x*), or there be admissible evidence to show that a calendar month was intended (*y*). Where a person hired a furnished house for three lunar months, and a receipt was given for the rent for that period, but he continued in possession afterwards, it was held that a jury were warranted in finding that the subsequent occupation was on a *weekly* hiring (*z*). By agreement on the 19th of April, certain premises were let at a yearly rent of 42*l.*, payable quarterly; the first payment, 7*l.* 13*s.* 6*d.*, to be made on the 24th of June next, being the proportion of rent due up to that time. The lessee was to enjoy the said rent until one of the parties should give to the other six months' notice to quit, and at the expiration of "any" such notice to leave the premises in as good condition, &c. This was held to be a half-yearly tenancy, commencing from the 24th of June: and that a notice to quit given at Midsummer and expiring at Christmas was valid (*a*). Where the defendant hired of the plaintiff apartments in his dwelling-house at a fixed rent, payable half-yearly, and entered into possession at Michaelmas, 1822: and at Lady-day, 1823, paid one half-year's rent, and at the Midsummer following gave up possession without having given notice to quit; but at Michaelmas in the same year he paid another half-year's rent, though at Lady-day, 1824, he refused to pay a third half-year's rent; in an action for use and occupation for that half-year's rent, it was held that a tenancy from year to year could not be inferred from these facts, and therefore that the action was not maintainable (*b*). A general letting at a yearly rent, though payable half-yearly or quarterly, or an acceptance of yearly rent or rent measured by an aliquot part of a year, is evidence of a taking from year to year (*c*). Where premises are let, at a yearly rent payable weekly, with power to determine the tenancy at three months' notice from any quarter-day, that creates a yearly tenancy, determinable as agreed (*d*).

Furnished House.

Where a house is let ready furnished the rent is deemed to issue out of the realty, and not partly out of the furniture (*e*).

Lodgings.

Lodgings may be let in the same manner as lands and tenements. A lodger is a tenant if the premises are let to him (*f*).

Protection of Lodger's Goods from Distress.

Prior to the Lodgers' Goods Protection Act, 1871, 34 & 35 Vict. c. 79, care had to be taken by the lodger to ascertain that the rent of the house had been paid up, as if not, the goods of the lodger

(*x*) *Simpson* v. *Margitson*, 11 Q. B. 23.

(*y*) Ib., and see as to agreement for hire of furniture, *Hutton* v. *Brown*, 45 L. T. 343.

(*z*) *Towne* v. *Campbell*, 3 C. B. 921.

(*a*) *Doe* d. *King* v. *Graton*, 18 Q. B. 496; 21 L. J., Q. B. 276.

(*b*) *Wilson* v. *Abbott*, 3 B. & C. 88.

(*c*) *Richardson* v. *Langridge*, 4 Taunt. 128; 13 R. R. 570; *Doe* d. *Hull* v. *Wood*, 14 M. & W. 682.

(*d*) *Rex* v. *Herstmonceaux*, 7 B. & C. 551.

(*e*) *Newman* v. *Anderton*, 2 Bos. & P. New R. 224.

(*f*) *Cook* v. *Humber*, 11 C. B., N. S. 33; 31 L. J., C. P. 73. As to executory agreement to let lodgings, see ante, p. 92.

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would be liable to a distress for rent due from his own landlord. But that act, which is fully set out hereafter (*g*), provides a simple process for freeing the lodger's goods from a distress of this kind. Previously to taking the premises, however, it may sometimes be prudent to make inquiries of the tax-gatherer and collector of the parochial rates, as if distresses be levied for them, it may cause considerable inconvenience and annoyance to the lodger, although his goods are not liable to such distresses.

Use of Knocker, Door Bell, &c.

A lodger has a right to the use of the door bell, the knocker, the skylight of the staircase, and the water-closet, unless it be otherwise stipulated at the time of taking the lodgings; therefore if the landlord deprive the lodger of the use of either, an action lies (*h*).

Lodgings to Prostitutes.

If a person let lodgings to an immodest woman to enable her to consort with the other sex, or if not knowing her habits at the time of letting, but becoming acquainted with her habits afterwards, he permit her to continue his tenant, he cannot recover in an action for the lodgings so let; but if the woman merely lodge in the house, and receive her visitors elsewhere, the rent may be recoverable (*i*).

Larceny of Lodger's Goods.

A lodging-house keeper is not responsible to his lodger if property of the latter be stolen from his apartments, either by another lodger or by a third person: the principle is, that the lodger must himself take care of his own goods; there is a distinction in this respect between an innkeeper and a lodging-house keeper (*k*).

## SECT. 3.—*Tenancy at Will.*

What constitutes a Tenancy at Will.

A tenancy at will is where lands or tenements are let by one man to another, to hold at the will of the lessor: in this case the lessee is called tenant at will, because he has no certain or sure estate: for the lessor may put him out at any time he pleases (*l*). Either party may at any time determine a strict tenancy at Will, although expressed to be held at the will of the lessor only (*m*), and the landlord may determine it by a demand of possession or otherwise without a previous formal notice (*n*). The granting of a lease to a third person by a lessor of a tenant at will, though it determines the tenancy at will as against the lessor, does not give him such a right of entry as is contemplated by the Real Property Limitation Act, 1833, 3 & 4

(*g*) Chap. XI., Sect. 9 (*g*).

(*h*) *Underwood* v. *Burrows*, 7 C. & P. 26.

(*i*) *Appleton* v. *Campbell*, 2 C. & P. 347; *Jennings* v. *Throgmorton*, Ry. & Moo. 251; *Girardy* v. *Richardson*, 1 Esp. 13.

(*k*) *Holder* v. *Soulby*, 8 C. B., N. S. 254; 29 L. J., C. P. 246; *Dansey* v. *Richardson*, 3 E. & B. 144; *Clench* v. *Dr. Arenberg*, 1 C. & E. 42.

(*l*) Lit. s. 68; Cole Ejec. 448.

(*m*) Co. Lit. 55 a; Smith L. & T. 17 (2nd ed.).

(*n*) *Doe* v. *Price*, 9 Bing. 356, and p. 240, post.

Will. 4, c. 27, s. 2 (*o*). Where there is a tenancy at will, at a fixed rent, such rent may be distrained for (*p*). Where there is no such fixed rent an action for use and occupation may be maintained (*q*).

How created.

Where a person lets land to another without limiting any certain or determinate estate, a tenancy at will is thereby created (*r*). A person who lives in a house rent free, by the sufferance of the owner, is a tenant at will (*s*). A mere permission to occupy land constitutes a tenancy at will only (*t*). An interest of freehold or quasi freehold character cannot be created orally or by a mere written agreement (not under seal): a person, therefore, holding under such an agreement is a tenant at will, and (after determination of such tenancy) removable by ejectment, without prejudice to his equitable rights (*u*). Courts of law have for a very long time leaned as much as possible against construing demises, where no certain term is mentioned, to be tenancies at will, but have rather held them to be tenancies from year to year so long as both parties please, especially where an annual rent is reserved (*x*). If an agreement be made to let premises so long as both parties please, and reserving a compensation, accruing de die in diem, and not referable to a year, or any aliquot part of a year, it does not create a holding from year to year, but a tenancy at will strictly so called; and though the tenant has expended money on the improvement of the premises, that does not give him a right to hold them until he be indemnified (*y*). If one devise a tenement to another, excepting the new house for his habitation when he pleases to stay there, and at other times for the use of the lessee; the lessee has the new house as tenant at will (*z*). The words "I give you a close to enjoy as long as I please, and to take again when I please, and you shall pay nothing for it," create a tenancy at will (*a*). So a party having become tenant to two others *at their will and pleasure*, at the rate of 25*l*. 4*s*. per annum, payable quarterly, and having remained in possession under this agreement for two years, and paid a year's rent, after which the lessors distrained for a quarter's rent, was held to be tenant at will and not from year to year (*b*). If a tenant whose lease has expired be permitted to continue in possession pending a treaty for a further

"Rent free."

"So long as both parties please." *Richardson* v. *Langridge.*

"Will and pleasure."

(*o*) *Hogan* v. *Hand*, 2 W. R. 673; 4 L. T. 465, P. C.

(*p*) *Anderson* v. *Midland R. Co.*, 3 E. & E. 614; 30 L. J., Q. B. 94; *Doe* d. *Davies* v. *Thomas*, 6 Exch. 858.

(*q*) Chap. XIV., post.

(*r*) Com. Dig. tit. *Estates* (H. 1); *Richardson* v. *Langridge*, 4 Taunt. 128; 13 R. R. 570.

(*s*) *Rex* v. *Collett*, Rus. & Ry. C. C. 498; *Rex* v. *Jobling*, Id. 525; *Doe* d. *Groves* v. *Groves*, 10 Q. B. 486.

(*t*) *Doe* d. *Hull* v. *Wood*, 14 M. & W. 682.

(*u*) *Dosse* v. *East I. Co.*, 8 W. R. 245, P. C.

(*x*) *Timmins* v. *Rowlinson*, 3 Burr. 1009; 1 W. Blac. 533; Co. Lit. 55; *Doe* d. *Hull* v. *Wood*, 14 M. & W. 682; *Anderson* v. *Midland R. Co.*, 30 L. J., Q. B. 94.

(*y*) *Richardson* v. *Langridge*, 4 Taunt. 128; 13 R. R. 570.

(*z*) *Cudlip* v. *Rundall*, 3 Salk. 156.

(*a*) *Rex* v. *Fillongley*, Cald. 569.

(*b*) *Doe* d. *Bastow* v. *Cox*, 11 Q. B. 122.

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*Tenancy at Will.*

lease, he is not a tenant from year to year, but a tenant strictly at will (*c*): it is the same if he be admitted tenant pending a treaty for purchase, which is afterwards broken off (*d*).

Entry under void Lease. *Doe* v. *Bell.*

If a man enter under a void lease, he is not a disseisor, but a tenant at will (*e*), under the terms of the lease in all other respects except the duration of time (*f*): and when he pays or agrees to pay any of the rent therein expressed to be reserved he becomes a tenant from year to year upon the terms of the void lease, so far as they are applicable to and not inconsistent with a yearly tenancy (*f*).

Tenancy of Dissenting Minister.

A minister of a dissenting congregation, placed in possession of the chapel and dwelling-house by certain persons in whom the fee was vested, in trust to permit and suffer the chapel to be used for the purpose of religious worship, is a mere tenant at will to those persons; his interest is determinable by a demand of possession, without any previous notice to quit (*g*); and he is not even entitled as of right, before the determination of his tenancy, to have a reasonable time allowed him for the removal of his furniture (*h*).

Other Tenancies at Will.

Where a tenant at will let into possession a person whom the landlord had refused to take as tenant unless he found security, and who remained in possession two years, continuing to endeavour to find securities, but without success; it was held, that he was not even tenant at will (*i*). Slight evidence has been held sufficient to make a tenant on sufferance a tenant at will (*k*). Where a term of years is created by way of use, and limited to a trustee, the owner of the freehold who holds subject to such term is a quasi tenant at will to his own trustee (*l*).

Determination of Tenancy at Will.

An estate at will may be determined by a demand of possession (*m*), or by the express declaration of either of the parties (*n*), or by implication of law: of the latter description will be the death of either party, which in general determines the will (*o*)—acts of ownership exercised by the landlord (*p*)—his alienation of the reversion and

(*c*) *Doe* d. *Hollingsworth* v. *Stennett*, 2 Esp. 717; 5 R. R. 769; *Simpkin* v. *Ashurst*, 1 C., M. & R. 261.

(*d*) *Peacock* v. *Peacock*, 16 Ves. 57; *Doe* d. *Stanway* v. *Rock*, 1 Car. & M. 549; 4 M. & G. 30; *Ball* v. *Cullimore*, 2 C., M. & R. 120. And see p. 253, post.

(*e*) *Denn* d. *Warren* v. *Fearnside*, 1 Wils. 176; *Goodtitle* d. *Galloway* v. *Herbert*, 4 T. R. 680; *De Medina* v. *Polson*, Holt, N. P. C. 47.

(*f*) *Doe* v. *Bell*, 5 T. R. 471; 2 R. R. 642; ante, .

(*g*) *Doe* d. *Jones* v. *Jones*, 10 B. & C. 718; *Doe* d. *Nicholl* v. *M'Kaeg*, Id. 721; *Perry* v. *Shipway*, 1 Giff. 1.

(*h*) Per cur. in *Doe* v. *M'Kaeg*, supra. As to egress and regress *after* determination, see Lit. s. 69, and p. 242 (*k*), post.

(*i*) *Doe* d. *Heming* v. *Brett*, Hurl. & Walm. 3.

(*k*) *Turner* v. *Doe* d. *Bennett* (in error), 9 M. & W. 643.

(*l*) *Doe* d. *Jacobs* v. *Phillips*, 10 Q. B. 130.

(*m*) See *Doe* v. *Jones*, 10 B. & C. 718; *Doe* v. *Price*, 9 Bing. 356; *Doe* v. *M'Kaeg*, supra. The law seems to be that there must be a demand before writ, and that the writ itself is not a demand, but that the writ may immediately follow the demand.

(*n*) *Doe* d. *Bastow* v. *Cox*, 11 Q. B. 122.

(*o*) *Doe* d. *Stanway* v. *Rock*, 1 Car. & M. 549; 4 M. & G. 30; *Cockerell* v. *Owerell*, Holt. 417; *James* v. *Dean*, 11 Ves. 391; 8 R. R. 178; *Att.-Gen.* v. *Ld. Foley*, 2 Dick. 363.

(*p*) Co. Lit. 55 b, 57 b, 245 b; cited

Determination of Tenancy at Will—*contd.*

notice thereof (*q*)—waste committed by the tenant (*r*)—his demising or leasing or assigning the premises over (*s*)—or, in short, doing any act which is inconsistent with an estate at will (*t*). An entry by the landlord on the land without the tenant's consent, and cutting and carrying away stone therefrom, amounts to a determination of the will (*u*). It is requisite that the landlord should give the tenant notice that he determines the tenancy, if the act relied on be done off the premises (*x*). Where the act is done on the land, it is presumed that the tenant is there and knows of it (*y*). A demand of possession made on the premises from the wife of a sublessee at will is sufficient (*z*). So the lessor by making a lease for years to commence presently determines the tenancy at will, although there be a stipulation that the new lessee shall not enter until after the day for payment of the rent by the tenant at will (*a*). The will is also determined by an agreement by the lessor for the sale of the freehold to the tenant at will (*b*).

Constructive demand of possession.

The words "Unless you pay what you owe me, I shall take immediate measures to recover possession of the property," addressed to the tenant by the party entitled to the fee, have been held a sufficient determination of the will, and equivalent to a demand of possession, so as to maintain ejectment (*c*). A., having been in possession of a house and lands adjoining as tenant at will to the lord of a manor, was told by a subsequent lord that he must leave. On his refusal to do so, a writ of ejectment was served upon him; it was then verbally arranged that A. should give up part of the land, and retain the house and remaining land during the life of himself and wife. It was held that these acts amounted to a determination of the tenancy at will, and as a new tenancy at will was thereby created as to part, the Real Property Limitation Act, 1833, 3 & 4 Will. 4, c. 27, ss. 7, 10, began to run from that time, and not from the date of the original tenancy (*d*).

9 M. & W. 646; *Doe* d. *Moore* v. *Lawder*, 1 Stark. R. 308; Smith L. & T. 17 (2nd ed.).

(*q*) Co. Lit. 55 b; *Dinsdale* v. *Isles*, 2 Lev. 88; 1 Vent. 247; *Ball* v. *Cullimore*, 2 C., M. & R. 120; *Doe* d. *Goody* v. *Carter*, 9 Q. B. 863; *Doe* d. *Davies* v. *Thomas*, 6 Exch. 854, 857.

(*r*) Lit. s. 71; Co. Lit. 55 b; Smith, L. & T. 20, 268 (2nd ed.).

(*s*) Cole Ejec. 449, 453; *Pinhorn* v. *Souster*, 8 Exch. 763; *Melling* v. *Leake*, 16 C. B. 652.

(*t*) Cruise's Dig. tit. ix. s. 17; Co. Lit. 57 a, 55 b, n. 15; *Hinchman* v. *Isles*, 1 Ventr. 247; *Countess of Shrewsbury's case*, 5 Rep. 13 b; *Birch* v. *Wright*, 1 T. R. 382; 1 R. R. 223; *Pollen* v. *Brewer*, 7 C. B., N. S. 371; *Wallis* v. *Delmar*, 29 L. J., Ex. 276; Smith L. & T. 19 (2nd ed.).

(*u*) *Doe* d. *Bennett* v. *Turner*, 7 M. & W. 226; 9 Id. 643.

(*x*) Co. Lit. 55 b.

(*y*) *Pinhorn* v. *Souster*, 8 Exch. 763; *Carpenter* v. *Collins*, Yelv. 73; *Ball* v. *Cullimore*, 2 C., M. & R. 120.

(*z*) *Roe* d. *Blair* v. *Street*, 2 A. & E. 329; 4 N. & M. 42.

(*a*) *Dinsdale* v. *Isles*, 2 Lev. 88; 1 Ld. Raym. 224.

(*b*) *Daniels* v. *Davison*, 16 Ves. 249; 10 R. R. 171.

(*c*) *Doe* d. *Price* v. *Price*, 9 Bing. 356.

(*d*) *Locke* v. *Matthews*, 13 C. B., N. S. 753; 9 Jur., N. S. 874.

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A sub-demise or assignment by a tenant without notice thereof to his landlord does not determine the will, so as to prejudice the landlord (*e*).

Assignment by Tenant.

Bankruptcy.

Becoming an insolvent debtor has been held to be a determination of the will (*f*), and becoming bankrupt would seem to have the same effect.

Joint Tenancy.

If two joint tenants create a tenancy at will at a certain rent, and one dies, the survivor takes the whole premises and may maintain an action for the entire rent against the lessee continuing in possession (*g*). So where a lease is made to three joint tenants, rendering rent, the death of one does not determine the tenancy; but the survivors are liable to pay the whole rent (*h*).

Marriage.

A lease at will by a feme sole did not, even before the Married Women's Property Act, determine by her marriage, unless the husband did some express act to determine the tenancy (*h*); nor did the marriage of a feme sole determine a tenancy at will made to her (*h*); and the effect of the act is to give the married woman the same estate as if she were still a feme sole.

Rights of the Parties on the Determination.

The sudden determination of the will of one party will not operate to the material injury of the other: therefore if a tenant at will sow his land, and the landlord determine the tenancy before the corn be ripe, the tenant notwithstanding has free liberty to enter upon the land to cut and carry his crop (*i*); and, on a like principle of justice, the tenant may, in all cases, have reasonable time allowed him to remove his goods after the determination of the estate by the act of the landlord (*k*). Where there is a tenancy at will, rent being paid quarterly, the lessee, after a quarter of a year is commenced, may determine his will, but then he must pay that quarter's rent; and if the lessor determine his will after the commencement of a quarter, he loses his rent for that quarter; and so it is if the rent be payable half-yearly (*l*).

Removal of Tenant's goods.

Acquisition of Fee Simple by Statute of Limitations.

A tenant at will paying no rent for thirteen years acquires a fee simple in the land demised. Such is the effect of the Real Property Limitation Act, 1833, 3 & 4 W. 4, c. 27, s. 7, and the Real Property Limitation Act, 1874, 37 & 38 Vict. c. 57, s. 2. By sect. 2 of the act of 1874, no person may make an entry or bring an action to

(*e*) *Pinhorn* v. *Souster*, 8 Ex. 763; *Melling* v. *Leake*, 16 C. B. 652.

(*f*) *Doe* d. *Davies* v. *Thomas*, 9 Ex. 984.

(*g*) *Henstead's case*, 5 Co. R. 10 b.

(*h*) *Henstead's case*, 5 Co. R. 10 b.

(*i*) Lit. s. 68; Co. Lit. 55 b; *Oland* v. *Burdwick*, Cro. Eliz. 460; *Bulwer* v. *Bulwer*, 2 B. & A. 470, 471. And see Chap. XX., post.

(*k*) Lit. s. 69, "if the lessor puts him out, yet he shall have free entrie, egresse and regresse into the house by reasonable time to take away his goods and utensils;" Noy's Max. c. 11; *Doe* d. *Nicholl* v. *M'Kaey*, 10 B. & C. 721.

(*l*) *Carpenter* v. *Collins*, Yelv. 73; *Layton* v. *Field*, 3 Salk. 222; *Leighton* v. *Theed*, 2 Salk. 413; 1 Ld. Raym. 707; *Parker* v. *Harris*, 4 Mod. 79; 1 Salk. 262; *Title* v. *Grovett*, 2 Ld. Raym. 1008; Co. Lit. 55 a, b, note 374; *Kighly* v. *Bulkly*, 1 Sid. 338.

recover land but within twelve years next after the right to make the entry or to bring the action "shall have first accrued" to him or to his predecessor in title, and by sect. 7 of the act of 1833 :—

Acquisition of fee simple by Real Property Limitation Act, 1833, 3 & 4 W. 4, c. 27, s. 7.

When any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent as tenant at will, the right of the person entitled thereto, or of the person through whom he claims to make an entry or distress or bring an action to recover such land, shall be deemed to have first accrued, either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy: provided always, that no mortgagor or cestui que trust shall be deemed to be a tenant at will.

Operation of s. 7 of Act of 1833, where no rent paid.

It will be observed that this section says nothing of the payment or non-payment of rent by the tenant at will, and verbally operates in favour of such tenant although he may have been paying rent during the whole tenancy at will. The judicial opinion has been expressed that so absurd a result may be avoided by construing each successive payment of rent as an acknowledgment of title in the landlord (*m*), and learned writers have attempted to get rid of the difficulty by a resort to the 35th section of 3 & 4 W. 4, c. 27 (*n*), or even by considering that the Legislature assumed that no rent is paid (*o*). Each of these solutions however is open to objection; the first because it is only an acknowledgment in writing (see 3 & 4 W. 4, c. 27, s. 14, ante, p. 235), which operates in favour of the landlord: the second because s. 35 applies only "for the purposes of the act;" and the third, because the casus omissus in a statute cannot be supplied. In most cases on which any question would arise the payment of rent would have turned the tenancy at will into a tenancy from year to year (*p*), or perhaps even from month to month, or from week to week (*q*), and to such cases the 8th section of 3 & 4 W. 4, c. 27, under which the statute in the case of the tenancy from year to year or other period begins to run from the last payment of rent, would apply. The question, therefore, is not likely to arise in practice, but if it should so arise, it is suggested that a Court would rather adopt one of the solutions above mentioned, notwithstanding the objections to it, or would adopt some new solution, than sanction the absurd result of turning a rent-paying tenant into a freeholder.

General difficulties of the Section.

New Tenancy.

In other and more practical respects, the section has been found a very difficult one to construe. It is settled law, however, that if the tenancy at will be determined and a new tenancy at will created by agreement after such determination, the statute begins to run from

(*m*) Per cur. in *Hodgson* v. *Hooper*, 3 E. & E. 149; 29 L. J., Q. B. 222.

(*n*) Darby and Bosanquet, p. 262; Banning, p. 139.

(*o*) Lord St. Leonards' Treatise on "The New Statutes relating to Property," 2nd ed., p. 53, n.

(*p*) Ante, Sect. 2.

(*q*) See *Simpson* v. *Margitson*, 11 Q. B. 23, ante, Sect. 3.

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the commencement of the new tenancy, and not from the commencement of the old one (*r*). And although the question whether if a determination of the tenancy at will be followed by a tenancy at sufferance, the statute begins to run from the commencement of such tenancy at sufferance, has been said to be an open one, at any rate for a Court of Appeal (*s*); it has been pointed out by the judicial committee in *Day* v. *Day* (*t*), that the question whether there has been an actual determination of a tenancy at will subsequently to the first year of its creation is irrelevant in any case where no new tenancy at will has been created; and the better opinion would seem to be that if a tenancy at will be determined more than a year after its commencement, and the tenant remains in possession without a fresh tenancy at will being created, time does not run from the actual determination of the tenancy, but from one year after its commencement, that is, it runs as if the actual determination had never taken place (*u*).

Encroachment.

An encroachment by a tenant is presumed to be for the benefit of his landlord, so that where a lessee for years and lives enclosed a piece of waste on the understanding that it was to be treated as if comprised in the lease, it was held that the statute did not run from the date of the enclosure, but from the date of the end of the lease (*x*).

Subletting by Tenant at Will without interruption.

Subletting by the tenant at will with the knowledge of and without interruption by the owner was held to confer an indefeasible title in the tenant at will in *Day* v. *Day* (*y*).

Occupation of Property prohibited by Statute from being sold.

In the peculiar case of *Mayor, &c. of Brighton* v. *Guardians of the Poor of Brighton* (*z*), the defendants had occupied without rent or acknowledgment for more than twelve years certain offices which the plaintiffs were prohibited by statute from selling without a consent which had not been obtained. It was held that, assuming the defendants had been at any time tenants at will, they had become entitled to possession by virtue of sect. 7 of the Real Property Limitation Act, 1833, 3 & 4 W. 4, c. 27.

Occupation under Agreement for Purchase.

An occupation under an agreement for purchase constitutes a tenancy at will, which is determined by the death of the occupier and continued to the devisee of his real estate (*a*); and an occupation for 99 years under a building agreement for a lease which is not granted does not confer a freehold upon the occupier so as to entitle him to

(*r*) *Doe* d. *Bennett* v. *Turner*, 7 M. & W. 226; *Turner* v. *Doe* d. *Bennett*, 9 M. & W. 643; *Locke* v. *Matthews*, 13 C. B., N. S. 753; 32 L. J., C. P. 9.

(*s*) See *Randall* v. *Stevens*, 2 E. & B. 641; and see the question very fully discussed in the notes to *Taylor* v. *Horde*, 2 Sm. L. C.

(*t*) *Day* v. *Day*, L. R., 3 P. C. 751; 40 L. J., P. C. 35; 24 L. T. 856; 19 W. R. 1017.

(*u*) See Darby and Bosanquet, p. 262, citing *Doe* d. *Goody* v. *Carter*, 9 Q. B. 863.

(*x*) *Whitmore* v. *Humphries*, L. R., 7 C. P. 4; 41 L. J., C. P. 43.

(*y*) *Day* v. *Day*, L. R., 3 P. C. 751.

(*z*) *Brighton (Mayor)* v. *Brighton (Guardians)*. 5 C. P. D. 568; 49 L. J., C. P. 648.

(*a*) *Doe* d. *Stanway* v. *Rock*, 4 M. & G. 30.

eject at the end of the 99 years the successors of the party who had granted the agreement for a lease after their re-entry (*b*).

The proviso as to trusts at the end of sect. 7 of 3 & 4 W. 4, c. 27, applies to express trusts only, and not to an implied trust such as that created by occupation under an agreement for purchase (*c*).

Proviso as to Trusts applies to Express Trusts only.

## Sect. 4.—*Tenancy on Sufferance.*

How a Tenancy on Sufferance is constituted.

A tenant on sufferance is one who entered by a lawful demise or title, and after that has ceased wrongfully continues in possession without the assent or dissent of the person next entitled (*d*); as where a tenant pur autre vie continues in possession after the death of the cestui que vie (*e*); or where any one continues in possession without agreement after a particular estate is ended (*f*). If a tenant for years surrender and then hold over, he will be either tenant on sufferance or disseisor, at the election of the landlord (*g*). An under-tenant who is in possession at the determination of the original lease, and is suffered by the reversioner to hold over, is only a tenant on sufferance (*h*). Where a tenancy at will is determined by the landlord exercising acts of ownership, and the tenant remains in possession, he becomes tenant on sufferance only: but slight evidence would be sufficient to show a new creation of a tenancy at will (*i*), or he may by payment of rent or other acknowledgment of tenancy become tenant from year to year (*k*).

Distinction between Tenant at Will and Tenant on Sufferance.

There is a great difference between a tenant at will and a tenant on sufferance: the former is always in by right; but the latter holds over by wrong after the expiration of a lawful title (*l*). The reversioner who suffers this is considered to be guilty of some laches or negligence, as is generally the case. Against the crown there can be no tenant on sufferance, for the crown not being capable of committing laches, such person will be an intruder (*m*). Where a cottager occupied a piece of land inclosed from the waste on the side of a turnpike road for more than thirty years, without paying rent, and at

(*b*) *Warren* v. *Murray*, [1894] 2 Q. B. 648; 64 L. J., Q. B. 42; 71 L. T. 458; 43 W. R. 3; 9 R. 793—C. A.

(*c*) Ib.

(*d*) Co. Lit. 57 b, 270 b; 1 Steph. Com. 273.

(*e*) Co. Lit. 57 b; *Allen* v. *Hill*, Cro. Eliz. 238; 3 Leon. 153.

(*f*) Com. Dig. tit. *Estates* (H.); *Doe* d. *Martin* v. *Watts*, 7 T. R. 83; 4 R. R. 387; *Roe* d. *Jordan* v. *Ward*, 1 H. Blac. 96; 2 R. R. 728; *Doe* d. *Collins* v. *Weller*, 7 T. R. 487; 4 R. R. 496; *Doe* d. *Tucker* v. *Morse*, 1 B. & Ad. 365.

(*g*) *Pennington* v. *Morse*, Dyer, 62 a; Winch, 32; *Right* v. *Darby*, 1 T. R. 159; 1 R. R. 169; *Doe* d. *Tilt* v. *Stratton*, 4 Bing. 466.

(*h*) *Simpkin* v. *Ashhurst*, 1 C., M. & R. 261.

(*i*) *Doe* d. *Bennett* v. *Turner*, 7 M. & W. 226; 9 Id. 643.

(*k*) *Mann* v. *Lovejoy*, Ry. & M. 355; *Right* v. *Darby*, 1 T. R. 159; 1 R. R. 169; *Doe* d. *Calvert* v. *Frowd*, 4 Bing. 557; *Doe* d. *Clarke* v. *Smaridge*, 6 Q. B. 957.

(*l*) Co. Lit. 57 b; cited 3 C. B. 229, note (*b*); Cole Ejec. 456.

(*m*) Co. 57 b; Cole Ejec. 456.

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the end of that time paid sixpence rent on four several occasions to the owners of the adjoining land: it was held, that this was conclusive evidence of a permissive occupation only, so as to maintain ejectment; and that it was a proper question for the jury, whether there had been an acknowledgment of the tenancy (*n*). Where a

Empty House.

person obtained possession of a house which was empty, without the privity of the landlord, intending to take a lease of it from him, and some negotiations afterwards took place between them upon the subject: it was held that the relation of landlord and tenant never subsisted, but that if there was a tenancy of any sort it was on sufferance (*o*). An instrument in these terms, "I hereby certify that I remain in the house, No. 3, Swinton Street, belonging to W. G., on sufferance only, and agree to give him possession at any time he may require," does not create any tenancy, nor require a stamp (*p*).

Ejectment.

A landlord may maintain ejectment against his tenant on sufferance without any previous demand of possession (*q*). A tenant on sufferance, who is turned out of possession by his landlord, without any demand of possession, cannot maintain ejectment, but may sometimes maintain trespass (*r*). It would seem, however, that the action should be for assault and battery rather than for trespass to the land (*s*).

Demise by estoppel.

A tenant on sufferance has no demisable estate, but he may create a tenancy by estoppel (*t*).

## SECT. 5.—*Tenancy of Mortgagor to Mortgagee.*

The notion of a mortgagor being in some cases a tenant at will seems to be recognized by the Real Property Limitation Act, 1833, 3 & 4 Will. 4, c. 27, s. 7, which provides that no mortgagor shall be deemed to be a tenant at will to his mortgagee within the meaning of that clause; but it seems more correct to say that the mortgagor is a tenant on sufferance only (*u*). It is clear, too, that the mortgagor cannot create a subtenancy; that his subtenants would be tortfeasors, and could not sue the mortgagee in trespass (*u*).

Mortgagor may sue for Rent.

By the Judicature Act, 1873, s. 25, sub-s. (5), a mortgagor entitled to possession may, unless notice of an intention to take possession

(*n*) *Doe* d. *Jackson* v. *Wilkinson*, 3 B. & C. 413; and see *Doe* d. *Thompson* v. *Clark*, 8 B. & C. 717; *Locke* v. *Matthews*, 13 C. B., N. S. 753; 9 Jur., N. S. 874.

(*o*) *Doe* d. *Knight* v. *Quigley*, 2 Camp. 505; 11 R. R. 780.

(*p*) *Barry* v. *Goodman*, 2 M. & W. 768.

(*q*) *Doe* d. *Leeson* v. *Sayer*, 3 Camp. 8; *Doe* d. *Bennett* v. *Turner*, 7 M. & W. 226; *Doe* d. *Heming* v. *Brett*, Hurl. & W. 3; Cole Ejec. 457.

(*r*) *Doe* d. *Crisp* v. *Barber*, 2 T. R. 749; 1 R. R. 611; *Doe* d. *Harrison* v. *Murrell*, 8 C. & P. 134.

(*s*) Cole Ejec. 456.

(*t*) *Shopland* v. *Ryoler*, Cro. Jac. 55, 99; *Thunder* d. *Weaver* v. *Belcher*, 3 East, 449.

(*u*) *Gibbs* v. *Cruikshank*, L. R., 8 C. P. 454; 42 L. J., C. P. 273.

shall have been given by the mortgagee, or unless the cause of action arise upon some joint contract, sue for possession or rent in his own name only.

"Attornment Clause" in Mortgage Deed.

In order to obtain for the mortgagee the benefit of being able to recover his interest as rent by the preferential remedy of distress, it became common to insert in mortgage deeds an "attornment clause," by which the mortgagor "attorns," or agrees to become tenant to, the mortgagee at a rent representing the interest; and this fictitious tenancy has given rise to much litigation.

Where the mortgagor agreed to become tenant to the mortgagee at his will and pleasure, at the rate of 25*l.* per annum, payable quarterly, and occupied for two years, paying the rent, it was held to be a tenancy at will, and not from year to year (*x*). So where it was agreed that the mortgagor should hold the premises as tenant at will to the mortgagee at a specified rent, for which it should be lawful for the mortgagee to distrain, it was held that the clause creating a tenancy was operative, as not being inconsistent with the main object of the instrument, and that a tenancy at will was thereby created (*y*). But where the attornment clause expressly provides for a tenancy from year to year, a tenancy at will is not created by words also expressly providing that the mortgagee may re-enter and determine the tenancy at any time without notice, so that the mortgagee in such a case may distrain under the 42nd section of the Bankruptcy Act, 1883 (*z*). Where the mortgagor by the mortgage deed attorned and agreed to become tenant from year to year to the mortgagee at a fixed rent, payable half-yearly, to enable him to distrain for his interest when in arrear, and with the usual power of entry after default; it was held, that such attornment did not create a tenancy from year to year *with all its incidents*, and that the mortgagee might, after default, maintain ejectment against the mortgagor without giving him six months' notice to quit (*a*). The mere fact that the mortgagee has received *interest* down to a time later than the day of demise in ejectment, is not a recognition of the mortgagor as his tenant (*b*); nor is the distraining after such day of demise, for interest due before the day, under a power to do so as for rent reserved on a lease, there being no clause that the mortgagor shall keep possession so long as he pays interest (*c*). Where a mortgage deed contained a covenant that the

*Threlfall, In re.*

(*x*) *Doe* d. *Barstow* v. *Cox*, 11 Q. B. 122; *Doe* d. *Dixie* v. *Davies*, 7 Exch. 89.

(*y*) *Pinhorn* v. *Souster*, 8 Exch. 763.

(*z*) *Queen's Benefit Building Society, Ex parte, Threlfall, In re*, 16 Ch. D. 274; 50 L. J., Ch. 318; 44 L. T. 74; 29 W. R. 128—C. A.

As to what amount may be distrained for under an attornment clause, see *Harrison, Ex parte, Betts, In re*, 18 Ch. D. 127; 50 L. J., Ch. 832; 45 L. T. 290; 30 W. R. 38—C. A.

(*a*) *Metropolitan Counties Assurance Co.* v. *Brown*, 4 H. & N. 428.

(*b*) *Doe* d. *Rogers* v. *Cadwallader*, 2 B. & Ad. 473; but see *Doe* d. *Whitaker* v. *Hales*, 7 Bing. 322.

(*c*) *Doe* d. *Wilkinson* v. *Goodier*, 10 Q. B. 957; *Metropolitan Counties Assurance Co.* v. *Brown*, 4 H. & N. 428.

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"Attornment Clause" in Mortgage Deed—*contd.*

mortgagor, during his occupation, should pay a rent rather larger than the interest, half-yearly, and that the mortgagee should have the usual remedies of landlords of distress and sale; provided that this reservation should not prejudice the mortgagee's right to enter and evict the mortgagor; it was held that, after distraining for one half-year's rent, the mortgagee might eject the mortgagor, without notice to quit, after a subsequent default (*d*). So where a mortgage deed contained a clause that for the better securing the principal and interest, and in contemplation of part discharge thereof, the mortgagor attorned tenant to the mortgagee, at a quarterly rent, to be recoverable by distress and sale, or action, with a power of immediate entry and sale for the mortgagee, upon default of payment of the mortgage money; it was held there was no need of a notice to quit after default (*e*). But in *Clowes* v. *Hughes*, where the mortgage deed provided that the mortgagor, in event of default, should immediately, or at any time after such default, hold the mortgaged premises as yearly tenant to the mortgagees from the date of the deed, and that they should have the same remedies for recovering the rent as if it had been reserved upon a common lease, it was held that notice of an intention to treat the mortgagor as tenant was a condition precedent to distress (*f*). A mortgage deed executed by the mortgagor only contained a clause whereby, "for the more effectual recovery of the interest, the mortgagor did attorn and become tenant to the mortgagee of the premises at the yearly rent of 40*l.* to be paid half-yearly, so long as the principal sum remained secured;" the mortgagor continued in possession, and made several of these half-yearly payments; it was held, that the subsequent occupation, connected with the covenant, created the relation of landlord and tenant, and that the mortgagee might distrain for a half-yearly payment in arrear (*g*); but the principle of this case does not apply to a continuance of occupation with payment of rent by the heir-at-law of the mortgagor (*h*).

Notice of Intention to treat Mortgagor as Tenant.

*Clowes* v. *Hughes.*

Attornment to Second Mortgagee.

A mortgagor may attorn tenant to two mortgagees in respect of the same property. And if the amount of the rents fixed by the two attornment clauses is fair, so as not to raise a fraud upon the law of bankruptcy, valid distresses can be levied by both mortgagees after the commencement of the bankruptcy of the mortgagor. So it was held by the Court of Appeal in *Punnett, ex parte, Kitchin, in re* (*i*).

*Punnett, Ex parte.*

(*d*) *Doe* d. *Garrod* v. *Olley*, 12 A. & E. 481; *Metropolitan Counties Assurance Co.* v. *Brown*, supra.

(*e*) *Doe* d. *Snell* v. *Tom*, 4 Q. B. 615; *Metropolitan Counties Assurance Co.* v. *Brown*, supra.

(*f*) *Clowes* v. *Hughes*, L. R., 5 Ex. 160; 39 L. J., Ex. 62; 22 L. T. 103; 18 W. R. 459.

(*g*) *West* v. *Fritche*, 3 Exch. 216; *Morton* v. *Woods*, L. R., 3 Q. B. 658; 37 L. J., Q. B. 242; aff. L. R., 3 Q. B. 293.

(*h*) *Scobie* v. *Collins*, [1895] 1 Q. B. 375; 64 L. J., Q. B. 10; 71 L. T. 775.

(*i*) *Punnett, Ex parte, Kitchin, In re*, 16 Ch. D. 226; 50 L. J., Ch. 212; 44 L. T. 226; 29 W. R. 129.

A rent may be so excessive as to lead the court to the conclusion that the attornment clause was a mere device to obtain an additional security, in which case a distress will be invalid as against the trustees in bankruptcy as a fraud upon the bankruptcy law (*k*).

Fraud on Bankruptcy Law.

It is enacted by s. 6 of the Bills of Sale Act, 1878, that "every attornment, instrument, or agreement, not being a mining lease"(*l*), whereby a power of distress is "given" (it has been held that this means expressly given over specified goods (*m*)) and rent reserved as a mode of providing for interest on a debt, "shall be deemed to be a bill of sale" of the chattels which may be seized under the distress (so as to be void unless registered as directed by s. 8 of the Bills of Sale Act (1878) Amendment Act, 1882); but a proviso is added that nothing in the section shall extend to any mortgage of an estate "which the mortgagee, *being in possession* (*n*), shall have demised to the mortgagor as his tenant at a fair and reasonable rent." This section appears *to add the requirement of possession on the part of the mortgagee*, but otherwise to incorporate the effect of the decisions prior to 1878, and to exempt reasonable attornment clauses from the operation of the Bills of Sale Acts. A power to distrain off premises demised by a mining lease on any adjoining or neighbouring collieries is limited to the demised colliery, and such collieries only as may be or become connected with it by underground workings, and is a power of distress for a real rent, and the lease in which it is contained does not require registration, either as conferring a power of distress by way of security for a debt within this section, or otherwise (*o*).

Effect of Bills of Sale Act, 1878, on Attornment Clauses.

Distress off demised premises.

By the Bills of Sale Act, 1882, s. 8, unregistered bills of sale, executed after the commencement of that act, are void, not only, as under the acts of 1854 and 1878, as against execution creditors and trustees in bankruptcy, but as against the grantor, and unregistered attornment clauses must always be attended with considerable risk to mortgagees. It has been held that a clause whereby the mortgagor simply attorned tenant to the mortgagee (who had not been in possession) at a yearly rent by quarterly payments, was a bill of sale

Bills of Sale Act, 1882.

(*k*) *Jackson, Ex parte, Bowes, In re*, 14 Ch. D. 725; 43 L. T. 272; 29 W. R. 253—C. A. See also *Williams, Ex parte*, 7 Ch. D. 138; *Stockton Iron Co., In re*, 10 Ch. D. 335; *Punnett, Ex parte*, supra.

(*l*) See *Roundwood Colliery Co., In re*, [1897] 1 Ch. 373—C. A., and infra.

(*m*) *Hall* v. *Comfort*, 18 Q. B. D. 11; 35 W. R. 48.

(*n*) In *Green* v. *Marsh*, [1892] 2 Q. B. 230; 61 L. J., Q. B. 442—C. A., there was an attornment clause with power of distress at a rent of 250*l.* a year, and afterwards an agreement for rent at 5*l.* a week and to quit on four weeks' notice with an admission that 200*l.* was due, but without any additional power of distress. It was unsuccessfully contended that the agreement was a new demise by a mortgagee in possession, and held that both the attornment clause and the subsequent agreement were void for want of registration.

(*o*) *Roundwood Colliery Co., In re, Lee* v. *Roundwood Colliery Co.*, [1897] 1 Ch. 373; 66 L. J., Ch. 186; 75 L. T. 641; 45 W. R. 324—C. A. It was also held that even if the power could not be so regarded, then, being a power not uncommon in mining leases, it would come within the exception in sect. 6 in favour of such leases.

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Attornment Clauses—*contd.*

*Kennedy, Ex parte, Willis, In re.*

within the section, so that where the mortgagee distrained after the mortgagor had been adjudicated bankrupt, the distress was unlawful, and the trustee in bankruptcy was entitled to the money realized by the distress, and this decision was affirmed by the Court of Appeal, in which it was laid down that the proviso of sect. 6 of the act of 1878 applies only to cases in which the mortgagee having previously taken possession of the mortgaged premises has demised them to the mortgagor, and not to a case where the demise is created by the mortgage deed itself (*p*). It has since been pointed out that the Bills of Sale Acts are directed not at the ownership of real but of personal property, and held expressly that an attornment clause is effectual to create the relation of landlord and tenant between mortgagor and mortgagee, and is not avoided by s. 6 of the Bills of Sale Act, 1878, except as regards the power of distress; so that it is valid to the extent of allowing the mortgagee to eject the mortgagor by summary judgment under Order XIV. (*q*).

Construction of Mortgage Deeds.

A mortgage indenture, after a power of sale on non-payment of the mortgage-money, contained a covenant by the mortgagee that there should be no sale or notice of sale, nor means taken for obtaining possession until a year after notice thereof to the mortgagor: the mortgagee also covenanted for quiet enjoyment by the mortgagor or his tenant at will, on payment of a yearly rent; it was held, that under this deed the mortgagor was tenant at will only to the mortgagee, and that no tenancy from year to year was thereby created (*r*). An estate was mortgaged in fee, with the usual proviso for redemption, on payment in June, 1834, and it was also provided that the mortgagee should not call in the principal money until December, 1840, if the interest were regularly paid; and there was a covenant that the mortgagor should hold, occupy and enjoy the estate until default in payment of the principal or interest as aforesaid; it was held that this operated as a lease to the mortgagor until December, 1840 (*s*). A tenant for years of a house demised it by way of mortgage to hold from thenceforth, subject to the proviso after named; and he further sold and transferred the fixtures and some chattels to the mortgagee, also subject to the proviso after named; the deed contained a proviso or reconveyance on payment of the money on a certain day, and also a proviso that, on non-payment, the mortgagee might enter and receive the rents, and sell the premises, and fixtures; it was held that the mortgagee's right to take possession did not attach until the day on

(*p*) *Kennedy, Ex parte, Willis, In re*, 21 Q. B. D. 384; 57 L. J., Q. B. 634; 36 W. R. 793, per Lindley and Lopes, L.JJ., dub. Lord Esher, M.R., affirming Cave, J., and giving leave to appeal to the House of Lords. (No appeal was in fact brought.)

(*q*) *Mumford* v. *Collier*, 25 Q. B. D. 279; 59 L. J., Q. B. 552; 38 W. R. 716.

(*r*) *Doe* d. *Dixie* v. *Davies*, 7 Exch. 89.

(*s*) *Wilkinson* v. *Hall*, 3 Bing. N. C. 508; *Doe* d. *Lyster* v. *Goldwin*, 2 Q. B. 143; *Doe* d. *Roylance* v. *Lightfoot*, 8 M. & W. 553; *Doe* d. *Parsley* v. *Day*, 2 Q. B. 147.

which the money was to be paid, and that therefore he could not maintain an action of trespass previously (*t*). But where a person demised premises, to hold from thenceforth for a term, provided that if the lessor paid a certain sum and interest a year after, then that the demise should be void; provided also, that upon default the lessee might sell; and there was a *covenant* by the lessor for payment of principal and interest, and that at any time after default it should be lawful for the lessee to enter, and from thenceforth to hold the premises and take the rents; it was held, that the lessee might take possession immediately and before default (*u*).

Summary Judgment under Ord. XIV.

*Daubuz* v. *Lavington.*

Where the attornment clause provided for a tenancy at will, and the mortgagee, having given notice to quit, sued for the recovery of the land, it was held that the action was one "for the recovery of land by a landlord against a tenant whose term had expired" within Ord. III., Rule 6, case F. of the Rules of the Supreme Court, 1883, so that the plaintiff might specially endorse his writ and apply for final judgment under Order XIV. (*v*).

## Sect. 6.—*Master and Servant.*

Servant occupying separate House does not become Tenant.

An agent or servant who is allowed to occupy premises belonging to his principal for the more convenient performance of his duties, acquires no *estate* therein, although he be also allowed to use the premises for carrying on therein an independent business of his own (*x*), nor does any tenancy arise in the common case of a servant occupying a cottage rent-free, with less wages on that account (*y*). Where a person was employed by the Highgate Archway Company to collect toll for them, and lived in the toll-house, one shilling per week being deducted from his wages by way of rent; and the company having ceased to collect toll at the particular spot, he was dismissed from their employ, and received a notice to leave the house, which he promised to do: it was held that these circumstances did not constitute him a tenant of the company (*z*). Where a servant occupies premises of his master, without paying rent, as part remuneration for his services, in order to ascertain whether the servant is a "substantial householder" within the 43 Eliz. c. 2, s. 1, so as to be eligible to the office of overseer of the poor, the question

(*t*) *Wheeler* v. *Montefiore*, 2 Q. B. 133; but see *Doe* d. *Parsley* v. *Day*, 2 Q. B. 147.

(*u*) *Rogers* v. *Grazebrook*, 8 Q. B. 895.

(*v*) *Daubuz* v. *Lavington*, 13 Q. B. D. 347; 53 L. J., Q. B. 283; 51 L. T. 206; 32 W. R. 772; and see *Mumford* v. *Collier*, 25 Q. B. D. 279, and supra, p. 250.

(*x*) *White* v. *Bayley*, 10 C. B., N. S. 227.

(*y*) *Rex* v. *Stock*, 2 Taunt. 339; 11 R. R. 605; *Mayhew* v. *Suttle*, 4 E. & B. 347, 357; 23 L. J., Q. B. 372; 24 Id. 54; *R.* v. *Shipdam*, 3 D. & R. 384; *R.* v. *Bardwell*, 2 B. & C. 161; *R.* v. *Kelstern*, 6 M. & S. 136; *R.* v. *Cheshunt*, 1 B. & A. 473; *R.* v. *Snape*, 6 A. & E. 278; *Allen* v. *England*, 3 F. & F. 49.

(*z*) *Hunt* v. *Colson*, 3 Moo. & Sc. 790; *Mayhew* v. *Suttle*, supra.

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is whether the occupation is subservient and necessary to the service; if it is, the occupation is that of the master; if it is not, the occupation is that of a tenant, and the servant is a "householder" (*a*).

Service Franchise.

Officers or servants *permitted* to occupy houses as part remuneration for their services, were considered as occupying as tenants within the Reform Act (2 Will. 4, c. 45), s. 27, but not if they were *required* to occupy them with a view to the more efficient performance of their duties (*b*); but this distinction has been done away with by s. 3 of the Representation of the People Act, 1884, 48 Vict. c. 3, which provides that "where a man himself inhabits any dwelling-house by virtue of any office, service, or employment," and the dwelling-house is not inhabited by any person under whom he serves, he shall be deemed for the purposes of the parliamentary franchise to occupy as a tenant.

Liability of Servant in Ejectment.

Where a servant, on being served with an ejectment, appeared and defended the action, it was held, that he had thereby made himself personally liable as tenant in possession (*c*).

## SECT. 7.—*Vendor and Vendee.*

Occupation by Vendee under Contract for Sale of Freehold.

An occupation under an agreement for the purchase of land, if a good title can be made, may create a tenancy (*d*), which must be determined by a demand of possession or otherwise before an ejectment can be supported (*e*). Where a person was let into possession under an agreement of purchase, he paying interest on the purchase-money until completion of the purchase, which was to be in three months; and the purchase not being then completed, he continued in possession: it was held that there was only a tenancy at will, which might be determined without a notice to quit (*f*). So where A., having agreed to buy lands of B., had paid part of the purchase-money, and was let into possession, it was held, that this was a mere tenancy at will, which might be determined by a demand of possession: after which an ejectment might be maintained (*g*), but not an action for use and occupation (*h*). Where the vendee of an

(*a*) *Reg.* v. *Spurrell*, L. R., 1 Q. B. 72; 35 L. J., M. C. 74.

(*b*) *Hughes* v. *Chatham* (*Overseers*), 5 M. & G. 54.

(*c*) *Doe* d. *James* v. *Stanton*, 2 B. & A. 371; 1 Chit. R. 119; *Doe* d. *Atkins* v. *Roe*, 2 Chit. R. 179.

(*d*) *Doe* d. *Newby* v. *Jackson*, 1 B. & C. 448; *Kirtland* v. *Pounsett*, 2 Taunt. 145; *Hearn* v. *Tomlin*, Peake, 192; 3 R. R. 684; *Hope* v. *Booth*, 1 B. & Ad. 498; *Doe* d. *Milburn* v. *Edgar*, 2 Bing. N. C. 498; *Winterbottom* v. *Ingham*, 7 Q. B. 611.

(*e*) *Right* d. *Lewis* v. *Beard*, 13 East, 110; *Doe* d. *Newby* v. *Jackson*, 1 B. & C. 448; *Doe* d. *Milburn* v. *Edgar*, 2 Bing. N. C. 498; *Doe* d. *Stanway* v. *Rock*, 4 M. & G. 30; *Doe* d. *Gray* v. *Stanion*, 1 M. & W. 700; Cole Ejec. 58.

(*f*) *Doe* d. *Tomes* v. *Chamberlain*, 5 M. & W. 14; *Doe* d. *Bord* v. *Burton*, 16 Q. B. 807.

(*g*) *Doe* d. *Hiatt* v. *Miller*, 5 C. & P. 595; *Ball* v. *Cullimore*, 2 C., M. & R. 120.

(*h*) *In re Banks* v. *Rebbeck*, 2 Low. M. & P. 452.

estate sold by auction has been suffered to enter upon and hold the premises while the title was under investigation, and the contract has afterwards been determined for want of title, the vendor cannot on these grounds only recover for use and occupation, although a jury find that the occupation has been beneficial (*i*). But where by the contract of sale he admits himself to be tenant from week to week to the vendor at a fixed sum per week, payable in advance or otherwise, such rent may be distrained for (*k*). And if the vendee retain possession after the contract of purchase has gone off, he will be liable for subsequent use and occupation (*l*).

Occupation under Contract for Assignment of Term.

An occupation under an agreement for assigning a lease, where it was agreed that the assignee should pay the lessee, until the completion of the assignment, at the rate of 100*l.* per year, was held to constitute the relation of landlord and tenant between the lessee and assignee (*m*); but where, in an agreement for the sale of leasehold premises, to be paid for by instalments, it was stipulated that, in default of payments of the instalments at specified times, the former instalments should be forfeited, and the vendor should not be compellable to convey, upon which the purchaser was let into possession, and made default; he was held to be from thenceforth a mere tenant on sufferance (*n*).

Occupation by Vendor.

A continuance of occupation by a vendor after conveyance executed, without any agreement, will not raise an implied tenancy, nor render him liable to an action for use and occupation (*o*). But an express agreement that the purchaser shall receive "all rents and profits" from the day fixed for completion of purchase, entitles the purchaser to a fair occupation rent from the vendor until possession is given (*p*). And the same rule applies, although the delay in completion is the fault of neither party (*q*).

(*i*) *Winterbottom* v. *Ingham*, 7 Q. B. 611. The rents taken from subtenants, not recoverable under a claim for use and occupation (*Rumball* v. *Wright*, 1 C. & P. 589), will be recoverable as money paid to the use of the intending vendor.

(*k*) *Yeoman* v. *Ellis*, L. R., 2 C. P. 601; 36 L. J., C. P. 326.

(*l*) *Howard* v. *Shaw*, 8 M. & W. 118.

(*m*) *Saunders* v. *Musgrave*, 6 B. & C. 524; 2 C. & P. 294; *Anderson* v. *Midland R. Co.*, 3 E. & E. 614; 30 L. J., Q. B. 94. See also *Seaton* v. *Booth*, 4 A. & E. 528.

(*n*) *Doe* d. *Moore* v. *Lawder*, 1 Stark. R. 308; *Doe* d. *Rogers* v. *Pullen*, 2 Bing. N. C. 749.

(*o*) *Tew* v. *Jones*, 13 M. & W. 12.

(*p*) *Metropolitan R. Co.* v. *Defries*, L. R., 2 Q. B. 387; 36 L. T. 494; 25 W. R. 841—C. A., affirming decision below, L. R., 2 Q. B. D. 189; 36 L. T. 150; 25 W. R. 271.

(*q*) *Sherwin* v. *Shakespeare*, 5 De G., M. & G. 517; 23 L. J., Ch. 177.

# CHAPTER VII.

## OF SUBSTITUTION OF PARTIES TO THE CONTRACT OF TENANCY BY ASSIGNMENTS, SUB-LEASE, BANKRUPTCY, MARRIAGE AND DEATH.


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### SECT. 1.—*Assignments Generally.*

What is an Assignment.

AN assignment is the transfer or conveyance of some pre-existing term or reversion, estate, right, title, or interest. The party assigning is called the assignor, and he to whom the assignment is made the assignee. The word "assigns" extends not only to the immediate assignee, but also to assignees ad infinitum (*a*). Every lessor may assign his reversion, and every lessee may assign his term, unless expressly restrained from so doing by some condition in his lease (*b*), or be a tenant at will (*c*), or on sufferance (*d*). By s. 6 of the Real Property Act, 1845, 8 & 9 Vict. c. 106, "a contingent, an executory, and a future interest, and a possibility coupled with an interest, in any tenements or hereditaments, of any tenure, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, also a right of entry, whether immediate or future, and whether vested or contingent, into or upon any tenements or hereditaments in England, of any tenure, may be disposed of by deed." But a right of re-entry for a forfeiture cannot be so assigned (*e*).

(*a*) *Spencer's case*, 5 Co. R. 16; *Baily* v. *De Crespigny*, L. R., 4 Q. B. 180, 186.
(*b*) Post, Chap. XVII., Sect. 2.
(*c*) Ante, p. 238.
(*d*) Ante, p. 245.
(*e*) *Hunt* v. *Bishop*, 8 Ex. 675.

A person becomes assignee either by his own act, as where he executes a deed of assignment to him, or by act of law, as where by the bankruptcy or death of the lessee he succeeds to the rights and liabilities of the lessee under the lease as his trustee in bankruptcy or executor.

Different Modes of Assignment.

The Statute of Frauds (*f*) enacts, "that no leases, estates or interests, either of freehold or terms of years, or any uncertain interest, not being copyhold or customary interest, of, in, to or out of any messuages, manors, lands, tenements, or hereditaments, shall be assigned, granted or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting or surrendering the same, or their agents thereunto lawfully authorized by writing: or by act and operation of law;" and the Real Property Act, 1845, 8 & 9 Vict. c. 106, s. 3, "an assignment of a chattel interest, not being copyhold, in any tenements or hereditaments, shall be void at law unless made by deed."

Stat. Frauds, s. 3.

8 & 9 Vict. c. 106, s. 3.

By the Law of Property Amendment Act, 1859, 22 & 23 Vict. c. 35, s. 21, "any person shall have power to assign personal property, now by law assignable, including chattels real, directly to himself and another person, or other persons or corporation, by the like means as he might assign the same to another." Therefore, upon the appointment of a new trustee of leaseholds and personal estate, the continuing trustees may assign the trust property direct to themselves and the new trustees jointly, upon the trusts of the settlement; whereas previously an assignment and re-assignment were necessary to effect this object.

Assignment to Self and other Person.

22 & 23 Vict. c. 35, s. 21.

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## SECT. 2.—*The Contract for Assignment.*

### (a) *Generally.*

By virtue of the 4th section of the Statute of Frauds, the effect of which has been already considered (*g*), any contract to sell either a reversion or a term must be in writing.

### (b) *Contract for Assignment of Reversion.*

Where a reversion is sold, the possession of a tenant is notice to a purchaser of the actual interest which a tenant may have (*h*). Where the purchaser at the date of the contract knew that the property was occupied by a tenant, and did not inquire as to the tenant's interest,

Sale of Reversion.—Notice of Tenant's Interest.

(*f*) 29 Car. 2, c. 3, s. 3.
(*g*) Ante, pp. 90, 92 et seq. And see Dart on Vendors and Purchasers.
(*h*) *Daniels* v. *Davison*, 15 Ves. 249; 10 R. R. 171.

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Notice of Tenant's Interest—*contd.*

it was held that he had notice of the lease, which it was subsequently discovered that the tenant had (*i*). In *Caballero* v. *Henty* (*k*), the conditions of sale of a public-house stated it was in the occupation of a tenant. A brewer, intending to use the public-house for the sale of his beer, agreed to buy it. He afterwards learnt that it was under lease to another brewer for a term of which eight years were unexpired. It was held that the purchaser was not bound to ascertain from the tenant the terms of his tenancy, and that the vendor could not enforce specific performance.

Payment for hay and straw. *Phillips* v. *Miller.*

In *Phillips* v. *Miller* (*l*), it was held that vendors were not bound to make good to purchasers certain sums paid by the purchasers to tenants for hay and straw according to market value (whereas by the custom of the country fodder value only was payable), in pursuance of special agreements by the vendors with the tenants not mentioned in the particulars of sale. This decision, however, proceeded principally on the ground that the agreements with the tenants were personal contracts not binding on the reversion (*m*). The vendors bonâ fide believed that it was unnecessary to mention the agreements in the particulars of sale.

### (c) *Contract for Assignment of Term.*

Contract for Assignment of Term must be in writing.

Similarly to a contract to grant a lease, any contract to assign it, however short the residue of the term may be, must by virtue of the 4th section of the Statute of Frauds (set out at length, supra, p. 255), be in writing and signed by the party to be charged or his agent. The cases on contracts to grant and contracts to assign a lease turn upon much the same considerations, and contracts to grant have already been dealt with (ante, p. 90). The following cases, however, on contracts for assignment, may be set down here :—

Decisions on Contracts for Assignment of Term.

A., being possessed of a messuage and premises for the residue of a certain term of years, agreed with B. to relinquish possession to him and to suffer him to become tenant of the premises for the residue of the term, in consideration of B.'s paying a sum of money towards completing certain repairs of the premises. Held, that this was an agreement relating to the sale of an interest in land within the statute (*n*).

A., being tenant under a parol agreement for a seven years' lease, agreed to give up the immediate possession thereof to B., in order

(*i*) *James* v. *Lichfield*, L. R., 9 Eq. 51.

(*k*) *Caballero* v. *Henty*, L. R., 9 Ch. 447 ; 43 L. J., Ch. 653 ; 22 W. R. 446.

(*l*) *Phillips* v. *Miller*, L. R., 10 C. P. 420 ; 44 L. J., C. P. 265 ; 32 L. T. 638, Exch. Ch., reversing decision below, L. R., 9 C. P. 201.

(*m*) See also *Roberts* v. *Tregaskis*, 38 L. T. 176, where an agreement not to increase rent nor give notice to quit was held not to bind a purchaser of the landlord's interest.

(*n*) *Buttermere* v. *Hayes*, 5 M. & W. 456. See also *Leaf* v. *Tuton*, 10 M. & W. 393.

that B. might enter thereon as tenant; in consideration whereof, and also as a compensation for certain improvements made by A., and for the value of certain articles left, B. agreed to pay A. 100*l*. A. accordingly gave up possession to B., who was thereupon accepted as tenant from year to year, at a different rent from that formerly paid by A.: and B. afterwards, in part-performance of the agreement on his part, paid A. 51*l*. In an action to recover the balance of the 100*l*.:—held, that the contract was within the statute, and consequently that the plaintiff was not entitled to recover (*o*): except, perhaps, for money found to be due on an account stated (*p*). So where in consideration that A., who was in the possession and occupation of premises wherein he carried on the business of a milkman, would yield up the possession and occupation of the said premises to B., and permit him thenceforth to occupy the same, and would assign over to B. all his property in the stock and plant and deliver the same to B., the latter promised to pay a certain sum, it was held, that this was a contract for an interest in or concerning lands within the statute (*q*).

*Hodgson* v. *Johnson*.

In *Hodgson* v. *Johnson* it was agreed verbally that the plaintiff should take possession of a brickyard of which the defendant was tenant, and take the plant and bricks at a valuation, and that the defendant should pay up all rent due, and endeavour to induce the landlord to accept the plaintiff as tenant. The plaintiff took possession and gave the defendant a warrant of attorney for payment of the sum at which the bricks and plant were valued. A distress was afterwards put in upon the premises, and the plant and bricks sold for rent due from the defendant before the agreement, and the plaintiff was turned out of possession by the landlord. In an action for breach of the agreement to pay up the rent, it was held, that the contract taken in its entirety was a contract for the sale of an interest in lands within the statute, and therefore that the plaintiff could not sever and sue only upon that part which related to the payment of rent (*r*).

Contract by intending with existing Tenant to pay for and procure acceptance of Surrender. *Cocking* v. *Ward*.

In *Cocking* v. *Ward* (*s*), the defendant wishing to obtain a farm of which the plaintiff was tenant, orally promised to pay the plaintiff 100*l*., if the plaintiff would surrender and prevail upon the landlord to accept the defendant as tenant. The plaintiff quitted as agreed and the defendant became tenant. It was held that the contract concerned an interest in land, and that although the contract had been executed the 100*l*. could not be recovered, except as money due on account stated in consequence of the defendant having admitted, as he need not have done, that he owed it.

(*o*) *Kelly* v. *Webster*, 12 C. B. 282.
(*p*) *Cocking* v. *Ward*, 1 C. B. 858.
(*q*) *Smart* v. *Harding*, 15 C. B. 652.
(*r*) *Hodgson* v. *Johnson*, E., B. & E. 685; 5 Jur., N. S. 290. See, however, *Pulbrook* v. *Lawes*, 1 Q. B. D. 284.
(*s*) *Cocking* v. *Ward*, 1 C. B. 158.

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Misdescription. Public-House.

In the conditions of sale of the lease of a public-house it was described as a "free public-house," and the lease contained a covenant that the lessee and his assigns should take their beer from a particular brewer; though the lease was entirely read over by the auctioneer at the time of the sale, who said mistakenly that it was a free public-house, and that the covenant about the beer had been decided to be bad; it was ruled that a purchaser who heard the lease read over was not bound under these circumstances to complete the purchase, but was entitled to recover back the deposit (*t*). À fortiori, the purchaser of a public-house "with victualler's and other licences" may rescind and recover his deposit if such licences cannot be transferred to him (*u*).

Offensive Trade.

Where the particulars of sale of premises in Covent Garden stated, that under the lease "no offensive trade was to be carried on, and that the premises could not be let to a coffee-house keeper or working hatter," and the original lease when produced appeared to prohibit the business of a brewer, baker, sugar-baker, vintner, victualler, butcher, tripe-seller, poulterer, fishmonger, cheese-seller, fruit-seller, herb-seller, coffee-house keeper, working hatter and many others, and the sale of coals, potatoes or any provisions, it was held, that there was such a material discrepancy between the particulars and the lease so as to entitle a purchaser to rescind his contract (*x*). Where an original lessee of land subject to a covenant against certain obnoxious trades, with a proviso for re-entry for a breach of such covenant, granted under-leases of houses erected on the land, not containing a similar covenant and proviso, it was held, that a purchaser by auction of houses erected on part of this land, and of the improved ground rents of the houses so underlet, might recover back his deposit-money from the auctioneer, the omission of the proviso in the under-leases not having been specified in the conditions or mentioned at the time of the sale (*y*). Where the particulars of sale by auction of several lots described one as subject to the same rights of way as were then enjoyed under existing leases of certain houses, one of which leases was to be seen; and a plan annexed showed one right of way to those houses over that lot, but not another, and it also showed another right of way over that lot to a second adjoining lot, and the same person bought these two lots by two biddings, but a single contract was entered into for the whole:—it was held, that he might rescind the contract as to both lots, and that it was not a case for the application of a compensation provision as to misdescription of the premises (*z*).

(*t*) *Jones* v. *Edney*, 3 Camp. 285; 13 R. R. 803.

(*u*) *Claydon* v. *Green*, L. R., 3 C. P. 511; 37 L. J., C. P. 226.

(*x*) *Flight* v. *Booth*, 1 Bing. N. C. 370.

(*y*) *Waring* v. *Hogarth*, 1 Ry. & Moo. 39; but see *Hayward* v. *Parke*, 16 C. B. 295.

(*z*) *Dykes* v. *Blake*, 4 Bing. N. C. 463.

The general rule is that upon an agreement to purchase a lease, the purchaser has constructive notice of the covenants therein only when he has a fair opportunity of ascertaining what those covenants are; and this rule applies whether it be a lease or a sub-lease which is purchased (*a*).

General Rule.

An auctioneer who has sold goods has no authority to pay the landlord's rent, in order to avoid the goods being distrained (*b*).

Auctioneer may not pay Rent to avoid Distress.

### (d) *Title of the Vendor.*

Prior to the Vendor and Purchaser Act, 1874, there was, in every contract for the sale of an *existing lease*, an implied undertaking by the seller (if the contrary were not expressed, as it usually was in practice) to make out the lessor's title to demise (*c*), and without showing such title, the seller could not maintain an action at law against the buyer for refusing to complete the purchase (*d*).

Common Law, Warranty of Lessor's Title.

This warranty is now dispensed with by the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), which by sect. 2, rule 1, enacts that "under a contract to assign a term of years, whether derived or to be derived out of a freehold or leasehold estate, the intended assign shall not be entitled to call for the title to the freehold." It is to be observed that this rule only barred the purchaser's right to call for the title to the *freehold*, so that if an under-lease be sold, the title of any mesne landlord might still be called for; and further that the rule does not apply at all to a lease for lives (*e*). The Conveyancing Act, 1881, however (44 & 45 Vict. c. 41), enacts, by sect. 3, sub-sect. (1), that "under a contract to sell and assign a term of years derived out of a leasehold interest in land, the intended assign shall not have the right to call for the title to the leasehold reversion;" but this section by sub-sects. (9) and (10) applies only "if and as far as a contrary intention is not expressed in the contract of sale," and "to sales made after the commencement" of the act, *i.e.* by s. 2, on or after the 1st January, 1882.

Warranty dispensed with by V. & P. Act, 1874, as to Freehold,

and by Conveyancing Act, as to Leasehold Reversion.

The words "leasehold reversion" in the Conveyancing Act mean "the reversion of that leasehold interest out of which the term of years contracted to be sold is derived," so that on the grant of a sub-lease by a lessee the intending sub-lessee has a right to inspect the lessee's lease (*f*).

(*a*) *Reeve* v. *Berridge*, 36 W. R. 517—C. A.; *Hyde* v. *Warden*, L. R., 3 Ex. D. 72; 26 W. R. 201—C. A.

(*b*) *Sweeting*, app. v. *Turner*, resp., 41 L. J., Q. B. 58.

(*c*) *Hall* v. *Betty*, 4 M. & G. 410.

(*d*) *Souter* v. *Drake*, 5 B. & Ad. 992; *De Medina* v. *Norman*, 9 M. & W. 820; 2 Dowl., N. S. 239; *Laythorp* v. *Bryant*, 2 B. & C. 735.

(*e*) See Dart, V. & P., vol. i., p. 290.

(*f*) *Gosling* v. *Woolf*. [1893] 1 Q. B. 39: 68 L. T. 89; 41 W. R. 106; 5 R. 81.

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The 3rd section of the Conveyancing Act, following common forms in conditions of sale, provides also, by sub-sects. (4) and (5), that a purchaser is to assume that covenants have been performed, &c., as follows:—

Purchaser to assume that covenants performed.

Conveyancing Act, 1881, s. 3, sub-ss. (4) and (5).

(4.) Where land sold is held by lease (not including under-lease) the purchaser shall assume, unless the contrary appears, that the lease was duly granted; and, on production of the receipt for the last payment due for rent under the lease before the date of actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the lease have been duly performed and observed up to the date of actual completion of the purchase.

(5.) Where land sold is held by under-lease, the purchaser shall assume, unless the contrary appears, that the under-lease and every superior lease were duly granted; and, on production of the receipt for the last payment due for rent under the under-lease before the date of actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the under-lease have been duly performed and observed up to the date of actual completion of the purchase, and further that all rent due under every superior lease, and all the covenants and provisions of every superior lease, have been paid and duly performed and observed up to that date.

Agreement for Lease.

Upon a contract for the sale of an agreement for a lease, it is not an implied condition that the lessor has power to grant the lease (*g*). This rule was laid down before the Vendor and Purchaser Act, which affirms its principle, but does not expressly embody it.

Construction of Contracts of Sale.

An agreement for the sale of *all B.'s interest* in a lease does not mean free from all under-leases by way of mortgage and other incumbrances then affecting the premises (*h*). When it was stipulated (before the Vendor and Purchaser Act) that the vendor should not be obliged to produce the lessor's title, the vendee might notwithstanding insist upon defects in the lessor's title, which were disclosed by the abstract delivered, or which he had discovered aliunde (*i*); but it was said to be otherwise where the purchaser had agreed to take the vendor's title "as he holds the same," without requiring the lessor's title (*k*). The Vendor and Purchaser Act appears to admit the objection of defects discovered in the lessor's title by the abstract or otherwise. If a person, who has contracted to purchase the lease of a house, subsequently discovers that it was originally leased jointly with another house, and that the lessor could enter for breach of covenants in respect of either house, he seems clearly not bound to complete the purchase.

(*g*) *Kintrea* v. *Preston*, 1 H. & N. 357.
(*h*) *Phelps* v. *Prothero*, 16 C. B. 370.
(*i*) *Shepherd* v. *Keatley*, 1 C., M. & R. 117; *Wheeler* v. *Wright*, 7 M. & W. 359; *Sellick* v. *Trevor*, 11 M. & W. 722; *Darlington* v. *Hamilton*, Kay, 550.
(*k*) *Spratt* v. *Jeffery*, 10 B. & C. 249; *Hayward* v. *Parke*, 16 C. B. 295; *Mills* v. *Tweed*, L. R., 1 C. P. 39.

It was usual, before the Conveyancing Act, for the vendor of a leasehold interest to protect himself by a stipulation that the production of the last receipt for rent should be conclusive evidence of the due performance of covenants. This stipulation was always strictly construed against the purchaser (*l*). It is now, as we have seen, implied into all contracts by s. 3 of the Conveyancing Act. If it be negatived, however, a purchaser of a leasehold may object to the vendor's title, on the ground that he has incurred a forfeiture, *e.g.*, by omitting for the space of a month to pay the annual premium of insurance pursuant to his covenant, although it does not appear that the lessor has taken advantage of the forfeiture (*m*). Under a contract for the purchase of the residue of an old term, a purchaser is not bound to accept a similar new lease: for the former differs in value from the latter, the residue of an old term being in certain respects more advantageous (*n*); but a purchaser cannot refuse to perform an agreement for the sale of "the unexpired term of eight years' lease and goodwill," on the ground that only seven years and seven months of the term remained (*o*).

Objection on Ground of Forfeiture.

A purchaser cannot resist specific performance on the ground that the lease purchased contains unusual covenants not mentioned in the contract of sale (*p*).

Objection on ground of unusual covenants.

It is incumbent on the vendor of a lease which contains a restriction against alienation, to prove that he has obtained the lessor's consent to the assignment (*q*); and it is also incumbent on him, and not on the purchaser, to procure the lessor's licence for the assignment (*r*). If necessary, he must pay any reasonable premium and extra rent required for such consent (*s*). This was held in a case where the lessee held at a rent of 36*l.* for a term of thirty-five years, and the lessor refused the licence for a sub-lease for twenty-one years at a rent of 65*l.*, except upon payment of an increased rent of 6*l.* and a premium of 50*l.* Stuart, V.-C., decreed specific performance, and, in the event of the lessee being unable to grant a proper sub-lease, an inquiry as to damages (*s*). The failure to procure from the lessor a licence to assign, or to register previous assignments, before the day on which it is agreed to

Lessor's Licence to assign.

Premium for Licence.

(*l*) See *Bull* v. *Hutchens*, 32 Beav. 615; *Laurie* v. *Lees*, 7 App. Cas. at p. 32.

(*m*) See *Wilson* v. *Wilson*, 14 C. B. 616.

(*n*) *Mason* v. *Corder*, 7 Taunt. 9; 17 R. R. 427.

(*o*) *Belworth* v. *Hassell*, 4 Camp. 140; 16 R. R. 761.

(*p*) *Grosvenor* v. *Grosvenor*, 28 L. J., Ch. 173; 5 Jur., N. S. 117.

(*q*) *Mason* v. *Corder*, 7 Taunt. 9; 17 R. R. 427; *Winter* v. *Dumergue*, 14 W. R. 699.

(*r*) *Lloyd* v. *Crispe*, 5 Taunt. 249; 14 R. R. 744; and see *Birmingham* v. *Sheridan*, 33 L. J., Ch. 571; 12 W. R. 658; *Forrer* v. *Nash*, 35 Beav. 167; 14 W. R. 8; *Wallis* v. *Littell*, 11 C. B., N. S. 369; 31 L. J., C. P. 100; *Barton* v. *Banks*, 2 F. & F. 213; *Davis* v. *Nisbett*, 10 C. B., N. S. 752; 31 L. J., C. P. 6.

(*s*) *Hilton* v. *Tipper*, 18 L. T. 626; 16 W. R. 888.

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assign and give possession of leasehold premises, is no breach of the agreement (*t*).

Proof of Discharge of an Incumbrance.

A purchaser is not compellable to accept a title to premises formerly subject to an incumbrance, the discharge of which is shown only by presumption: thus where a leasehold was sold, subject to a ground rent, which was said to be apportioned out of a larger rent, but the apportionment was not evidenced by an existing deed, but only by the acceptance of a mesne landlord, and presumption; it was held that the purchaser was not bound to accept the title (*u*).

(e) *Rights and Liabilities as to Title Deeds.*

Right to Title Deeds goes with Right to Land.

It is an established principle that whoever is entitled to the land has also a right to all the title-deeds affecting it (*x*); and he may maintain an action of detinue against any person who withholds them from him after demand made (*y*); or an action of trover (*z*); consequently the party entitled to the term is entitled to the lease.

Lien on Lease.

A solicitor's lien on a lease will not prevent the lessee from assigning the estate in the leasehold (*a*).

Custody of expired Lease.

After the expiration or determination of a lease the lessor is not entitled to possession of it as against the lessee, nor can he maintain trover for it (*b*).

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SECT. 3.—*Assignment of Reversion.*

Right of Assignee of Reversion to sue for Breach of Covenant.

A lessor may by deed assign his reversion. At common law such an assignment would only have given the assignee a right to the rent reserved, to distrain for rent, and to sue for breaches of covenants at law, but not for breaches of express covenants entered into by the lessee with the lessor (*c*). To remedy this, the statute 32 Hen. 8, c. 34, enacts that all grantees of reversions shall enjoy all the advantages, benefits and remedies by entry for non-payment of rent, or for doing of waste or other forfeiture (*d*), or by action only for non-performance of conditions, covenants or agreements, contained or expressed in leases, which the lessors had; and

32 Hen. 8, c. 34.

Liability.

conversely, that lessees and their assigns shall have the same

(*t*) *Stowell* v. *Robinson*, 3 Bing. N. C. 928. And see *Wrighton* v. *Newton*, 2 C., M. & R. 124.

(*u*) *Barnwell* v. *Harris*, 1 Taunt. 430 10 R. R. 560.

(*x*) *Harrington* v. *Price*, 3 B. & Ad. 170; *Hooper* v. *Ramsbottom*, 6 Taunt. 12.

(*y*) *Lightfoot* v. *Keane*, 1 M. & W. 745; *Slater* v. *Dangerfield*, 15 M. & W. 263; *Newton* v. *Beck*, 3 H. & N. 220.

(*z*) *Harrington* v. *Price*, 3 B. & Ad. 173; *Davies* v. *Vernon*, 6 Q. B. 443.

(*a*) *Odell* v. *Wake*, 3 Camp. 394; 14 R. R. 763.

(*b*) *Hall* v. *Ball*, 3 M. & G. 242; *Elworthy* v. *Sanford*, 3 H. & C. 330; 34 L. J., Ex. 42.

(*c*) *Martyn* v. *Williams*, 1 H. & N. 817, 826; 26 L. J., Ex. 117.

(*d*) *Bennett* v. *Herring*, 3 C. B., N. S. 370.

remedies against assignees of the reversion as they, the lessees, had against the lessors.

Lease must be by Deed.

This statute does not apply where the demise is not by deed (*e*). If the demise be otherwise than by deed, the lessor, notwithstanding assignment of the reversion, retains his rights of action (*f*).

Covenants must run with land.

The statute is also confined to such covenants as "touch and concern the thing demised," and therefore run with the land (*g*), as already explained (ante, p. 172).

Reversion must be the same.

To enable the assignee of a reversioner to sue on the covenants in a lease, he must be seised of the same reversion to which the covenants were originally annexed; therefore, where there was a lease for years, under which the tenant entered, but which was never executed by the lessor, who died and devised the property, it was held, that the devisee could not sue as assignee of the reversion for breaches of covenants in the lease (*h*). A lease was made by A. and B. his wife, who were seised of an undivided moiety in right of the wife, and also by C., who was seised of the other undivided moiety, and it contained a covenant by the lessee, with A. and C. only, to repair; semble, that this was not a covenant running with the land on which the assignee of the reversion could sue (*i*). The assignee of a rent reserved by deed (without being an assignee of the reversion, if any), may maintain an action for the rent which becomes due after the assignment (*k*).

Assignment with reservation of rent to Assignor.

In *Southwell* v. *Scotter* (*l*), it was doubted whether, by the peculiar form of words there used, the assignor of a reversion could bind the lessee by a stipulation in the assignment that rent could continue to be paid to the assignor, and it is very doubtful whether such an obligation (unless construed as an obligation to pay to the assignor as agent of the assignee) could be created by any form of words whatever. Such a stipulation seems to be repugnant to the assignment of a reversion, the very essence of which is that the assignee should stand to the lessee in the place of the assignor, whereas such a stipulation makes practically two landlords.

Dispute of title of Assignee by Tenant. *Carlton* v. *Bowcock.*

The rule that a tenant may not dispute his landlord's title (*m*) applies only to the title of the original landlord who let him in, and not to that of an assignee of the reversion (*n*), and such title may be disputed by a tenant. But if the tenant has paid rent to a

(*e*) *Standen* v. *Christmas*, 10 Q. B. 135; *Elliott* v. *Johnson*, L. R., 2 Q. B. 12; 36 L. J., Q. B. 41; 8 B. & S. 38.

(*f*) *Bickford* v. *Parson*, 5 C. B. 920.

(*g*) See *Spencer's case*, 1 Sm. L. C.

(*h*) *Cardwell* v. *Lucas*, 2 M. & W. 111; *Cooch* v. *Goodman*, 2 Q. B. 580.

(*i*) *Wootton* v. *Steffenoni*, 12 M. & W. 129; *Thompson* v. *Hakewill*, 19 C. B., N. S. 717; 35 L. J., C. P. 18.

(*k*) *Williams* v. *Hayward*, 1 E. & E. 1040; 28 L. J., Q. B. 374; *Allen* v. *Bryan*, 5 B. & C. 512; 4 L. J., K. B. 210; 29 R. R. 307; *Robins* v. *Cox*, 1 Lev. 22; *Newcombe* v. *Harvey*, Carth. 161.

(*l*) *Southwell* v. *Scotter*, 49 L. J., Ex. 356.

(*m*) *Cooke* v. *Loxley*, 5 T. R. 4; 2 R. R. 521; ante, Chap. V., Sect. 22.

(*n*) *Carlton* v. *Bowcock*, 51 L. T. 659, per Cave, J.

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claiming assignee of the reversion or his agent, such payment is primâ facie evidence of the title of such assignee, and the tenant, except in a case of fraud or misrepresentation, can only defeat that title by showing that he paid in ignorance, and that some third person is the real assignee of the reversion; it is not enough for him to show that the claiming assignee has no title (*o*).

Surrenderee of Copyhold.

The surrenderee of a copyhold reversion may bring covenant against the lessee within the equity of the statute 32 Hen. 8, c. 34; for it is a remedial law, and no prejudice can arise to the lord, notwithstanding the lessee had assigned the term before the surrender (*p*).

Mortgagor and Mortgagee.

If a mortgagor and mortgagee of a term make an under-lease in which the covenants for the rent and repairs are only with the mortgagor and his assigns, the assignee of the mortgagee cannot maintain an action for the breach of these covenants, because they are collateral to his grantor's interest in the land, and therefore do not run with it; but the mortgagor himself may, the covenants being in gross (*q*). Where a mortgagor made a lease for a term, reciting the mortgage, and the lessee covenanted to pay a certain sum annually in part of the interest on the mortgage at a certain place, it was held a covenant in gross, not running with the land (*r*).

Tenants in Common.

On a covenant to repair, tenants in common may sue a lessee of a house, who, after the demise, but before the breach alleged, became a co-tenant of the plaintiffs in the same house (*s*).

Assignee of reversion on lease by estoppel.

*Cuthbertson* v. *Irving.*

The assignee of the reversion on a lease, which is good only by estoppel, may maintain an action on the covenants, as was held in a case where the lessor was a mortgagor in possession when the lease was granted, and consequently having only a title against the lessee by estoppel, could assign only what he had, so that his assignee had only a title by estoppel against the lessee, or no title at all (*t*).

Reversion of sub-lessee.

Where a person, who was in fact tenant from year to year (as he held under a void lease for years), underlet by deed for a term, and the under-lessee again underlet by deed for a less term: it was held, that this under-lessee had a reversion on which his assignee could maintain an action of covenant (*u*).

Assignor cannot sue assignee.

After assigning over a lease, the assignor, having no reversion, cannot sue the assignee except on express covenants contained in the assignment (*x*).

(*o*) Ib.

(*p*) *Glover* v. *Cope*, 1 Salk. 185; 4 Mod. 81; *Whitton* v. *Peacock*, 3 Myl. & R. 325.

(*q*) *Webb* v. *Russell*, 3 T. R. 393; 1 R. R. 725; *Stokes* v. *Russell*, Id. 679; *Russell* v. *Stokes* (in error), 1 H. Blac. 562; 1 R. R. 732.

(*r*) *Pargeter* v. *Harris*, 7 Q. B. 708; *Saunders* v. *Merryweather*, 3 H. & C. 902; 35 L. J., Ex. 115.

(*s*) *Yates* or *Gates* v. *Cole*, 2 Brod. & B. 660; 23 R. R. 524; *Twynam* v. *Pickard*, 2 B. & A. 105; *Badeley* v. *Vigurs*, 4 E. & B. 71; *Norval* v. *Pascoe*, 34 L. J., Ch. 82.

(*t*) *Cuthbertson* v. *Irving*, 4 H. & N. 742; 6 Id. 135.

(*u*) *Onley* v. *James*, 13 M. & W. 209.

(*x*) *Hicks* v. *Downing*, 1 Ld. Raym. 99; 1 Salk. 13.

The assignee of a reversion has no right of action against the lessee for arrears of rent due (*y*), inasmuch as the right to rent is a chose in action, or for breaches of covenants, although running with the land, committed before the assignment of the reversion (*z*); but the assignor may sue for such previous breaches notwithstanding the assignment. Where a mortgagor of a term of years made an under-lease by indenture, this, though at first a lease by estoppel, was held to be convertible into a lease in interest by a re-conveyance by the mortgagees, so as to give a right of action to the assignees of the lessee on the covenants in the under-lease (*a*). Where by lease of lands in 1872 the lessor covenanted to make a new street within one year, it was held that after his death, in 1878, assignees deriving title from the trustees of his will and his executor were not liable in 1892 to the assignees of the lease for his breach of covenant to make the street (*b*).

Breaches before Assignment.

The assignee of a reversion may re-enter for breach of covenants, other than the covenant to pay rent, without giving notice to the tenant that the reversion has been assigned to him (*c*). As regards rent, it is expressly provided by 4 Ann. c. 16 (c. 3 in the Revised Statutes), by which conveyances of reversions are good and effectual to all intents and purposes without attornment of the tenants, that no tenant is to be prejudiced by the payment of any rent to the grantor, or by breach of any condition for non-payment of rent, before notice shall be given to him of the grant by the grantee.

Notice to Tenant before Re-entry for non-payment of Rent.

The grantee of a reversion, therefore, may take advantage of all covenants *which run with the land* (*d*). The remedy is mutual, for the same statute gives the lessee a right of action against the grantee of the reversion (*e*). The statute does not extend to mere collateral covenants (*f*); but it includes devises (*g*).

An assignment of the reversion must be by deed (*h*). A. let a house to B., as tenant from year to year, and afterwards granted a lease by deed to C. of the house for twenty-one years: this was held to transfer the reversion to C., and to disentitle A. to recover from B. any rent which accrued during C.'s lease (*i*). A conveyance in fee, whether absolutely or by way of mortgage, will pass a term

How assignments of the Reversion may be made.

(*y*) *Flight* v. *Bentley*, 7 Sim. 149.

(*z*) *Martyn* v. *Williams*, 1 H. & N. 817; 26 L. J., Ex. 117.

(*a*) *Webb* v. *Austin*, 7 M. & G. 701.

(*b*) *Morris* v. *Kennedy*, [1896] 2 Ir. R. 247—C. A.

(*c*) *Scaltock* v. *Harston*, 1 C. P. D. 106; 45 L. J., C. P. 125; 34 L. T. 130; 24 W. R. 431.

Notice of breaches, under the Conveyancing Act (see Chap. VIII., Sect. 6, post) is of course necessary.

(*d*) *Spencer's case*, 1 Sm. L. C. 60, ante, p. 172.

(*e*) *Jourdain* v. *Wilson*, 4 B. & A. 266.

(*f*) *Webb* v. *Russell*, 3 T. R. 393; 1 R. R. 725.

(*g*) *Machell* v. *Dunton*, 2 Leon. 33.

(*h*) *Beely* v. *Terry*, 3 Lev. 155; *Brawley* v. *Wade*, M'Clel. 664.

(*i*) *Harmer* v. *Bean*, 3 C. & K. 307; *Burrows* v. *Gradin*, 1 D. & L. 213.

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which has been carved out of it, and afterwards re-assigned to the grantor, subject to a sub-lease (*k*).

Effect of Mortgage of Reversion.

*Moss* v. *Gallimore.*

Mortgages *subsequent* to a lease operate as grants of the reversion, and carry with them, as incidental to such reversion, a right to the rent and the benefit of the landlord's remedies for the recovery (*l*). The mortgagee, therefore, may enforce the payment of the rent from the lessee either by distress or action; and the lessee will be exonerated by such payment from any demand on the part of the mortgagor or those claiming under him; even though actual compulsion on the part of the mortgagee has not been resorted to, but the lessee has paid the rent voluntarily (*m*). Payment of rent to the mortgagor without notice of the mortgage is valid (*n*), but a voluntary payment of rent in advance is not within this rule, so as to discharge a tenant who had notice of the mortgage before the rent was due, for a voluntary payment of rent in advance is merely a loan by the tenant to the landlord (*o*). A payment, however, is a payment of rent when the rent falls due, and becomes irrecoverable by the mortgagee so far as it is made in respect of rent due before the notice (*p*). It is not necessary that the notice should be in terms; it is sufficient that the mortgage should be brought to the mind of the tenant (*q*).

Payment of Rent.

*Cook* v. *Guerra.*

## SECT. 4.—*Severance of Reversion.*

Assignee of Reversion in Part.

An assignee of the reversion in part of the demised premises, as where A. after having demised 300 acres to B. assigns the reversion in 200 of them by description to C., can sue for *apportioned* rent at common law (*r*), and could always, under the statute 32 Hen. 8, c. 34 (ante, p. 262), sue for breach of the *covenants* respecting that part (*s*), but could not, under 32 Hen. 8, c. 4, take advantage of a condition for re-entry on breach of covenant or any other condition (*t*).

Assignee of Part of Reversion.

An assignee of part of the reversion, as where A., owner in fee of land, having demised the whole of it to B. for 21 years, assigns the reversion to C. for C.'s life, or assigns the whole reversion to C. and D. as tenants in common, can not only sue for breach of covenant under the statute (*tt*), but also take advantage of any condition (*ttt*).

(*k*) *Burton* v. *Barclay*, 7 Bing. 745.

(*l*) Ante, p. 54.

(*m*) *Moss* v. *Gallimore*, 1 Doug. 279; 1 Smith, L. C.

(*n*) 4 Ann. c. 16, s. 10.

(*o*) *De Nicolls* v. *Saunders*, L. R., 5 C. P. 58; 39 L. J., C. P. 297; 22 L. T. 661; 18 W. R. 1106.

(*p*) *Cook* v. *Guerra*, L. R., 7 C. P. 132; 41 L. J., C. P. 89; 26 L. T. 97; 20 W. R. 367.

(*q*) Id.

(*r*) As to mode of apportionment, see post, Chap. X., Sect. 6; and for an instance of the rare action for apportionment see *Burgoyne* v. *Ainsworth* (*Law Times* newspaper for October 10th, 1885), in which case the action was brought in the Brompton County Court.

(*s*) Co. Litt. 315 a; *Twynam* v. *Pickard*, 2 B. & A. 105 (covenant to repair); *Badeley* v. *Vigurs*, 4 E. & B. 71 (covenant to leave in repair).

(*t*) *Wright* v. *Burroughs*, 3 C. B. 685.

(*tt*) *Attoe* v. *Hemmings*, 2 Bulst. 281.

(*ttt*) *Wright* v. *Burroughs*, supra.

Where a lease of an undivided part of certain mines contained a recital of an agreement between the lessee, the lessor, and the owners of the other two-thirds, for pulling down an old mill, and building another of larger dimensions, and the lease contained a covenant to keep such new mill in repair, and so leave it at the end of the term, but did not contain a covenant to build, it was held that the assignee of the lessor of the one-third might sue in respect of his interest (*u*).

Assignee of Part of Reversion—*contd.*

It has since been enacted—with respect only to re-entry for non-payment of rent—by the Law of Property Amendment Act, 1859, 22 & 23 Vict. c. 35, s. 3, that—

Law of Property Amendment Act, 1859, s. 3.

Where the reversion upon a lease is severed, and the rent or other reservation is legally apportioned, the assignee of each part of the reversion shall, in respect of the apportioned rent or other reservation allotted or belonging to him, have and be entitled to the benefit of all conditions or powers of re-entry for non-payment of the original rent or other reservation, in like manner as if such conditions or powers had been reserved to him as incident to his part of the reversion in respect of the apportioned rent or other reservation allotted or belonging to him.

Apportionment, on severance, of condition for re-entry on non-payment of rent.

The passing of the benefit and burden of all covenants and conditions to the several assignees of a severed reversion *in the case of a lease after* 1881, is provided for by ss. 10—12 of the Conveyancing and Law of Property Act, 1881, 44 & 45 Vict. c. 41, as follows:—

Conveyancing Act, 1881, ss. 10—12.

**10.** (1.) Rent reserved by a lease, and the benefit of every covenant or provision therein contained, having reference to the subject-matter thereof, and on the lessee's part to be observed or performed, and every condition of re-entry and other condition therein contained, shall be annexed and incident to and shall go with the reversionary estate in the land, or in any part thereof, immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary estate, and shall be capable of being recovered, received, enforced, and taken advantage of by the person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased.

Rent and benefit of lessee's covenants to go with estate in any part of land.

(2.) This section applies only to leases made after the commencement of this act.

**11.** (1.) The obligation of a covenant entered into by a lessor with reference to the subject-matter of the lease shall, if and as far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease, be annexed and incident to and shall go with that reversionary estate, or the several parts thereof notwithstanding severance of that reversionary estate, and may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise; and, if and as far as the lessor has power to bind the person from time to time entitled to

Obligation of lessor's covenants to bind estate in any part of land.

(*u*) *Easterby* v. *Sampson*, 6 Bing. 644; 4 M. & P. 601 (Exch. Ch.).

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Conveyancing Act, ss. 10—12 —*contd.*

Apportionment on severance, of every condition.

that reversionary estate, the obligation aforesaid may be taken advantage of and enforced against any person so entitled.

(2.) This section applies only to leases made after the commencement of this act.

**12.** (1.) Notwithstanding the severance by conveyance, surrender, or otherwise, of the reversionary estate in any land comprised in a lease, and notwithstanding the avoidance or cesser in any other manner of the term granted by a lease as to part only of the land comprised therein, every condition or right of re-entry, and every other condition, contained in the lease, shall be apportioned, and shall remain annexed to the severed parts of the reversionary estate as severed, and shall be in force with respect to the term whereon each severed part is reversionary, or the term in any land which has not been surrendered, or as to which the term has not been avoided or has not otherwise ceased, in like manner as if the land comprised in each severed part, or the land as to which the term remains subsisting, as the case may be, had alone originally been comprised in the lease.

(2.) This section applies only to leases made after the commencement of this act.

General effect of ss. 10—12 of Conveyancing Act.

It will have been observed that none of these three sections are retrospective, but that they all apply only to leases made after the commencement of the Act, *i.e.* by s. 2, on or after the 1st January, 1882. All the sections, however, go beyond the Law of Property Amendment Act, 1859, 22 & 23 Vict. c. 35, s. 3, in their application to all other conditions in addition to the condition of re-entry for non-payment of rent. The 12th section expressly applies to severance "by surrender or otherwise" in addition to severance by conveyance, and also appears to dispense with the necessity of the rent having been apportioned before action of ejectment for non-payment of rent. All the sections apply to leases generally, whereas 32 Hen. 8, c. 34, applies to leases by deed only.

Action by tenants in common.

One tenant in common cannot join the others in an action without their consent in writing (*y*); but joinder is not necessary, and any one tenant in common may sue singly if he pleases (*z*), and recover damages in proportion to his interest.

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## SECT. 5.—*Assignment of Term.*

### (a) *Absolutely.*

Power to assign.

Every tenant, except a tenant on sufferance, has power to assign his term, unless he be, as is frequently the case (*a*), expressly prohibited in the contract of tenancy from doing so.

(*y*) R. S. C. Ord. XVI., Rule 11.

(*z*) *Roberts* v. *Holland*, [1893] 1 Q. B. 665; 62 L. J., Q. B. 621; 41 W. R. 494; 5 R. 370.

(*a*) See post, Chap. XVII., Sect. 2.

An assignment by a tenant at will determines the tenancy, but not without notice to his landlord (*b*).

What amounts to an Assignment.

An assignment must, by s. 3 of the Real Property Act, 1845, 8 & 9 Vict. c. 106, be by *deed*, and must pass the legal estate of the assignor; for a transfer of a mere equitable interest will not make a man liable as an assignee. An agreement to take an assignment of a lease, followed by possession on the part of the equitable assignee, is not sufficient to give the lessor any right to sue the equitable assignee in equity on the covenant in the lease (*c*). The delivery and depositing of a lease as a security for money, without any written assignment, passes no interest at law, although it may create a right which may be enforced in equity (*d*); but the transfer may be complete, although the assignee has never in fact got possession of the deed of assignment, by reason of a claim of lien on the part of the assignor's attorney for the expense of preparing it (*e*).

Assignment by subletting for whole of lessee's term. *Beardman* v. *Wilson.*

An assignment, as contradistinguished from a sub-lease, signifies a parting with *the whole term;* and when the whole term or more than the whole term is made over by the lessee, although in the deed by which that is done the rent and a power of re-entry for non-payment are reserved to himself, and not to the original lessor, yet the instrument amounts to an assignment and not a sub-lease (*f*), and in such case the person to whom it is made over may sue the original lessor or his assignees of the reversion, or be sued by them as assignee of the term, on the respective covenants in the original lease, which run with the land, even though new covenants are introduced into the assignment (*g*). Upon this principle an assignee of a term, who had granted a sub-lease for the whole term, was held in *Beardman* v. *Wilson* to have in effect assigned over, and therefore to have ceased to be liable to the lessor or his assignee for the subsequent rent or subsequent breaches of covenant (*h*).

The effect of the doctrine that the sub-lease is equivalent to an assignment is clearly to deprive the sub-lessor of his right to distrain (*i*), but it seems to be equally clear that his right to sue upon a covenant for rent remains (*k*), that he may recover for use and occupation (*l*), and that he may re-enter for condition broken (*m*).

(*b*) *Pinhorn* v. *Souster*, 8 Ex. 763.
(*c*) *Cox* v. *Bishop*, 8 De G., M. & G. 815; 26 L. J., Ch. 389.
(*d*) *Doe* d. *Maslin* v. *Roe*, 5 Esp. 105; *Williams* v. *Evans*, 23 Beav. 239.
(*e*) *Odell* v. *Wake*, 3 Camp. 394.
(*f*) *Hicks* v. *Downing*, 1 Ld. Raym. 99; *Palmer* v. *Edwards*, 1 Doug. 187; *Thorne* v. *Woolcombe*, 3 B. & Ad. 595; *Wollaston* v. *Hakewill*, 3 M. & G. 297; *Langford* v. *Selmes*, 3 Kay & J. 220.
(*g*) *Palmer* v. *Edwards*, 1 Doug. 187, n.
(*h*) *Beardman* v. *Wilson*, L. R., 4 C. P. 57; 38 L. J., C. P. 91; 19 L. T. 282; 17 W. R. 54.
(*i*) *Parmenter* v. *Webber*, 8 Taunt. 593; 20 R. R. 575; Brook's Abr. tit. Dette, pl. 39; *Preece* v. *Corrie*, 5 Bing. N. C. 24; *Pascoe* v. *Pascoe*, 3 Bing. N. C. 898.
(*k*) *Baker* v. *Gostling*, 1 Bing. N. C. 19.
(*l*) *Pollock* v. *Stacey*, 9 Q. B. 1033.
(*m*) *Doe* v. *Bateman*, 2 B. & Ald. 168.

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By sub-lease for whole of sub-lessor's term—*contd.*

It is necessary to point out, however, that the extent of the principle that a sub-lease for the whole of the sub-lessor's term amounts to an assignment, has been much controverted (*n*). *Poultney* v. *Holmes* (*o*), where it was held that a sub-lease by parol for the whole of the sub-lessor's term was good to sustain an ejectment of the sub-lessor by the lessee, was questioned in *Barrett* v. *Rolph* (*p*), and though confirmed in *Pollock* v. *Stacey* (*q*), had some little doubt thrown upon it in *Beardman* v. *Wilson* (*r*). Upon the preponderance of authority there appears to be a distinction between a sub-lease by deed and a sub-lease by parol only. The sub-lease by parol only not being operative as an assignment by virtue of the Real Property Act, 1845, 8 & 9 Vict. c. 106 (*s*), is said to create a lease so as to effectuate the intention of the parties (*t*).

Sub-lease for Years by Tenant from Year to Year.

A tenant from year to year who underlets for a long term, does not thereby assign all his estate, which may possibly continue longer than the term expressed to be granted by the sub-lease (*u*), and consequently retains a reversion with a title to distrain until his defeasible reversion be defeated (*x*), *i.e.* until a notice to quit given to him has expired.

Operative Words in Assignments.

An assignment is usually made by the word "assign," but sometimes "grant, assign, and set over" are used; no particular words are necessary; provided the intention of the parties be sufficiently expressed (*y*). Where a lessee for life granted all his estate and interest to A. and his executors: it was held not to amount to an assignment, because a grant to a man and his executors could not convey an estate for life, being a freehold (*z*). An agreement to assign on payment of a sum by instalments, the assignee in the meantime to perform the covenants in the lease and keep the assignor harmless, and the assignor to re-enter on non-payment of any instalment, is merely an agreement for an assignment and not an assignment (*a*). Where a lessee agreed to execute an effectual assignment of two leases of premises, "as he held the same for terms of twenty-eight years," and the assignee agreed to accept a proper assignment accordingly, without requiring the lessor's title, it was held that he was bound to

(*n*) See the authorities reviewed in *R.* v. *Wilson*, 5 M. & R. 157, n.; 1 Sm. L. C. in the notes to *Spencer's case*.

(*o*) *Poultney* v. *Holmes*, 1 Stra. 405.

(*p*) *Barrett* v. *Rolph*, 14 M. & W. 348.

(*q*) *Pollock* v. *Stacey*, 9 Q. B. 1033.

(*r*) *Beardman* v. *Wilson*, L. R., 4 C. P. 17.

(*s*) Or before that Act, by the Statute of Frauds.

(*t*) An Irish statute, 23 & 24 Vict. c. 154, s. 3, in reference to the whole subject, and making no distinction between deed and parol, enacts, "that the relation of landlord and tenant shall be deemed to be founded in the express or implied contract of the parties, and a reversion shall not be necessary to such relation."

(*u*) *Oxley* v. *James*, 13 M. & W. 209.

(*x*) Ib.

(*y*) See Forms of Assignments, post, Appendix B.

(*z*) *Earl of Derby* v. *Taylor*, 1 East, 502; 6 R. R. 337.

(*a*) *Hartshone* v. *Watson*, 5 B. & C. 477.

take an assignment of two consecutive leases, though the second was void, being executed under a power which had not been pursued (*b*).

An assignment in consideration of quarterly payments for the remainder of the term will not upon a payment being made constitute the assignee a tenant, so as to give the assignor a right to distrain for payments subsequently due (*c*).

Assignment for Benefit of Creditors. *White* v. *Hunt.*

In *White* v. *Hunt* (*d*), a debtor assigned to a trustee for the benefit of his creditors "all his goods and chattels, personal estate, substance and effects whatsoever, and all his right, title, property, benefit, claim and demand whatever therein." It was held that these words passed a term, and rendered the trustee liable as assignee for rent.

Usual Covenants in Assignments.

The proper and usual covenants on the part of the assignor of a term, viz., that the lease is in full force: that all the rent, covenants and conditions have been paid, performed and observed to that time: that he has power to assign: for quiet enjoyment by the assignee during the remainder of the term, without interruption by the assignor or any person claiming under him:—free from incumbrances for him:—and for further assurance; are implied in every assignment made on or after the 1st January, 1882, by virtue of s. 7 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41). The proper covenants on the part of the assignee—for which no provision has been made by the Conveyancing Act—are, that he will pay the rent and perform the covenants in the lease and save harmless the assignor from any breach thereof by him or his assigns (*e*).

Barring of Action on Covenant of Indemnity by Assignee's discharge as a Bankrupt.

The right of action of lessee against assignee on the covenant of indemnity is barred by the order of discharge of the assignee as a bankrupt, which order frees the assignee from all contingent liability, such as that upon the covenant to yield up in repair, as having been provable in bankruptcy (*f*).

Liability of Assignor to Assignee. *Russell* v. *Shoolbred*

The liabilities of an assignor to an assignee upon the covenant of indemnity were much considered by the Court of Appeal in the peculiar case of *Russell* v. *Shoolbred* (*g*), in which it was held, that an assignor who pays rent has no lien on the term, and cannot be prejudiced by a subsequent assignment; and that a right of distress is not a security to the benefit of which a surety paying rent is entitled under the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97, s. 5). On the general covenant to indemnify the proper costs of defending an action for breach of covenant are recoverable

(*b*) *Spratt* v. *Jeffery*, 10 B. & C. 249; and see *Tweed* v. *Mills*, L. R., 1 C. P. 39.

(*c*) *Hazeldine* v. *Heaton*, C. & E. 40.

(*d*) *White* v. *Hunt*, L. R., 6 Ex. 32; 40 L. J., Ex. 23; 23 L. T. 559; overruling *Carter* v. *Warne*, M. & M. 479.

(*e*) See forms, Appendix B., post.

(*f*) *Hardy* v. *Fothergill*, 13 App. Cas. 351; 58 L. J., Q. B. 44; 59 L. T. 273; 37 W. R. 177, affirming 18 Q. B. D. 646; 35 W. R. 588.

(*g*) *Russell* v. *Shoolbred*, 29 Ch. D. 254; 53 L. T. 365—C. A.

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Liability of Assignor to Assignee—*contd.*

as damages (*h*). Where, on an agreement to assign a lease, and to indemnify the lessee from the rent, the assignee entered before any legal assignment was made, some goods of the lessee being left on the premises: it was held that the assignee was liable on his indemnity, those goods having been taken as a distress for rent, and that it was immaterial whether the goods were left with the leave of the assignee (*i*).

Notice to lessor of assignment of Term.

There is no obligation at common law upon either assignor or assignee to give any notice to the lessor of the assignment; but the lease frequently contains a covenant that notice shall be given, and sometimes also that a copy of each assignment shall be furnished to, or even that the assignment itself shall be prepared by, the lessor's solicitors.

Liability of Lessee, notwithstanding Assignment.

A lessee continues liable upon express covenants in the lease, notwithstanding any assignment; therefore an action of covenant will lie against a lessee for years, or his executors, on an express covenant, notwithstanding he has assigned his term, and the lessor has accepted rent from the assignee (*k*). The lessor may at the same time sue the lessee upon his express covenant, and the assignee upon the privity of estate; but he can have execution against one only.

Effect of Eviction out of part.

An eviction out of part of the land will only amount to a discharge of an assignee pro tanto (*l*).

On what Covenants the Assignee is liable.

An assignee of a term is not bound by the personal covenants of the lessee. But he is bound to perform all the covenants which "run with the land," and that without being named by the special word "assigns" (*m*). He is also liable to his immediate assignor upon any express covenants by him in the deed of assignment (*n*). But he is not liable to the lessee for rent which the lessee has been called upon to pay after the assignee had assigned over (*o*), and there is no implied contract by an assignee entering upon an invalid assignment and quitting without notice, that he will indemnify the lessee against the rent for any period after he has ceased to occupy (*p*).

Remote Assignee. *Moule* v. *Garrett.*

There is, however, an implied promise on the part of each successive assignee to indemnify the original lessee against breaches of covenant committed by each assignee during the continuance of his

(*h*) *Murrell* v. *Tysh*, C. & E. 80. It has been held in Ireland that in an action by lessee against assignee for breach of covenant in the deed of assignment to keep the demised premises in repair, the lessee, in the absence of actual loss, can only recover nominal damages, although the lessor may have sued the lessee for breach of covenant in the lease (*Beattie* v. *Quirey*, 10 Ir. R. C. L. 516).

(*i*) *Groom* v. *Bluck*, 2 M. & G. 567.

(*k*) *Barnard* v. *Godscall*, Cro. Jac. 309; *Thursby* v. *Plant*, 1 Wms. Saund. 240.

(*l*) *Stevenson* v. *Lambard*, 2 East, 575; 6 R. R. 511; *Campbell* v. *Lewis*, 3 B. & A. 392.

(*m*) As to what covenants "run with the land," see ante, Chap. V., Sect. 8.

(*n*) *Harris* v. *Goodwyn*, 9 Dowl. 409; *Burnett* v. *Lynch*, 5 B. & C. 589; 8 D. & R. 368; 4 L. J., K. B. 274; 29 R. R. 343.

(*o*) *Wolveridge* v. *Steward*, 1 C., M. & R. 644.

(*p*) *Crouch* v. *Tregonning*, L. R., 5 Ex. 88; 41 L. J., Ex. 97; 26 L. T. 286; 20 W. R. 536.

own estate, and this promise is implied although such assignee may have covenanted to indemnify his immediate assignor against all subsequent breaches (*q*).

In an action by the assignor claiming indemnity from the assignee for breaches of covenant in the lease, the court will merely direct payment on account of breaches already committed, and will not make a general declaration of the assignor's right to indemnity (*r*).

When the Assignee's Liability commences.

An assignee of a term may be sued on the covenants which run with the land, although he has not taken actual possession (*s*); so the assignee of an assignee is liable, although he has not taken actual possession, for breaches of covenant happening after the assignment to him (*t*), and before any assignment over by him (*u*): so a mortgagee *by assignment* of the term, though not in possession, is liable to perform the covenants in the lease which run with the land (*x*). To avoid this, mortgages of leaseholds are generally made by way of under-lease (*y*). Where a lessee covenanted for himself and his assigns to pull down certain old houses and build others within seven years, but did not perform the covenant, and, after the end of seven years, assigned, an action of covenant was held not to lie against the assignee because the breach was complete before the assignment, and the liability of the assignee depends solely upon the privity of estate; had the covenant, however, been broken after the assignment, as if the lessee had assigned before the seven years expired, the assignee would have been liable (*z*). And he would have been liable to an ejectment for the forfeiture committed prior to the assignment to him, unless such forfeiture had been waived (*a*).

Assignee may assign over to Man of Straw. *Onslow* v. *Corrie.*

An assignee being liable to the original lessor or his assigns only in respect of privity of estate, may get rid of such liability by an assignment over (*b*), except as to previous breaches; with respect to which he will continue liable both at law (*c*) and in equity (*d*). Such an assignment may be made even to a pauper or to a person

(*q*) *Moule* v. *Garrett*, L. R., 5 Ex. 132; 41 L. J., Ex. 62; 26 L. T. 367; 20 W. R. 416—Ex. Ch.

(*r*) *Lloyd* v. *Dimmack*, 7 Ch. D. 398; 47 L. J., Ch. 398; 38 L. T. 173; 26 W. R. 458.

(*s*) *Walker* v. *Reeves*, 2 Doug. 461, n.; 3 Id. 19.

(*t*) *Taylor* v. *Shum*, 1 Bos. & P. 21; 4 R. R. 759.

(*u*) *Beardman* v. *Wilson*, L. R., 4 C. P. 57; 17 W. R. 54.

(*x*) *Stone* v. *Evans*, Peake, Ad. Ca. 94; *Burton* v. *Barclay*, 7 Bing. 745; *Williams* v. *Bosanquet*, 7 Brod. & B. 238; 21 R. R. 585; overruling *Eaton* v. *Jaques*, 2 Doug. 455.

(*y*) Post, 274.

(*z*) *Churchwardens of St. Saviour's, Southwark* v. *Smith*, 1 W. Blac. 351; 3 Burr. 1272; *Grescott* v. *Green*, 1 Salk. 199; *Brittin* v. *Vaux*, Lutw. 109; *Hawkins* v. *Sherman*, 3 C. & P. 459.

(*a*) *Bennett* v. *Herring*, 3 C. B., N. S. 370.

(*b*) *Valiant* v. *Dodomede*, 2 Atk. 546; *Pitcher* v. *Tovey*, 12 Mod. 23; *Le Keux* v. *Nash*, 2 Str. 1222; *Walker* v. *Reeves*, 2 Doug. 461, n.; 3 Id. 19; *Taylor* v. *Shum*, 1 Bos. & P. 21; 4 R. R. 759; Co. Lit. 3 a, 356 b; *Boulton* v. *Canon*, Freem. 336; *Chancellor* v. *Poole*, 2 Doug. 764; *Beardman* v. *Wilson*, L. R., 4 C. P. 57; 17 W. R. 54.

(*c*) *Harvey* v. *King*, 2 C., M. & R. 18; *Pitcher* v. *Tovey*, 1 Salk. 81.

(*d*) *Philpot* v. *Hoare*, 2 Atk. 219; Amb. 480; *Treade* v. *Coke*, 1 Vern. 165; 3 Eq. Ca. 47; *Onslow* v. *Corrie*, 2 Madd. 330.

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imprisoned for debt (*e*), but the assignee will continue liable upon any express covenant entered into by him in the assignment to himself (*f*).

The assignee of a term, declared against as such, has been held not to be liable for rent accruing after he had assigned over, though it was stated that the lessor was a party executing the assignment, and agreed thereby that the term, which was determinable at his option, should be absolute (*g*). But if the breach had been continuing, it would have been otherwise: as if there had been a covenant to repair within a certain time after notice, and the repairs were not done according to such notice, though the premises were out of repair before the assignment (*h*). In *Wolveridge* v. *Steward* the lessee assigned to A. his interest in demised premises by indenture, executed by both parties, "subject to the payment of the rent and performance of the covenants and agreements reserved and contained in the original lease." A. took possession and occupied the premises under this assignment, and before the expiration of the term assigned to a third person. After the assignment over the lessee was called upon by the lessor to pay rent which the assignee had suffered to be in arrear; it was held, that the lessee could not maintain an action of covenant against A. in respect of such breach, the words "subject to the payment of rent, &c.," being words of qualification and not words of contract (*i*).

*Wolveridge* v. *Steward.*

Rights of Assignees of a Term.

Assignees of a term may sue the reversioner, or his assigns, for breaches of covenant running with the land which are committed by him or them after the assignment (*k*); an assignee of a lease by estoppel is no exception to the rule (*l*). But an assignee cannot maintain an action upon a breach of covenant before the assignment to him (*m*), nor for the breach of any covenant which does not, by touching or concerning the demised premises, run with the land or the reversion (*n*).

### (b) *By way of Mortgage.*

Mortgagee's Liability.

A mortgagee of a leasehold estate *by assignment* is liable, so long as he has the legal estate, to perform the covenants which are obligatory on any ordinary assignee, whether he be in possession or

(*e*) *Valiant* v. *Dodemede*, 2 Atk. 446; *Le Keux* v. *Nash*, 2 Stra. 1221; *Taylor* v. *Shum*, 1 Bos. & P. 21; 4 R. R. 759; *Onslow* v. *Corrie*, 2 Madd. 330.

(*f*) *Wolveridge* v. *Steward*, 1 Cr. & M. 644.

(*g*) *Chancellor* v. *Poole*, 2 Doug. 764.

(*h*) Com. Dig. tit. *Covenant* (B.).

(*i*) *Wolveridge* v. *Steward* (in error), 1 Cr. & M. 644; 3 Moo. & Sc. 561.

(*k*) Bac. Abr. tit. *Covenant* (E. 5).

(*l*) *Cuthbertson* v. *Irving*, 4 H. & N. 742; 6 Id. 135; 28 L. J., Ex. 306; 29 Id. 485.

(*m*) *Lewis* v. *Ridge*, Cro. Eliz. 863; *Martyn* v. *Williams*, 1 H. & N. 817; 26 L. J., Ex. 117.

(*n*) See *Spencer's case*, 1 Smith, L. C. 60; and Chap. V., Sect. 8 (b), ante, 172.

not (*o*) : he may assign it without being in actual possession (*p*). A mortgagee may avoid the liability of an assignee by taking a sub-lease instead of an assignment, and this is frequently done (*q*). A trustee to whom a lease is assigned to secure an annuity to a third person is strictly an assignee (*r*). A power given to a trustee in a mortgage deed to sell if the mortgagee requests it, does not necessarily imply a right to enter on the premises (*s*).

Equitable Assignments by Deposit.

Every assignment of a lease is by s. 3 of the Real Property Act, 1845, 8 & 9 Vict. c. 106, void at law "unless evidenced by deed." Where a lease is deposited by way of equitable mortgage as a security for money advanced (*t*), it is clear that the depositee has no legal title (*u*) ; and it would seem to be the better opinion that the lessor has no remedy in equity against the depositee, upon the covenants in the lease (*x*), even although the depositee be in possession (*y*). It has been held, too, in a case where the depositee not only entered, but also paid rent in arrear, and was accepted by the lessor as owner of the lease, the lessor had no equity to compel the depositee to take a legal assignment of the lease (*z*).

## Sect. 6.—*Severance of Term.*

Assignee of Part liable for Part of Rent in Action, but to Distress for Whole.

An assignee of part of the land cannot be charged in an action of debt, with the whole rent, but only for a proportionate part thereof (*a*). But an assignee of part is liable to a distress for rent due for the whole of the demised premises (*a*), and to an action on every covenant running with the land and affecting the part assigned, inasmuch as an assignee cannot discharge himself of all his liability to the covenants running with the land, which are in their nature divisible (*b*).

Assignee of part may sue.

The assignee of part may also sue without joining his co-assignees, as was held in a case where an assignee of five-sixths of a sub-lease

(*o*) *Stone* v. *Evans*, 7 East, 341 ; *Williams* v. *Bosanquet*, 1 Brod. & B. 238 ; 21 R. R. 585 ; *Burton* v. *Barclay*, 7 Bing. 745; Robbins on Mortgages, ch. xii., p. 155.

(*p*) *Smartle* v. *Williams*, 3 Lev. 388 ; Real Property Act, 1845, 8 & 9 Vict. c. 106, s. 5.

(*q*) Robbins on Mortgages, p. 156, where it is said that "in framing such mortgages the practice is to demise the property to the mortgagee at a peppercorn rent, reserving the last day or last few days of the term, and to make the mortgagor covenant to pay the rent and perform the covenants of the original lease."

(*r*) *Gretton* v. *Diggles*, 4 Taunt. 766 ; 14 R. R. 662.

(*s*) *Watson* v. *Waltham*, 2 A. & E. 485.

(*t*) See *Williams* v. *Evans*, 23 Beav. 239 ; *Matthews* v. *Goodday*, 31 L. J., Ch. 282 ; *Bulfin* v. *Dunne*, 12 Ir. Ch. R. 67.

(*u*) *Doe* d. *Maslin* v. *Roe*, 5 Esp. 105.

(*x*) *Moores* v. *Choat*, 8 Sim. 508 (overruling *Flight* v. *Bentley*, 7 Sim. 149) ; Fisher on Mortgages (4th ed.), p. 16 ; Robbins on Mortgages, p. 155.

(*y*) *Cox* v. *Bishop*, 8 De G., M. & G. 815 ; 26 L. J., Ch. 389.

(*z*) *Moore* v. *Greg*, 2 De G. & S. 334.

(*a*) *Curtis* v. *Spitty*, 1 Bing. N. C. 756 ; *Mercerон* v. *Dowson*, 5 B. & C. 479 ; *Hare* v. *Cator*, Cowp. 766 ; *Holford* v. *Hatch*, 1 Doug. 183.

(*b*) *Congham* v. *King*, Cro. Car. 221 ; *Gamon* v. *Vernon*, 2 Lev. 231 ; *Stevenson* v. *Lambard*, 2 East, 576 ; 6 R. R. 511.

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recovered damages from the mesne landlord for breach of a covenant for renewal of the head lease (*c*).

No contribution between two part Assignees.

Upon the first view of the authorities it seems that though an assignee of part is liable to be distrained upon for the entire rent, he cannot, on payment of such entirety on threat of distress, obtain contribution from the assignee of the other part. In *Hunter* v. *Hunt* (*d*) it was expressly held that no action lay for money paid to the use of the defendant in such a case, the defendant being assignee of a sub-lease of one, and the plaintiff an assignee of a sub-lease of another, of two adjoining houses held under one lease at an entire rent. In *Johnson* v. *Wild* (*e*) a lessee of land assigned part to A., and sub-let other part to B., and it was held that A. on paying the entire rent on threat of distress had no right of contribution against B. But in the first of these cases it did not appear that the party sued for contribution had anything to distrain upon, and in the second it not only appeared that he had nothing to distrain upon, but also that being sub-lessee, not assignee, he could not have been sued for it.

## SECT. 7.—*Sub-lease.*

Sub-lease for whole Term is an Assignment. *Beardman* v. *Wilson.*

A sub-lease is a demise by a lessee (or his assignee) for a less term than he himself has. A demise for the whole term, if it be by deed, amounts to an assignment (*f*). A fortiori, a lease by deed for a period beyond the term will operate as an assignment. But there are many cases in which a sub-lease by parol for the whole term has been allowed to operate as such, so as to give the under-lessor a right to an action for rent (*g*), but not a right to distrain (*h*).

Sub-lease by lessee for any term.

A lessee for any term however short, and even a tenant from year to year, may make a sub-lease (*i*).

Constructive notice of head lease.

A sub-lessee has "constructive notice" of the head lease (*k*).

Rights of Lessor against Sub-lessee.

There being no privity of contract between the lessor and the sub-lessee, the lessor cannot sue the sub-lessee on any of the covenants of the original lease (*l*), but the lessor may distrain on the sub-lessee for the rent payable under the original lease, and may also avail himself of a condition for forfeiture in the original lease (*m*).

Distress.

(*c*) *Simpson* v. *Clayton*, 4 B. N. C. 758.
(*d*) *Hunter* v. *Hunt*, 1 C. B. 300.
(*e*) *Johnson* v. *Wild*, 44 Ch. D. 146; 59 L. J., Ch. 322; 62 L. T. 537; 38 W. R. 500, per Chitty, J.
(*f*) *Hicks* v. *Downing*, 1 Ld. Raym. 99; *Wollaston* v. *Hakewill*, 3 M. & G. 297; *Beardman* v. *Wilson*, L. R., 4 C. P. 57; 38 L. J., C. P. 91; 19 L. T. 282; 17 W. R. 54.
(*g*) *Poulteney* v. *Holmes*, 1 Str. 405; *Smith* v. *Mapleback*, 1 T. R. 445; 1 R. R. 247; *Pollock* v. *Stacey*, 3 Q. B. 1033; *Williams* v. *Hayward*, 1 E. & E. 1040; *Baker* v. *Gostling*, 1 Bing. N. C. 19; *In re Turner*, 11 Ir. Ch. R. 304.
(*h*) *Preece* v. *Corrie*, 5 Bing. 24; 6 L. J., C. P. 505; 30 R. R. 536; *Pascoe* v. *Pascoe*, 3 Bing. N. C. 898.
(*i*) *Mackay* v. *Mackreth*, 4 Doug. 213.
(*k*) See *Patman* v. *Hasland*, 17 Ch. D. 353; 50 L. J., Ch. 642; 44 L. T. 728; 29 W. R. 707, per Jessel, M.R.
(*l*) *Holford* v. *Hatch*, 1 Doug. 183.
(*m*) *Arnsby* v. *Woodward*, 6 B. & C. 519.

An injunction has also been granted to restrain a sub-lessee from permitting a sale by auction in contravention of a covenant in the original lease (*n*), and to restrain a sub-lessee from using the demised premises for a particular trade, in contravention of a covenant in the assignment of the premises to his lessor (*o*).

Injunction.

But a sub-lessee is not bound to take active steps to prevent a nuisance by a covenant not to permit it. Therefore in *Hall* v. *Ewin* (*p*), where the plaintiff let with a covenant that the lessee would not permit the demised premises to be used for an offensive business, and the lessee sub-let by a sub-lease which was assigned to the defendant, who sub-let to a person who, without the consent and against the request of the defendant, opened a wild beast exhibition on the premises, it was held that an action to restrain this use of the premises could not be maintained against the defendant, though it was maintainable against his sub-lessee. The ground of the decision was that the defendant had done nothing in actual contravention of the covenant against nuisances.

Sub-lessee not bound to take active steps to prevent nuisance.

*Hall* v. *Ewin.*

A contract to sell a lease is not satisfied by the conveyance of a sub-lease (*q*), for a sub-lease might become void if the covenants and conditions in the original lease were not duly performed (*r*). But on the purchase of a sub-lease it is not a valid objection to the title that the sub-lease may become forfeited by the non-performance of the covenants in the original lease (*s*). It is the duty of a person contracting for a sub-lease to ascertain the contents of the original lease (*t*).

Sales of Sub-leases.

A sub-lease should always contain an express covenant by the sub-lessee, to observe and perform all the covenants and conditions in the original lease, except those which he is specially exempted from performing (*u*).

Covenant to perform Covenants of Head lease.

Such a contract was held in the important case of *Hornby* v. *Cardwell, Hanbury, Third Party* (*x*), to amount to a contract of indemnity, so that the sub-lessee is liable to the mesne landlord for the costs of an action (reasonably defended) by the head landlord against the mesne landlord on the contracts of the head lease, whereas there is no such indemnity if the contract of the sub-lessee be merely to perform similar contracts to those contained in the head lease (*y*).

(*n*) *Parker* v. *Whyte*, 1 H. & M. 167; 32 L. J., Ch. 520.

(*o*) *Clements* v. *Welles*, L. R., 1 Eq. 209; 35 Beav. 213.

(*p*) *Hall* v. *Ewin*, 37 Ch. D. 14; 57 L. J., Ch. 95; 57 L. T. 831; 37 W. R. 84—C. A.

(*q*) *Madeley* v. *Booth*, 2 De G. & Sm. 718; *Darlington* v. *Hamilton*, Kay, 550; *Blake* v. *Phinn*, 3 C. B. 976; *Henderson* v. *Hudson*, 15 W. R. 860; *Sheard* v. *Venables*, 36 L. J., Ch. 922; 15 W. R. 1166; *Duddell* v. *Simpson*, L. R. 2 Ch. Ap. 102.

(*r*) *Doe* d. *Muston* v. *Gladwin*, 6 Q. B. 953; *Logan* v. *Hall*, 4 C. B. 598.

(*s*) *Hayford* v. *Criddle*, 22 Beav. 477.

(*t*) *Cosser* v. *Collinge*, 3 Myl. & K. 283.

(*u*) See Form, Appendix A., Sect. 14.

(*x*) *Hornby* v. *Cardwell*, 8 Q. B. D. 329; 51 L. J., Q. B. 89; 45 L. T. 781; 30 W. R. 263—C. A.

(*y*) *Logan* v. *Hall*, 4 C. B. 598; *Penley*

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Where there is a contract to perform all the contracts of the head lease, and both the contracts of the head lease and the mesne lease are broken, the head landlord (although he can eject) cannot sue the sub-tenant for damages, there being no privity of contract between them; but the head landlord may sue the mesne landlord, who, in his turn, may sue the sub-tenant, or pursue what seems to be the more convenient course of bringing him in as third party under sect. 24, sub-s. 3 of the Judicature Act, 1873, and Order XVI., Rules 48—55 of the Rules of the Supreme Court. If this be done, the High Court has a discretion, under Order LXV., to order the sub-tenant so made third party to pay the costs of an action by the head landlord against the mesne landlord reasonably defended (*z*).

Bringing in sub-lessee as third party.

Sub-lessee not affected by Surrender of mesne Landlord.

A sub-lessee is not affected by the voluntary surrender of the lease by his mesne landlord to the superior landlord; nor, if he has knowledge of it, is he bound in any way to treat it as a notice to quit (*a*).

Sub-lease of one of two Houses held under one Lease.

If two houses are comprised in one lease and one of them be sub-let, the sub-lessee of such one house may be liable for any breach of covenant respecting the other on the ground of the covenants in the lease affecting the two (*b*). The sub-lessee of the one house is also liable to distress for the whole rent.

Mortgage.

The mortgage of a lease is usually affected by a sub-lease to the mortgagee, rather than by assignment to him, for the reason already given (ante, p. 275). In such a case, a declaration of trust in favour of the mortgagee will not make him liable on the lease (*c*).

## SECT. 8.—*Attornment.*

Origin of Attornment.

After the statute *Quia emptores*, by which subinfeudation was prohibited, it became necessary when the reversioner or remainderman after an estate for years, for life or in tail, granted his reversion or remainder, that the particular tenant should attorn to the grantee (*d*). This necessity of attornment was in some degree diminished by the Statute of Uses (*e*), whereby the possession was immediately executed to the use: and by the Statute of Wills (*f*), by which the legal estate was immediately vested in the devisee.

Substitution of Notice for Attornment.

4 & 5 Ann. c. 16, ss. 9, 10.

Attornments, however, have long been rendered unnecessary in nearly every case by 4 & 5 Ann. c. 16 [c. 3 in Revised Statutes], s. 9, which

v. *Watts*, 7 M. & W. 601; *Walker* v. *Walton*, 10 M. & W. 249: overruling *Neale* v. *Wyllie*, 3 B. & C. 533.

(*z*) *Hornby* v. *Cardwell*, 8 Q. B. D. 329—C. A., and note (*x*), ante.

(*a*) *Mellor* v. *Watkins*, L. R., 9 Q. B. 400; 23 W. R. 55.

(*b*) *Darlington* v. *Hamilton*, Kay, 550; *Creswell* v. *Davidson*, 56 L. T. 811.

(*c*) *Walters* v. *Northern Mining Co.*, 5 De G., M. & G. 629.

As to liability of mortgagee by sub-demise in possession, see *Perry* v. *Walker*, 24 L. J., Ch. 319, per Stuart, V.-C.

(*d*) Shep. Touch., chap. xiii.

(*e*) 27 Hen. 8, c. 10; *Rivis* v. *Watson*, 5 M. & W. 255.

(*f*) 34 & 35 Hen. 8, c. 5, repealed and re-enacted by the Wills Act, 1837, 7 W. 4 & 1 Vict. c. 26.

enacts, that "all grants or conveyances, by fine or otherwise, of any manors or rents, or of the reversion or remainder of any messuages or lands, shall be good and effectual to all intents and purposes without any attornment of the tenants of any such manors, or of the land out of which such rent shall be issuing, or of the particular tenants upon whose particular estates any such reversions or remainders shall and may be expectant or depending, as if their attornment had been had and made;" but by sect. 10 it is provided that "no such tenant shall be prejudiced or damaged by payment of any rent to any such grantor or conusor, or by breach of any condition for non-payment of rent, before notice shall be given to him of such grant by the conusee or grantee" (*g*).

Attornments to Strangers void.

By the Distress for Rent Act, 1737, 11 Geo. 2, c. 19, s. 11, attornments by tenants to strangers claiming title to the estate of their landlords are void, and their landlords' possession not affected thereby, unless made pursuant to some judgment at law, or decree in equity; or with the privity of the landlord, or to any mortgagee after the mortgage is become forfeited.

Attornment by Mortgagor to Mortgagee. *Kennedy, Ex parte.*

For the purpose of securing mortgage interest by the preferential powers of distress for rent, it has been the practice for mortgagors to "attorn tenants" to their mortgagees. The cases upon this subject have been already considered (*h*).

Assignee may sue or distrain without Attornment.

An assignee of the reversion, whether by way of mortgage or otherwise, if he has given due notice under 4 Ann. c. 16, s. 9, may sue or distrain for the rent (*i*). It makes no difference that the previous tenancy was only from year to year (*k*). But a prior mortgagee is not an assignee of the reversion, and therefore cannot distrain or sue for the rent until after the mortgagor's tenant has attorned to him, and so created a new tenancy as between them (*l*). After an attornment the mortgagee may distrain for the arrears of rent thereby admitted to be due (*m*). Such attornment may be made "after the mortgage is become forfeited" without the assent of the mortgagor (*n*).

No Stamp on mere Attornment.

An instrument in writing, professing to be a mere attornment, but which is in fact an agreement to create a fresh tenancy on new terms,

(*g*) See *Cook* v. *Moylan*, 1 Exch. 67; 5 D. & L. 101; Cole Ejec. 229, 473.

(*h*) Ante, Chap. VI., Sect. 6; and see especially, *Kennedy, Ex parte, Willis, In re*, 21 Q. B. D. 384—C. A., affirming Cave, J., but giving leave to appeal to the House of Lords. (No appeal was brought.)

(*i*) *Lumley* v. *Hodgson*, 16 East, 99; 14 R. R. 315; *Rivis* v. *Watson*, 5 M. & W. 255; *Lloyd* v. *Davies*, 2 Ex. 103.

(*k*) *Burrowes* v. *Gradin*, 1 D. & D. 213; *Harmer* v. *Bean*, 3 C. & K. 307.

(*l*) *Evans* v. *Elliott*, 9 A. & E. 342; *Partington* v. *Woodcock*, 6 A. & E. 690; *Rogers* v. *Humphreys*, 4 A. & E. 313. See Forms of Attornment, Appendix C., Nos. 16 and 16 (a).

(*m*) *Gladman* v. *Plumer*, 15 L. J., Q. B. 79; 10 Jur. 109.

(*n*) *Moss* v. *Gallimore*, 1 Smith, L. C.; *Doe* d. *Higginbotham* v. *Barton*, 11 A. & E. 314; *Doe* d. *Mayor, &c., of Poole* v. *Whitt*, 15 M. & W. 571; *Hickman* v. *Machin*, 4 H. & N. 720; but see *Alchorne* v. *Gomme*, 2 Bing. 54, 59, 61; *Delaney* v. *Fox*, 2 C. B., N. S. 768.

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requires a stamp as a lease or as an agreement for a lease (*o*). But a mere memorandum of attornment, not creating any new tenancy, or fresh terms, but merely substituting one landlord for another, does not require a stamp either as a lease or as an agreement (*p*), nor does an instrument merely acknowledging a tenancy on sufferance (*q*).

Effect of Attornment as an Estoppel.

An attornment generally estops the party making it from denying the title of the person to whom the attornment is made (*r*). Thus where an attornment was made to the claimants in an ejectment, who derived their title under a will, the tenant was held to be estopped from contending in a subsequent action that upon the true construction of the will the claimants had no title (*s*), although on a previous occasion it had been decided that the tenant might show the attornment to have been made by mistake and under suspicious circumstances, and that it had not been acted on for seven years, and a conveyance to himself made by the real owner (*t*). A. and B., tenants in common, having agreed to divide their property, and that *Blackacre* should belong to A.; the occupier of *Blackacre*, who after this agreement had paid his whole rent to A., cannot in an ejectment brought against him by A. object that the partition deed between A. and B. is not executed (*u*). Where a tenant had attorned and paid rent to a devisee of the landlord, and no fraud or misrepresentation had been practised towards him, it was held that he could not afterwards dispute the devisee's title by evidence showing that the testator was incompetent to make a will (*x*). Attornment by tenant to heir upon threat of eviction is tantamount to entry by the heir, and prevents the tenant from afterwards disputing his title (*y*). So, where a tenant of glebe land has attorned and paid rent to the subsequent incumbent, he will not be permitted to dispute his title by evidence of a simoniacal presentation of the incumbent (*z*). Sometimes, however, a tenant who has attorned will be allowed to prove that such attornment was procured by fraud, covin, or misrepresentation, or that it was made by mistake and in ignorance of material facts, and that the person to whom the attornment was made really had no title (*a*). Thus, where A., being tenant to B. who died, afterwards attorned to C. as heir of B., in ignorance that C.'s title as heir

(*o*) *Cornish* v. *Searell*, 8 B. & C. 471; 6 L. J., K. B. 254; 32 R. R. 445; *Doe* d. *Frankis* v. *Frankis*, 11 A. & E. 792; *Eagleton* v. *Gutteridge*, 11 M. & W. 465; 2 Dowl., N. S. 1053.

(*p*) *Doe* d. *Linsey* v. *Edwards*, 5 A. & E. 95, 102; *Doe* d. *Wright* v. *Smith*, 8 A. & E. 255.

(*q*) *Barry* v. *Goodman*, 2 M. & W. 768.

(*r*) Cole Ejec. 218, 219, 230.

(*s*) *Gravenor* v. *Woodhouse*, 2 Bing. 71; 25 R. R. 587.

(*t*) *Gravenor* v. *Woodhouse*, 1 Bing. 38; 25 R. R. 582.

(*u*) *Doe* d. *Pritchett* v. *Mitchell*, 1 Brod. & B. 11; 3 Moo. 219; 21 R. R. 567; and see *Arden* v. *Sullivan*, 14 Q. B. 832.

(*x*) *Doe* d. *Marlow* v. *Wiggins*, 4 Q. B. 367.

(*y*) *Hill* v. *Saunders*, 4 B. & C. 529.

(*z*) *Cooke* v. *Loxley*, 5 T. R. 4; 2 R. R. 521.

(*a*) *Rogers* v. *Pitcher*, 6 Taunt. 202; *Cornish* v. *Searell*, 8 B. & C. 471; 32 R. R. 445; *Doe* d. *Plevin* v. *Brown*, 7 A. & E. 447; *Brook* v. *Biggs*, 2 Bing. N. C. 572; *Hughes* v. *Hughes*, 15 M. & W. 703.

was disputed: held, that A. was not thereby estopped from showing that C. really had no title to the property, and that the attornment to him was a mistake (*b*). Where a person, having possession of land under a good title, became tenant and paid rent to a stranger, it was held, that he was not estopped, after such tenancy had determined and before he had given up possession, from setting up his own prior title in an ejectment by his lessor (*c*). But it is to be observed that in all such cases the onus of proof as to the title, &c., is shifted and thrown upon the person who attorned, and he must (amongst other things) *disprove* the title of the person to whom such attornment was made, which is sometimes impracticable or very difficult.

What amounts to an Attornment.

Payment of rent by a tenant to his landlord, after the title of the latter had expired, and after the tenant had received notice of an adverse claim, does not amount to an acknowledgment of title in the landlord, or to a virtual attornment; unless at the time of such payment the tenant heard the precise nature of the adverse claim, or how the landlord's title had expired (*d*). Where A. was tenant of premises under a lease granted by B., and a sequestration issued out of the Court of Chancery against the latter; and A. then signed the following instrument: "I hereby attorn and become the tenant to C. and D., two of the sequestrators named in the writ of sequestration issued in the said suit of Chancery, and to hold the same for such time and upon such conditions as may be subsequently agreed upon:" it was held, that this was an agreement to become tenant, and operated as an attornment; and also that as A. had not received possession from C. and D. he was not estopped by the attornment from disputing their title to the premises (*e*). But an instrument whereby the tenant merely puts one person in the place of another as his landlord and continues to hold under the same terms and conditions as before, is a mere attornment and not an agreement, and is evidence of ownership at the time it was executed against future occupiers, though they do not claim through the person who signed it (*f*). If an attornment be relied on to defeat the Statute of Limitations it must be made before action brought (*g*), and the defendant may contend that the party making such attornment did so without any intention to admit the party's right or title, and in ignorance that it would have that effect (*h*).

(*b*) *Gregory* v. *Doidge*, 3 Bing. 474.

(*c*) *Accidental Death Insurance Co.* v. *Mackenzie*, 9 W. R. 713.

(*d*) *Fenner* v. *Duploe*, 2 Bing. 10; 2 L. J., C. P. 102; 27 R. R. 537; *England* v. *Slade*, 4 T. R. 682; 2 R. R. 498; *Gregory* v. *Doidge*, 3 Bing. 474; *Claridge* v. *Mackenzie*, 4 M. & G. 143.

(*e*) *Cornish* v. *Searell*, 8 B. & C. 471; but see *Hall* v. *Butler*, 10 A. & E. 204.

(*f*) *Doe* d. *Linsey* v. *Edwards*, 5 A. & E. 95; *Doe* d. *Wright* v. *Smith*, 8 A. & E. 255; Cole Ejec. 229.

(*g*) *Doe* d. *Mee* v. *Leatherhead*, 4 A. & E. 784.

(*h*) *Doe* d. *Linsey* v. *Edwards*, 5 A. & E. 95, 106; *Kearney* v. *Genner*, cited Cole Ejec. 231.

CH. VII. SEC. 9. *Writs of Execution (Fieri Facias).*

## SECT. 9.—*Writs of Execution.*

### (a) *Fieri Facias.*

Seizure of term under Fi. fa.

Under the writ of fieri facias the sheriff may levy the debt on the lands or goods of the debtor and may therefore seize a leasehold interest. He may also seize the interest of a tenant under a tenancy from year to year (*i*).

Yearly tenancy.

Sheriff's Duty on executing a Fi. fa.

When the sheriff under a writ of fieri facias seizes a lease (actually or constructively) and sells the term, he must make an assignment of it by deed. If he merely puts the execution creditor in possession, that will not pass the term and the debtor may recover in ejectment (*k*). Seizure by a sheriff of a lease of a debtor's dwelling-house does not vest the term in the sheriff, but it remains in the debtor, even though sold by public auction, until after the sheriff executes an assignment to the purchaser (*l*). If the sheriff sells the term before the writ is returnable, but does not execute the assignment to the vendee till a subsequent period, the assignment is valid (*m*). Any such assignment may be made by the under-sheriff in the name and under the seal of office of the sheriff (*n*). Where a sheriff takes a lease and fixtures in execution, he must sell the fixtures separately, if he cannot find a purchaser for the whole (*o*). Where an outgoing tenant has agreed to assign the remainder of his term, the sheriff, before an actual assignment made, may sell the term under a fi. fa. against the tenant, and put upon it the value agreed to be given by the incoming tenant (*p*).

Equitable Interest.

Before the Judicature Act, an equitable interest in a term could not be seized and sold under a fi. fa. (*q*), but it would seem that it might have been reached in a court of equity (*r*), and that the effect of the Judicature Act is to render such an interest liable to execution generally, though this has been doubted (*s*).

Possession under Fi. fa.

When the sheriff seizes and sells a term under a fi. fa., he does not usually put the purchaser into actual possession of the property, especially if there be an under-tenant (*t*); but the purchaser is left to obtain actual possession by ejectment (*u*), or to recover the rent

(*i*) *Doe* d. *Westmoreland* v. *Smith*, 1 M. & R. 137.
(*k*) *Doe* d. *Hughes* v. *Jones*, 9 M. & W. 372; 1 Dowl., N. S. 352; Cole Ejec. 569.
(*l*) *Playfair* v. *Musgrove*, 14 M. & W. 239; 3 D. & L. 72.
(*m*) *Doe* d. *Stevens* v. *Donstan*, 1 B. & A. 230; 19 R. R. 300.
(*n*) *Doe* d. *James* v. *Brawn*, 5 B. & A. 243; 24 R. R. 347.
(*o*) *Barnard* v. *Leigh*, 1 Stark. R. 43.
(*p*) *Sparrow* v. *Earl of Bristol*, 1 Marsh. 10; 15 R. R. 666.
(*q*) *Scott* v. *Scholey*, 8 East, 467; 9 R. R. 487; *Martindale* v. *Booth*, 3 B. & Ad. 498; *The Mayor, &c. of Poole* v. *Whitt*, 15 M. & W. 571.
(*r*) *Gore* v. *Bowser*, 3 Sm. & Giff. 1; 24 L. J., Ch. 316, 440; *Partridge* v. *Foster*, 10 Jur., N. S. 741; 12 W. R. 1127.
(*s*) See Atkinson on Sheriff.
(*t*) *Taylor* v. *Cole*, 3 T. R. 295; 1 Smith, L. C.; 1 R. R. 706.
(*u*) Cole Ejec. 569.

from any under-tenant by distress or action in the usual manner (*x*). The purchaser becomes liable to the rent and covenants in the lease in like manner as any other assignee of the term (*y*). But the lessee continues liable on his covenants in the lease to pay rent and to repair, &c., notwithstanding the term has been taken from him under the execution (*z*), in like manner as he would have done had he executed an assignment of the term to a purchaser, in which case he would have probably had the usual covenant of indemnity from such rent and covenants.

### (b) *Elegit.*

Writ of elegit.

Under a writ of elegit the sheriff, instead of levying, delivers to the creditor who *elects* this remedy in preference to a levy, the lands of the debtor. The Statute of Westminster 2, from which the writ is derived, provided for the delivery of "all the chattels" and half the land. The Bankruptcy Act, 1883, s. 146, enacts that a writ of elegit "shall not extend to goods," but it is submitted that a leasehold interest does not come within the expression "goods" in that section. The Judgments Act, 1838, 1 & 2 Vict. c. 110, s. 11, authorizes the delivery under an elegit of all the lands instead of half only. The words of this section, which appear to include leaseholds (*a*), are that the sheriff may "make and deliver execution unto the party in that behalf suing of *all* such lands, tenements, tithes, rents, and hereditaments, including lands and hereditaments of copyhold and customary tenure, as the person against whom execution is so sued, or any person in trust for him, shall have been seised or possessed of at the time of entering up the said judgment (*b*), or at any time afterwards, or over which such person shall at the time of entering up such judgment, or at any time afterwards, have any disposing power which he might, without the assent of any other person, exercise for his own benefit."

The same land cannot be extended under two or more elegits, nor can the sheriff be entitled to poundage under more than one of such writs (*c*). But if two or more elegits be delivered to the sheriff, he should execute and give priority to that which was first delivered to him, and return to the other that he has not delivered the land to the plaintiff by a reasonable price and extent, the same having been

(*x*) *Lloyd* v. *Davies*, 2 Exch. 103; *Mayor, &c. of Poole* v. *Whitt*, 15 M. & W. 571.

(*y*) 1 Doug. 184.

(*z*) *Auriol* v. *Mills*, 4 T. R. 98; 1 Smith, L. C.; 2 R. R. 341.

(*a*) See *Rolleston* v. *Morton*, 18 M. & W. at p. 182, decided on the Irish Act, 3 & 4 Vict. c. 105; *Harris* v. *Davison*, 15 Sim. at p. 138, decided on s. 13 of the Judgments Act, 1838, 1 & 2 Vict. c. 110.

(*b*) The estates and interests of subsequent bonâ fide purchasers and mortgagees will not be affected unless the judgment, &c. be duly registered. See post, 285.

(*c*) *Carter* v. *Hughes*, 2 H. & N. 714.

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already extended and delivered to A. B. under a writ of elegit dated, &c., which had previously been delivered to him to be executed according to law.

The sheriff does not usually deliver actual possession of the property to the execution creditor: but it seems that he may lawfully do so where the debtor himself is in occupation (*d*). Tenants of the debtor cannot be turned out of possession under an elegit (*e*). The writ and inquisition thereon, when returned and filed, operate only as an assignment of the reversion; and therefore the judgment creditor cannot maintain ejectment against the tenants in possession until after their respective terms have expired or been duly determined by notice to quit or otherwise (*f*). But he may, like any other assignee of the reversion, sue or distrain for the rent which becomes due after the filing of the writ and the return thereto, and that without any previous attornment by the tenant (*g*), provided the writ and inquisition be valid, but not otherwise (*h*). He is not entitled to any rent which became due before the inquisition, although after the delivery of the writ to the sheriff (*i*). He may give a tenant such notice to quit as the debtor himself might have given, and afterwards maintain ejectment (*k*). If the tenancy commenced after the judgment was entered up and duly registered, an ejectment may be maintained against such tenant without previous notice to quit (*l*). So if the debtor himself is in actual possession (*m*).

When the debt and costs have been satisfied, and that appears upon an account taken by the master, the court will order possession of the land to be restored to the defendant (*n*).

Registration of Judgments, &c.

Judgments, &c., will not affect lands situate in Middlesex or Yorkshire, as against bonâ fide purchasers and mortgagees, until a memorial thereof is registered pursuant to the statutes in that behalf (*o*). In those and also in other counties, judgments, &c., must be registered with a Master of the Supreme Court, and execution thereon actually executed and registered, otherwise they will not prejudice subsequent bonâ fide purchasers and mortgagees, with or without notice of the judgment (*p*). In the counties palatine of Lancaster

(*d*) *Rogers* v. *Pitcher*, 6 Taunt. 206; *Chatfield* v. *Parker*, 8 B. & C. 543.

(*e*) *Taylor* v. *Cole*, 3 T. R. 295; 1 R. R. at p. 711.

(*f*) *Doe* d. *Da Costa* v. *Wharton*, 8 T. R. 1; Cole Ejec. 566.

(*g*) *Lloyd* v. *Davies*, 2 Exch. 103; *Ramsbottom* v. *Buckhurst*, 2 M. & S. 565; 15 R. R. 352.

(*h*) *Arnold* v. *Ridge*, 13 C. B. 745; Cole Ejec. 566.

(*i*) *Sharp* v. *Key*, 8 M. & W. 379; 9 Dowl. 770.

(*k*) Cole Ejec. 566.

(*l*) *Doe* d. *Putland* v. *Hilder*, 2 B. & A. 782; *Doe* d. *Evans* v. *Owen*, 2 C. & J. 71; but see 27 & 28 Vict. c. 112, s. 1, post.

(*m*) *Doe* d. *Parr* v. *Roe*, 1 Q. B. 700; *Doe* d. *Roberts* v. *Parry*, 13 M. & W. 356; 2 D. & L. 430; Cole Ejec. 566.

(*n*) *Price* v. *Varney*, 3 B. & C. 733; *Hughes* v. *Lumley*, 4 E. & B. 274.

(*o*) *Benham* v. *Keene*, 31 L. J., Ch. 129; 8 Jur., N. S. 604.

(*p*) See the Judgments Acts, Chitty's Statutes, tit. "Judgment and Execution."

and Durham, judgments, &c., must be registered with the proper officers of the courts there (*q*), and execution thereon actually executed and registered.

23 & 24 Vict. c. 38, s. 1.

By the Law of Property Amendment Act, 1860, 23 & 24 Vict. c. 38, s. 1, no judgment to be *entered up after the passing of that act* (*r*) affects any land (of whatever tenure) as to a bonâ fide purchaser for valuable consideration, or a mortgage (whether such purchaser or mortgagee have notice or not of any such judgment), unless process of execution of such judgment has been issued and registered before the execution of the conveyance or mortgage to him, and the payment of the purchase or mortgage money by him; but it is also provided that no judgment to be *entered up after the passing of the act* (*s*), nor any writ of execution or process thereon, shall affect any land, as to a bonâ fide purchaser or mortgagee, although execution shall have issued thereon and have been duly registered, unless it be executed within three calendar months from registration.

Writ of Execution must be issued and registered;

and also *executed* within 3 Months after Registration.

By the Judgments Act, 1864, 27 & 28 Vict. c.112, s. 1, no judgment to be entered up *after the passing of that act* (*t*) affects any land (of whatever tenure) until such land has been *actually delivered in execution* by virtue of a writ of elegit or other lawful authority, in pursuance of the judgment. And by sect. 3, the writ itself must be registered pursuant to the Judgment Act, 1860, 23 & 24 Vict. c. 38; after which a summary remedy is given by petition to the Chancery Division of the High Court for a sale of the debtor's interest in the land (*u*). This act includes equitable interests (*x*) and since the Judicature Act it has been unnecessary for a creditor, seeking to obtain equitable execution thereunder upon an equitable interest, previously to sue out an elegit (*y*); the appointment of a receiver is a delivery in execution by lawful authority (*z*).

Judgment not to affect Land till delivered in Execution.

## Sect. 10.—*Bankruptcy of Lessor.*

The reversion in lands held by lease under a landlord becoming bankrupt will under the term "property" vest in his trustees in bankruptcy (*a*), to whom there will be an assignment of the reversion by operation of law. It is conceived that 34 Hen. 8, c. 34 (*b*), whereby the assignee of the reversion may sue the lessee on the

Reversion vests in Trustees.

(*q*) 18 & 19 Vict. c. 15.
(*r*) 23rd July, 1860. If entered up after 29th July, 1864, see Judgments Act, 1864, 27 & 28 Vict. c. 112, s. 1.
(*s*) 23rd July, 1860. If entered up after 29th July, 1864, see Judgments Act, 1864, 27 & 28 Vict. c. 112, s. 1.
(*t*) 29th July, 1864.
(*u*) Sects. 4, 5, 6; see also Jud. Act, 1873, s. 34.
(*x*) *Hatton* v. *Haywood*, L. R., 9 Ch. 229; 43 L. J., Ch. 372.
(*y*) *Evans, Ex parte, Watkins, In re*, 13 Ch. D. 252; 49 L. J., Bank. 7—C. A.
(*z*) Ib.
(*a*) Bankruptcy Act, 1883, ss. 64, 168.
(*b*) Ante, p. 262.

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covenants, does not apply to such an assignment, but whether this be so or not is of little consequence, inasmuch as by sect. 57 of the Bankruptcy Act, 1883, trustees in bankruptcy may bring or defend any action, or other legal proceeding, relating to the property of the bankrupt.

The Bankruptcy Act contains no special provisions as to the tenants of a bankrupt. In the possible event of a reversion binding the landlord to an act so onerous as to make it worthless in the hands of the trustees, they may disclaim it as being "land burdened with onerous covenants" under sect. 55 of the act (*c*). Under sect. 23 of the Act of 1869, the reversion, like any freehold estate, would probably, on disclaimer, have vested in the Crown (*d*), but by sect. 55, sub-sect. 6 of the Act of 1883 (*e*) the court may make a vesting order of any disclaimed property, and a tenant would no doubt have a *locus standi* to apply to have such a vesting order made in his favour.

Bankruptcy of Lessor determines Tenancy at Will.

The bankruptcy of the landlord, as soon as known to a tenant at will, operates as a determination of the will, inasmuch as it works an assignment of the reversion (*f*).

Bankruptcy of mesne Landlord.

If the lessor be himself a tenant having created a sub-lease, the provisions of sect. 55, as to disclaimer, and especially of sub-sects. 2 and 6 thereof (post, pp. 295, 296), should be carefully considered.

## SECT. 11.—*Bankruptcy of Lessee.*

### (a) *Re-entry by Landlord for Forfeiture.*

Proviso for Re-entry lawful.

*Roe* v. *Galliers.*

A proviso for re-entry by the lessor in case of the bankruptcy of the lessee has for a long time been commonly inserted in leases; and in 1787 it was held in *Roe* d. *Hunter* v. *Galliers* (*g*), that such a proviso was perfectly good. Such a proviso, in all except building leases, is at the present day perhaps more commonly inserted than not, but it has been held nevertheless not to be a "usual" one (*h*). A proviso for re-entry if the lessee should be bankrupt or file a petition in liquidation, in a lease executed before the Act of 1883, may be put in force upon the presentation of a petition under that act (*i*). A condition for actual occupation by the tenant may be put in operation if trustees in bankruptcy take possession and assign to

(*c*) See the effect of this section, post, p. 291.

(*d*) *Re Mercer* and *Moore*, 14 Ch. D. 278; 49 L. J., Ch. 201; 42 L. T. 311.

(*e*) Post, p. 296.

(*f*) *Doe* v. *Thomas*, 6 Ex. 854; 20 L. J., Ex. 367.

(*g*) *Roe* d. *Hunter* v. *Galliers*, 2 T. R. 133; 1 R. R. 445. The lease was an agricultural one.

(*h*) *Hyde* v. *Warden*, 3 Ex. D. 72, and see ante, Chap. IV., Sect. 7.

(*i*) *Gould, Ex parte, Walker, In re*, 13 Q. B. D. 454; 51 L. T. 368; B. R. 168.

a purchaser (*k*), and so may the ordinary proviso for re-entry in case of bankruptcy notwithstanding any such assignment; but if the proviso be merely for re-entry in case of assignment without licence, and do not extend to bankruptcy, the trustees may disregard it, and assign without any licence from the landlord (*l*).

Effect of Bankruptcy of Lessee after assignment.

If the proviso be framed to come into effect if the lessee or his executors, administrators, or assigns, shall become bankrupt, and the lessee become bankrupt after assignment, the proviso cannot be put in force, for the bankruptcy intended by it is only the bankruptcy of him who has the term, and the proviso cannot be applied for the mere personal protection of the landlord against a stranger to it (*m*).

Annulment of Bankruptcy.

The annulment of a bankruptcy will not prevent the proviso from being put in force (*n*).

Ejectment on proviso for Re-entry.

Partial Relief.

The proviso for re-entry in case of bankruptcy may be put in force by peaceable entry or by action of ejectment, and this is one of the cases in which the notice ordinarily required by sect. 14 of the Conveyancing Act, 1881 (*o*), is expressly dispensed with by that section (*p*), except as amended by the Conveyancing Act, 1892. But there is no obligation upon the landlord to announce either to the bankrupt or his trustees whether he intends to take advantage of the proviso or not. If, however, after the act of bankruptcy or adjudication or other act to which the proviso applies, he accept or distrain for rent with knowledge of such act, he will have waived the forfeiture (*q*) and the trustees will have become his tenants, they, however, on their part being at liberty to disclaim the lease within the time and under the restrictions limited by sect. 55 of the Act of 1883.

Effect of proviso for Re-entry on building materials.

It has been held that in a building agreement a stipulation for forfeiture of building materials in event of the bankruptcy of the builder is void as contrary to the policy of the law of bankruptcy, and that such materials pass to the trustees notwithstanding the stipulation (*r*).

Tenant-Right.

It has not been expressly decided whether a "tenant-right" to allowances for seed and labour, &c., under a custom of the country passes to trustees in bankruptcy upon a proviso for re-entry in case of bankruptcy. The landlord is entitled to emblements in such a case (*s*), and in *Silcock* v. *Farmer* (*t*) it was held by the Court of

*Silcock* v. *Farmer.*

(*k*) *Doe* d. *Lockwood* v. *Clarke*, 8 East, 185; 9 R. R. 402.

(*l*) *Doe* v. *Bevan*, 3 M. & S. 353; 16 R. R. 293.

(*m*) *Smith* v. *Gronow*, [1891] 2 Q. B. 394; 60 L. J., Q. B. 776; 65 L. T. 117; 40 W. R. 46, per Wright, J.

(*n*) *Smith* v. *Gronow*, supra.

(*o*) Post, Chap. VIII., Sect. 6 (b).

(*p*) See *Gould, Ex parte, Walker, In re*, 13 Q. B. D. 454, and supra.

(*q*) See post, Chap. VIII., Sect. 5.

(*r*) *Ex parte Jay, Re Harrison*, 14 Ch. D. 19; 42 L. T. 600; 28 W. R. 449.

(*s*) See *Davis* v. *Eyton*, 7 Bing. 154, and Chap. XX., Sect. 3 (c).

(*t*) *Silcock* v. *Farmer*, 46 L. T. 404—C. A., per *Lord Colcridge*, C.J., and *Brett* and *Holker*, L.JJ.

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Appeal that a stipulation to pay for hay and straw grown in the last year of the term at the expiration of the term applied only to an expiration by effluxion of time, and not to a determination by re-entry for forfeiture. This decision, which is at variance in principle with some old authorities (*u*), would it is conceived have the effect of preventing a tenant-right under a custom from passing to the trustees, but a right to allowances under the Agricultural Holdings Act (Chap. XXI., post) would seem to be given them by sect. 61 of that act.

Hay and Straw.

Fixtures.

Removable fixtures (*x*) are removable during the term only or during such period after the expiration of it in which the tenant continues in lawful possession. Therefore after re-entry for forfeiture by bankruptcy the trustees have no right to enter and remove the fixtures (*y*), unless indeed the lease contain a stipulation for their removal by the bankrupt, in which case the trustees may enter and remove within a reasonable time after the re-entry by the landlord (*z*) or at any rate recover them from the landlord by action (*a*).

Partial Relief against Forfeiture.

The peculiar and partial relief against forfeiture in case of bankruptcy, which was newly given by the Conveyancing Act, 1892, will be dealt with hereafter (post, Chap. VIII., Sect. 6).

### (b) *Vesting of Lease in Trustees in Bankruptcy.*

Time of Vesting.

If the lease contain no proviso for re-entry in case of bankruptcy, or if it contain one, and the landlord does not re-enter, the lease, subject to the right of disclaimer which will be considered presently, vests in the official receiver on the lessee being adjudged bankrupt, and in the bankrupt's trustees as from time of their appointment (*b*). The bankrupt's option to claim a lease passes to his trustees (*c*) and so does his contract for a lease.

Tenancy from Year to Year.

A tenancy from year to year clearly vests in the trustee on the bankruptcy of the tenant, so as to render the trustee, unless he disclaims, liable for rent (*d*).

Assignment by Trustees.

Trustees in bankruptcy may assign the lease to a purchaser without any licence from the landlord, notwithstanding that it contain a covenant against assignment (*e*) whether such covenant be with the lessee and his executors merely (*f*) or with the lessee his executors

(*u*) See *Ex parte Maundrell, Re Drake*, 1 Buck, 85, in which was held in 1817 that a right to way-going crops under a lease determined by the Lord Chancellor under the repealed 49 Geo. 3, c. 121, s. 10, passed to assignees in bankruptcy.

(*x*) See as to this, post, Chap. XVI., Sect. 8.

(*y*) See *Pugh* v. *Arton*, L. R., 8 Eq. 626.

(*z*) *Stansfield* v. *Mayor of Portsmouth*, 4 C. B., N. S. 120; 27 L. J., C. P. 124.

(*a*) *Gould, Ex parte, Walker, In re*, supra, note (*p*).

(*b*) Bankruptcy Act, 1883, s. 54.

(*c*) *Buckland* v. *Papillon*, L. R., 2 Ch. 67; 36 L. J., Ch. 81; 15 L. T. 378.

(*d*) And see Robson on Bankruptcy, 6th ed., p. 451.

(*e*) *Doe* v. *Bevan*, 3 M. & S. 353; 2 Rose, 455; 16 R. R. 293.

(*f*) *Doe* v. *Smith*, 1 Marsh, 359; 5 Taunt. 795; 15 R. R. 660; 2 Rose, 280, 456.

and assigns (*g*). They may also assign to a pauper for the mere purpose of getting rid of their liability (*h*) upon the covenants in the lease, which liability is personal, with a right to be indemnified out of the assets (*i*).

To Pauper.

Trustees can claim against the landlord, at the expiration of their own tenancy by a notice to quit, all that the bankrupt tenant could have claimed against him, and the landlord cannot set off against a claim by trustees for allowances by custom a claim of his own for rent due from the tenant before the bankruptcy (*k*).

Personal Liability. Tenant-Right. Set-off.

The tenancy of the trustees will be determinable in the same manner as that of the bankrupt was, *i.e.*, by expiration of a lease, or by notice to quit in the case of a tenancy from year to year, given by either the trustees or the landlord. In a large number of cases, however, it is to be expected that the trustees will resort to the peculiar provisions of the Bankruptcy Act, and determine the tenancy by "disclaimer" (*l*).

Determination of Trustees' Tenancy.

A surety for a lessee will not be discharged by his trustee taking to the lease (*m*).

Surety not discharged.

It is enacted by the Sale of Farming Stock Act, 1816, 56 Geo. 3, c. 50 (*n*), s. 11, that "no assignee of any bankrupt" should dispose of any hay, straw, grass or grasses, turnips or other roots or any other produce "of a farm, or any manure, compost, ashes, seaweed or other dressings" intended for the farm in any other way than the bankrupt ought to have disposed of the same, if no commission of bankruptcy had issued. It was held by the Court of Appeal in *Lybbe* v. *Hart* (*o*), that this act applied to a trustee in bankruptcy under the Act of 1869; and it would seem also to apply to a bankruptcy under the Act of 1883, so that a trustee, notwithstanding disclaimer, is not entitled to sell hay, &c., which is subject to a covenant for consumption on the farm. Where a tenant restrained from selling hay and straw became bankrupt, and his trustee sold and afterwards disclaimed, it was held that the landlord could recover from the trustee, and that the trustee could not counterclaim for improvements within the Agricultural Holdings Acts (post, Chap. XXI., Sect. 3), inasmuch as s. 8 of that Act makes it compulsory for the tenant or his representative to proceed by arbitration (*p*).

User of Hay and Straw.

Hay and Straw.

(*g*) *Doe* v. *Bevan*, ubi supra.
(*h*) *Hopkinson* v. *Lovering*, 11 Q. B. D. 692; 52 L. J., Q. B. 391.
(*i*) *Titterton* v. *Cooper*, 9 Q. B. D. 473; 51 L. J., Q. B. 472; 46 L. T. 670; 30 W. R. 866; *Onslow* v. *Corrie*, 2 Mad. 330.
(*k*) *Alloway* v. *Steere*, 10 Q. B. D. 22; 52 L. J., Q. B. 38; 47 L. T. 333; 31 W. R 290.
(*l*) See sub-s. (d), infra.
(*m*) See *Harding* v. *Preece*, 9 Q. B. D. 281; 51 L. J., Q. B. D. 515; 47 L. T. 100; 31 W. R. 42.
(*n*) See this act at length, post, Appendix.
(*o*) *Lybbe* v. *Hart*, 29 Ch. D. 8; 54 L. J., Ch. 860; 52 L. T. 634. S. 149 of the act of 1883 is similar to s. 119 of the act of 1869 in providing for the construction of acts making mention of a "commission in bankruptcy."
(*p*) *Schofield* v. *Hincks*, 58 L. J., Q. B. 147; 60 L. T. 573; 37 W. R. 157.

CH. VII. s. 11.

*Bankruptcy of Lessee (Rescission of Lease).*

### (c) *Rescission of Lease.*

Sect. 55, sub-sect. 5, of the Bankruptcy Act, 1883, is as follows :—

Rescission of Lease.

Bankruptcy Act, 1883, s. 55 (5).

"The Court, may, on the application of any person who is as against the trustee, entitled to the benefit or subject to the burden of a contract made with the bankrupt, make an order rescinding the contract on such terms as to payment by or to either party of damages for the non-performance of the contract, or otherwise, as to the Court may seem equitable, and any damages payable under the order to any such person may be proved by him as a debt under the bankruptcy."

A lease would seem to be a "contract" within the meaning of this sub-section.

### (d) *Disclaimer of Lease by Trustees in Bankruptcy.*

Effect of the Acts before 1869.

By the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), all pre-existing bankruptcy acts were repealed. Many of the earlier acts (*q*) contained special provisions in reference to the case of a bankrupt tenant, and the Act of 1869 contained special provisions for the same case, the material difference between the former acts and the Act of 1869 being, that, under the former acts, a lease involving obligations which might exceed in value the benefits to be derived from it did not vest in the bankrupt's assignees until they did some act manifesting their acceptance, whereas, under the Act of 1869, all leases whatever, together with the rest of the bankrupt's property, vested in the trustees until they did some act manifesting their disclaimer (*r*).

Act of 1883.

The Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), which repeals and re-enacts with material amendments the Act of 1869, follows the same principle in respect to leases, and brings it out more fully by limiting a time within which a disclaimer is allowed to be operative. The many other amendments effected by the Act of 1883 are chiefly directed to safeguarding, mainly through the discretionary power of the Court of Bankruptcy, the interests of persons deriving title from the lessee. The subject-matter dealt with is an extremely complicated one, and the imperfect phraseology of the Act of 1869 had been supplemented by very numerous judicial decisions, occasionally almost legislative in character.

Effect of s. 23 of Act of 1869.

Shortly put, the effect of sects. 23 and 24 of the Act of 1869 was that the trustee in bankruptcy might, by writing, disclaim an onerous lease, and that upon the execution of such disclaimer, the lease should be deemed to have been *surrendered* on the date of the order of adjudication ; that any person interested in a disclaimed lease might apply to the Bankruptcy Court, which might order possession of the lease to be delivered up to him, or make such other order as to the possession as might be just ; that

(*q*) See, for instance, the acts of 1809, 1826, 1849, and 1861 ; 49 Geo. 3, c. 121, s. 19 ; 6 Geo. 4, c. 16, s. 75 ; 12 & 13 Vict. c. 106, s. 145 ; 24 & 25 Vict. c. 134, s. 131.

(*r*) See *Wilson* v. *Wallani*, 5 Ex. D. 155 ; 49 L. J., Ex. 437 ; 42 L. T. 375 ; 28 W. R. 597.

any person injured by the operation of the enactment should be deemed and might prove as a creditor of the bankrupt to the extent of the injury; and (sect. 24) that the trustee should not be entitled to disclaim where for not less than twenty-eight days he had failed upon application by any person interested to notify whether he disclaimed or not. A bankruptcy rule of doubtful validity (*s*) (Rule 28 of 1871) prescribed further that a trustee might not disclaim without leave of the court.

Rule under Act of 1869.

The main decisions (*t*) upon these sections amounted in effect to this:—that disclaimer of a lease did not put an end to a sub-lease (*u*): that it did not prevent the lessor from enforcing against a sub-lessee the remedies of distress and re-entry derived from the lease (*x*): that if the bankrupt were assignee, the lessee remained liable on the covenants (*y*): that part only of a lease could not be disclaimed (*z*): that all rights of the lessee under the lease, such as to remove fixtures, became lost to the trustee (*a*); and that the trustee, if neglecting or unable to disclaim, was personally liable on the covenants as from the date of his appointment (*b*).

Decisions on s. 23 of Act of 1869.

The 55th section of the Act of 1883 to a great extent follows the principle of the above decisions, but also materially amends the statute law of the subject by limiting a time for disclaimer, by making special provisions for safeguarding assignees, sub-lessees and others, and by enlarging the powers of the court in bankruptcy both to make general rules, and to make orders in particular cases. The 13th section of the Bankruptcy Act, 1890, extends the time for disclaimer from three months to *twelve* (giving power to the court still further to extend the time), and amends the special provisions as to safeguarding assignees, &c. Rule No. 69 of 1890, very much enlarging Rule 320 of 1886 by the requirement that a disclaimer must be *filed* and otherwise, enumerates the cases in which a lease may be disclaimed without the leave of the court, and prescribes that except as provided by the rule a disclaimer without leave shall be void. The combined effect of section 55 of the Act of 1883, of sect. 13 of the Act of 1890, and of Rule 69 of 1890, which are all printed in full in Appendix A., post, is shortly as follows:—

Effect of Act of 1883, s. 55, of 1890, s. 13; and Rule 69 of 1890.

Where a lease is onerous, or a contract for a lease is unprofitable, the trustee may within twelve months of the first appointment of a

Disclaimer by Leave.

(*s*) See *Reed* v. *Harvey*, L. R., 5 Q. B. D. 184.

(*t*) See *Shilson, Ex parte*, 36 W. R. 187, and p. 295 (*k*), infra.

(*u*) *Smalley* v. *Hardinge*, 7 Q. B. D. 524; 50 L. J., Q. B. 365.

(*x*) *Ex parte Walton, Re Levy*, 17 Ch. D. 746; 50 L. J., Ch. 657; 45 L. T. 1; 30 W. R. 395.

(*y*) *Hill* v. *East and West India Dock Co.*, 9 App. Cas. 448; 53 L. J., Ch. 842; 51 L. T. 163; 32 W. R. 925—H. L.

(*z*) *Allen, Ex parte, Fussell, In re*, 20 Ch. D. 341.

(*a*) *Ex parte Glegg, Re Latham*, 19 Ch. D. 7.

(*b*) *Titterton* v. *Cooper*, infra, 295.

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trustee disclaim it, with leave of the court having jurisdiction in bankruptcy, or without such leave, if the bankrupt has not assigned, sub-let or mortgaged the lease, *and* if the rent and value be less than 20*l.*, or if the estate is, as being not more than 300*l.* in value, being administered summarily, *or* if the "trustee serves the lessor with notice of his intention to disclaim, and the lessor does not within seven days after the receipt of such notice give notice to the trustee requiring the matter to be brought before the court" (*c*), *or* where the bankrupt has sub-let, or mortgaged the lease, and the trustee serves the lessor and the sub-lessee with notice of his intention to disclaim, and none of the parties so served within fourteen days after service requires the matter to be brought before the court. The disclaimer must be by writing signed by the trustee, and must be filed in the court. It will operate to discharge the trustee from personal liability, and to determine the rights and liabilities of the bankrupt, but not to affect the rights and liabilities of any other person. An oral lease and a tenancy from year to year (*d*), and indeed a tenancy for any period however short, seem to be equally within the sub-section under the words "unsaleable property," and also a contract for a lease under the words "unprofitable contract" (*e*).

Without Leave.

Contract for Lease—

Tenancy from Year to Year.

Forms of Disclaimer and notices, &c.

No less than nine forms in connection with disclaimer are prescribed by the Bankruptcy Rules of 1886 and 1890, seven being new in 1890.

Form No. 119A of "Notice of intention to disclaim lease," is as follows:—

(*Title.*)

Take notice that I intend to disclaim the [lease or tenancy *as the case may be*] dated , whereby [*here specify property let*] was let to the above-named debtor at a rent of *l.*

If you require the matter to be brought before the court, you must give notice to me in writing within seven days of the receipt by you of this notice.

Dated this day of 189 .

Trustee.

Address

To the Landlord of the above-mentioned property.

Form No. 120E of "Notice by Landlord or other person requiring trustee to bring matter of intended disclaimer of property burdened with onerous covenants before the court" is as follows:—

(*Title.*)

To Mr. .

Trustee of the property of the above-named bankrupt.

Sir, I hereby give you notice that the said bankrupt was, at the date of the receiving order, interested as lessee [*or, as the case may be*] in the property described in the schedule to this notice, and that as such lessee [*or, as the case may be*] the bankrupt was

(*c*) Rule 69 of the Rules of 1890, replacing, with additions, Rule 320 of the Rules of 1886, which was identical with Rule 232 of the Rules of 1884, post, App. A.

(*d*) And see Robson on Bankruptcy, 6th ed., p. 451. It was assumed in *Alloway v. Steere*, 10 Q. B. D. 22, and p. 289 (*k*), ante, that a tenancy from year to year could be disclaimed.

(*e*) See *Maughan, In re*, 14 Q. B. D. 956; 2 Morrell, 25.

liable in respect of [*set out nature of the bankrupt's liability*], which liability has devolved on you as trustee in bankruptcy of his property, and I hereby require you to bring the matter of your intended disclaimer of the bankrupt's interest in the said property before the court.

I am, &c.,
(Signed) A. B.
[*State how interested in the property.*]

The schedule to the above Form is printed with the whole nine Forms at length in Appendix C., post.

Lease from Crown.

The provisions of sect. 55 are "provisions relating to the remedies against the property of a debtor" within the meaning of s. 150 of the Act (whereby such provisions bind the Crown) so that a lease to the bankrupt from the Crown may be disclaimed by the trustee (*f*).

Mortgage.

Tenancy under the attornment clause in a mortgage is within the section (*g*).

But the equity of redemption which vests in the trustee of a bankrupt who before bankruptcy has assigned his whole term by way of mortgage is not property "burdened with onerous covenants" within the section, and no disclaimer of such equity of redemption is necessary (*h*).

Effect of Disclaimer without Leave.

A disclaimer without leave, if leave be required, is void (*i*): but if no leave was required, the court has no power over the trustee in the matter, either to review his decision, or to order him to pay rent for use and occupation from the time that the premises vested in him (*k*).

Limit of Time for Disclaimer.

The disclaimer must, by sub-s. 1 of sect. 55 of the Act of 1883, as amended by s. 13 of the Act of 1890, be made in ordinary cases within *twelve* months after the first appointment of a trustee; but it is provided by the same enactments that "where the property shall not have come to the knowledge of the trustee within one month after such appointment, he may disclaim at any time within *twelve* months after he became aware thereof;" and this time may be extended by the court either before or after the expiration thereof upon such terms, if any, as the court may think fit to impose, under s. 105, sub-sect. 4 of the Act of 1883 (*l*).

Extension.

Restriction on Disclaimer.

It is further provided that the trustee shall not be entitled to disclaim in any case where he has been applied to in writing by any person interested to decide whether he will disclaim or not, and he has for twenty-eight days after such application, or such extended

(*f*) *Trotter, In re, Thomas, Ex parte*, 57 L. J., Q. B. 574; 59 L. T. 447.

(*g*) See *Isherwood, Ex parte, Knight, In re*, 22 Ch. D. 384.

(*h*) *Gee, In re, Official Receiver, Ex parte*, 24 Q. B. D. 65; 59 L. J., Q. B. 16; 38 W. R. 143.

(*i*) Rule 69 of 1890, post, App. A.

(*k*) *Zerfass, Ex parte, Sandwell, In re*, 14 Q. B. D. 960; 30 W. R. 523.

(*l*) *Foreman, Ex parte, Price, In re*, 13 Q. B. D. 466; 33 W. R. 139.

By s. 12 of the Bankruptcy Act, 1890, 53 & 54 Vict. c. 71, it is enacted that:

"The period of twelve months shall be substituted for each of the periods of three months and two months limited by sub-s. 1 of s. 55 of the principal act, and such period of twelve months may be extended by the court."

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period as the court may allow, declined or neglected to give notice whether he disclaims or not. For this provision to operate, it must be proved that the application was actually delivered: mere proof of posting it will not be enough (*m*). Leave for extension ought to be applied for within twenty-eight days (*n*); but the extension may be granted afterwards (*o*), though special circumstances should be shown (*p*). In one case, where the trustee did not signify his intention as required, leave to disclaim was given only on condition of payment of a month's rent to the landlord, such rent, together with the landlord's costs, to be paid by the trustee personally (*q*).

Leave of the Court. Sub-s. 3.

By sub-sect. 3, the court may, before or on granting leave to disclaim, require such notices to be given to persons interested and impose such conditions of granting leave, and make such orders with regard to fixtures, tenant's improvements and other matters arising out of the tenancy as the court thinks just.

Compensation to Landlord.

Leave has been given to disclaim an expired lease (*r*).

If the trustee has continued to occupy the premises with a view to the benefit of the estate, or if his occupation has in fact produced a benefit, in either case there will be a reason for awarding compensation to the landlord (*s*).

Fixtures and Tenant's Improvements.

It had been held, under sect. 23 of the Act of 1869, that by disclaimer the trustee lost all right to remove fixtures (*t*), even by virtue of an express stipulation (*u*), so that the landlord was entitled as against the trustee to fixtures severed after bankruptcy, whether severed after (*x*) or before (*y*) disclaimer; and a similar rule was held to be applicable to rights in connection with acts of husbandry derived from an agricultural lease (*z*). Under the above sub-section 3 of sect. 55 of the Act of 1883, the court appears to have full discretionary power to order either fixtures or compensation to be given by any party before it to any other (*a*). By sect. 61 of the Agricultural Holdings Act, 1883, a trustee in bankruptcy is included in the term tenant, and appears to have a statutory claim to compensation for improvements within the meaning of that act.

Agricultural Improvements.

(*m*) *Reed* v. *Harvey*, 5 Q. B. D. 184: 49 L. J. Q. B. 295; 42 L. T. 511; 28 W. R. 423.

(*n*) See *Ex parte Lovering, Re Jones*, L. R., 9 Ch. 586; 43 L. J., Bank. 94.

(*o*) *Banner* v. *Johnson*, L. R., 5 H. L. 157; 40 L. J., Ch. 730.

(*p*) *Ex parte Harris, Re Richardson*, 16 Ch. D. 613; 44 L. T. 282.

(*q*) *Page, In re*, 1 Morrell, 287; L. R., 14 Q. B. D. 401; 33 W. R. 825.

(*r*) *Ex parte Paterson, Re Throckmorton*, 11 Ch. D. 908; *Ex parte Dyke, Re Morrish*, L. R., 22 Ch. D. 410; 52 L. J., Ch. 570; 48 L. T. 303; 31 W. R. 278 (C. A.).

(*s*) See *Ex parte Isherwood, Re Knight*, 22 Ch. D. 384; *Ex parte Arnal, Re Witton*, 24 Ch. D. 26; 49 L. T. 221; *Re Zappert*, 1 Morrell, 72; *Re Brooke*, Ib. 82; Williams's Bankruptcy Practice, 5th ed., at p. 230.

(*t*) *Ex parte Brook, Re Roberts*, 10 Ch. D. 100; 48 L. J., Bank. 22; 39 L. T. 458; 27 W. R. 255 (C. A.).

(*u*) *Ex parte Gleyg. Re Latham*, 19 Ch. D. 7; 51 L. J., Ch. 367.

(*x*) *Ex parte Stephens, Re Lavies*, 7 Ch. D. 127.

(*y*) *Ex parte Brook, Re Roberts*, supra (*t*).

(*z*) *Ex parte Dyke, Re Morrish*, 22 Ch. D. 410; 32 L. J., Ch. 570; 48 L. T. 303; 31 W. R. 278.

(*a*) See *Moser, In re*, 1 Morrell, 244.

A trustee selling hay and straw in breach of the bankrupt lessee's agreement, and afterwards disclaiming, has been held personally liable for his wrongful act, and not protected by disclaimer (*b*).

Hay.

Sub-sect. 2 provides that disclaimer shall put an end to the lease as between the lessor and the bankrupt or his trustee, but as between the lessor and the bankrupt or his trustee only, as follows:—

Effect of Disclaimer. Sub-s. 2.

The disclaimer shall operate to determine, as from the date of disclaimer, the rights, interests, and liabilities of the bankrupt and his property in or in respect of the property disclaimed, and shall also discharge the trustee from all personal liability in respect of the property disclaimed as from the date when the property vested in him, but shall not, except for the purpose of releasing the bankrupt and his property and the trustee from liability, affect the rights or liabilities of any other person.

By disclaimer, therefore, the lease is lost to the bankrupt and his estate for ever, and the rights of the landlord *upon the lease against the bankrupt and his estate* are also lost, though, as we shall see presently, the landlord has certain rights of proof and distress reserved to him.

Personal liability of Trustee.

The lease, with the other property of the bankrupt, vests in the trustee at the date of his appointment, so that disclaimer will save him wholly from all personal liability whatever. Should he not disclaim, his personal liability is undoubted (*c*).

Rights of Mortgagee, Assignee, Sub-lessee, and Lessee where Assignee bankrupt.

The "other persons" whose rights and liabilities are preserved by this sub-section are assignees, mortgagees (*d*), sub-lessees (*e*), lessees, where it is the assignee who is bankrupt (*f*), sureties for rent (*g*), and all persons whatever whose rights or liabilities may be affected by the disclaimer. Especially should it be borne in mind that if it be an assignee who is bankrupt, the lessee is, and has always been, liable on his covenants to the lessor, notwithstanding assignment (*h*).

Vesting Order. Sub-s. 6.

It is enacted by sub-sect. 6 that the court may, on application by any person either claiming any interest in any disclaimed property or [being] under any liability not discharged by the act in respect of any disclaimed property, make an order for the vesting the property in "any person"—which term includes the lessor himself, so that a vesting order may be (*i*) made in his favour (*k*)—entitled

In favour of Lessor.

(*b*) *Schofield* v. *Hincks*, 37 W. R. 157.

(*c*) See *Titterton* v. *Cooper*, 9 Q. B. D. 473, and compare *Tremeere* v. *Morison*, 1 B. N. C. 89, and the remarks thereon, p. 306, post.

(*d*) See *Re Wilson*, L. R., 1 Eq. 186.

(*e*) See *Smalley* v. *Hardinge*, 7 Q. B. D. 524; 50 L. J., Q. B. 368.

(*f*) See *East and West India Dock Co.* v. *Hill*, 9 App. Cas. 448, and ante, 291 (*y*).

(*g*) See *Harding* v. *Preece*, 9 Q. B. D. 281; 51 L. J., Q. B. 515.

(*h*) *Barnard* v. *Godscall*, Cro. Jac. 309, and ante, p. 272. By the Bankruptcy Act, however, the lessee loses the benefit of the covenant of indemnity which the assignee would give him, and therefore has a right of proof against the bankrupt's estate. See *Hardy* v. *Fothergill*, 13 App. Cas. 351; 37 W. R. 177, and p. 271 (*f*), ante.

(*i*) And will as a general rule be. See *Britton, In re*, 37 W. R. 621.

(*k*) *Finley, In re, Clothworkers' Co., Ex parte*, 21 Q. B. D. 475; 57 L. J., Q. B. 626;

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thereto: but the enactment is subject to the following restrictive proviso:—

Proviso restricting Vesting Order in favour of Sub-lessee.

Provided always, that where the property disclaimed is of a leasehold nature, the court shall not make a vesting order in favour of any person claiming under the bankrupt, whether as under-lessee or as mortgagee by demise, except upon the terms of making such person subject to the same liabilities and obligations as the bankrupt was subject to under the lease in respect of the property at the date when the bankruptcy petition was filed, and any mortgagee or under-lessee declining to accept a vesting order upon such terms shall be excluded from all interest in and security upon the property, and if there shall be no person claiming under the bankrupt who is willing to accept an order upon such terms, the court shall have power to vest the bankrupt's estate and interest in the property in any person liable either personally or in a representative character, and either alone or jointly with the bankrupt to perform the lessee's covenants in such lease, freed and discharged from all estates, incumbrances, and interests created therein by the bankrupt.

Proviso restricting Vesting Order in favour of Sub-lessee.

A mortgagee by demise, therefore, by taking a vesting order will incur the very liability—that of the covenants in the lease—which the substitution of a mortgage by demise for a mortgage by assignment was intended to free him from.

Modification of Proviso by Court.

By s. 13 however of the Bankruptcy Act, 1890, 53 & 54 Vict. c. 71, "the Court" [of Bankruptcy] "may if it thinks fit, modify the terms prescribed" by the above proviso "so as to make the person in whose favour the vesting order may be made subject only to the same liabilities and obligations as if the lease had been assigned to him when the bankruptcy petition was filed and [if the case so requires] as if the lease had comprised only the property comprised in the vesting order."

The general intention of the legislature was to interfere as little as possible with the rights of the lessor and third persons, to relieve the estate by giving the lessor a right of proof, and to relieve the trustee from personal liability; and although the legislature has not expressly empowered the court to graduate the terms of the vesting order to meet each case, it has in effect done so by enabling the court to adopt sect. 13 of the Act of 1890 if the landlord will not do what is right and reasonable. So it was observed by Vaughan Williams, J., in *Walker, in re, Mills, ex parte* (*l*), in which a term was vested by order in mortgagees of a lease by sub-demise upon the mortgagees performing all covenants, but the landlord becoming bound to accept a surrender upon six months' notice.

60 L. T. 134; 37 W. R. 6—C. A.; *Shilson. Ex parte, Cock, In re*, 20 Q. B. D. 343; 57 L. J., Q. B. 169; 36 W. R. 187; 58 L. T. 586; per Cave and A. L. Smith, JJ., getting rid of the doubts of Cave, J., in *Barker, In re, Turquand, Ex parte*, 14 Q. B. D. 405.

(*l*) *Walker, In re, Mills, Ex parte*, 64 L. J., Q. B. 783; 72 L. T. 330; 2 Manson, 60, 319; 15 R. 350, per Vaughan Williams, J.

All persons named in the sub-section have a right to compete in claiming the order, and the person who makes the first application must submit himself to the discretion of the registrar in bankruptcy, and run the risk that the registrar may think that other persons should have notice of the application (*m*).

Parties to application for Vesting Order.

A mortgagee by sub-demise assigning his mortgage to a trustee for himself is still liable to have a vesting order made against him, the assignment in trust being as between the mortgagee and the landlord, absolutely void (*n*).

Section 55 closes with a provision that any person injured by the disclaimer may prove his injury as a debt.

Proof. Sub-s. 7.

### (e) *Distress for Rent.*

History.

The early bankruptcy acts left the landlord's common law remedy by distress whole and intact, and goods in the custody of a messenger in bankruptcy were more than 100 years ago held (*o*) not to be in the custody of the law so as to be exempt from distress under the head of exemptions (*p*). A mere limitation of the distress to one year's rent, first imposed in 1826 by 6 Geo. 4, c. 16, s. 74, and repeated in 1849 by 12 & 13 Vict. c. 106, s. 129, was continued by the Acts of 1869 and 1883 in terms which first affirm the common law right of distress, and then limit the extent to which the proceeds of a distress may be available, an amending act of 1890 cutting down this limit from twelve months' arrears of rent to six.

The 42nd section of the Act of 1883 repeats exactly sect. 34 of the Act of 1869. As amended by s. 28 of the Act of 1890, it is as follows :—

Distress for Six Months' Rent.

Act of 1883, s. 42: Act of 1890, s. 28.

(1) The landlord or other person to whom any rent is due from the bankrupt may at any time, either before or after the commencement of the bankruptcy, distrain upon the goods or effects of the bankrupt for the rent due to him from the bankrupt, with this limitation, that if such distress for rent be levied after the commencement of the bankruptcy, it shall be available only for *six months' rent* (*q*) accrued due prior to the date of the order of adjudication, but the landlord or other person to whom the rent may be due from the bankrupt may prove under the bankruptcy for the surplus due for which the distress may not have been available.

Proof for Surplus.

(2) For the purposes of this section the term "order of adjudication" shall be deemed to include an order (*r*) for the administration of the estate of a debtor whose debts do not exceed 50*l*., or of a deceased person who dies insolvent.

(*m*) *Morgan, In re*, 22 Q. B. D. 592 ; 58 L. J., Q. B. 295 ; 60 L. T. 941 ; 37 W. R. 344—C. A., where see form of order.

(*n*) *Hepburn, Ex parte, Smith, In re*, 38 W. R. 744.

(*o*) *Plummer, Ex parte*, 1 Atk. 103, per Lord Hardwicke.

(*p*) See post, Chap. XI.

(*q*) By s. 28 of the Bankruptcy Act, 1890, 53 & 54 Vict. c. 71, it is enacted that :—

Section forty-two of the principal act, relating to the power of a landlord to distrain for rent, shall be read and construed as if the words "six months' rent" were substituted for the words "one year's rent."

(*r*) In Bankruptcy only ; an order in the Chancery Division for administration does

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It will be observed that these words not only do not prohibit a distress by the landlord, but expressly allow it, and the result would seem to be that a distress for more than six months' arrears is not made by them illegal or excessive, but that they have the effect of making the landlord a trustee for the trustee in bankruptcy for the surplus proceeds of any such distress.

A "Landlord or other Person."

The words "landlord or other person" apply to a person who is made landlord by an attornment clause in a mortgage deed (*s*), unless the rent be a sham rent agreed on for the purpose of evading the law of bankruptcy (*t*), but not to a gas company in respect of gas rent (*u*), unless it have special statutory powers, *e.g.*, to recover the gas rent "by the same process as landlords are by law empowered to recover rent in arrear" (*x*).

Administration Order.

The section has no application to the case where the estate of a deceased tenant is being administered as insolvent in the Chancery Division of the High Court, but only to the case where such estate is being administered in bankruptcy under sect. 125 of the Bankruptcy Act, 1883, or where the estate of a living debtor whose debts do not exceed 50*l.* is being administered under sect. 122 of that act. If the estate be in the course of administration otherwise than under the Bankruptcy Act, the landlord may distrain for six years' arrears (*y*).

Whether Distress barred by Proof.

There appears to be some authority for saying that a landlord, if he choose to prove for the six months' rent for which he might have distrained, loses the right of distress for such rent (*z*); and it seems, at any rate, that he cannot prove and distrain for the same amount of rent.

Right of Distress paramount.

Distress is not such a "legal process" as can be restrained by the court under sect. 10, sub-sect. 2, of the Bankruptcy Act, 1883 (*a*), and it can be fully proceeded with, notwithstanding that a receiver is in possession of the bankrupt's property (*b*).

not limit the power of the landlord to a recovery of six months' rent only: *Fryman's Estate, In re*, 38 Ch. D. 468; 57 L. J., Ch. 862; 58 L. T. 872; 36 W. R. 631.

(*s*) *Jackson, Ex parte, Bowes, In re*, 14 Ch. D. 725. See also *Williams, Ex parte*, 7 Ch. D. 138; *Stockton Iron Furnace Co., In re*, 10 Ch. D. 335; *Voisey, Ex parte, Knight, In re*, 21 Ch. 442; 52 L. J., Ch. 121; 47 L. T. 362; 31 W. R. 19; but as to necessity of registering an attornment clause, see Chap. VI., Sect. 5, ante.

(*t*) See *Voisey, Ex parte*, ubi supra.

(*u*) *Hill, Ex parte, Roberts, In re*, 6 Ch. D. 63; 46 L. J., Bank. 116; 37 L. T. 46; 25 W. R. 784.

(*x*) *Birmingham Gaslight Co., Ex parte*, L. R., 11 Eq. 615; 40 L. J., Bank. 52; 24 L. T. 639; 19 W. R. 603.

(*y*) *Fryman's Estate, In re*, 38 Ch. D. 468; 57 L. J., Ch. 862; 58 L. T. 872; 36 W. R. 631; per Chitty, J.

(*z*) *Grove, Ex parte*, 1 Atk. 105, per Lord Hardwicke, in 1739. See Robson, p. 303, where it is said that the landlord "must make his election to waive either his proof or distress." But in *Ex parte Grove*, the rights of a vendee came in question, and in *Ex parte Devine*, Cooke, B. L. 201, it was said by Lord Bathurst, that that was the ground of decision. On principle, it is submitted that this question ought to be determined in favour of the landlord.

(*a*) *Ex parte Birmingham Gaslight Co.*, L. R., 11 Eq. 615; 46 L. J., Bank. 52.

(*b*) *Ex parte Till, In re Mayhew*, L. R., 16 Eq. 97; 42 L. J., Bank. 84; 21 W. R. 574.

If the goods be sold by the trustees and removed from the premises before the landlord has distrained upon them, he has no right to follow them for the purpose of distress, but loses his preferential right altogether (*c*).

Landlord may not follow the Goods.

If the goods distrained be left unsold, and found in the order and disposition of the bankrupt at the commencement of the bankruptcy, they will pass to the trustee by the order and disposition clause of the Bankruptcy Act (*d*).

Benefit of Distress lost by leaving Goods with Bankrupt.

The limitation, that distress is applicable to six months' rent only, protects the goods of the bankrupt only, and not the goods of a third party which may be on the premises of the bankrupt. This follows from the very words of the section, which limit only "such distress," *i.e.*, distress on the goods of the bankrupt, and from the case in which it was held that property which the bankrupt tenant had mortgaged was liable to distress in full (*e*).

Third Party not protected by the Limitation.

The landlord's right to distrain for rent accruing due after the order of adjudication is quite unaffected: for such rent (though payable in advance), if the trustee do not disclaim the lease, or if the trustee continue in possession, the landlord may distrain in full (*f*), otherwise, as was observed by Bacon, C.J., a trustee in bankruptcy might make use of a man's property without paying any rent for it, and snap his fingers at him. For the rent due for not more than six months between any day of payment and the day of commencement of bankruptcy the landlord may distrain not only by virtue of the Bankruptcy Act, but by virtue of the Apportionment Act (*g*).

Distress for Rent due after Adjudication.

Payment by a tenant, after an act of bankruptcy, of rent to avoid a distress is valid (*h*), and a person who paid out a distress has been held entitled to be recouped in full out of the bankrupt's estate before the creditors received any dividend (*i*).

Payments to avoid Distress valid.

A landlord of a farm cannot, by entering into an agreement with his tenant after bankruptcy not to distrain on the terms of taking over the dead stock at a valuation (though the agreement is beneficial to the estate), obtain a larger amount for arrears of rent than the six months' rent allowed by the Bankruptcy Acts as above stated (*k*).

Agreement with landlord of farm to take Stock in lieu of Rent.

Where a landlord had, on an assignment of the lease, assented to a readjustment in the mode of paying the rent, and the tenant made

Effect of Non-payment of a Reduced Rent.

(*c*) *Bradyll* v. *Bale*, 1 Bro. C. C. 427.

(*d*) *Ex parte Shuttleworth, Re Deane*, 1 D. & C. 223.

(*e*) *Brocklehurst* v. *Lawe*, 7 E. & B. 176; 26 L. J., Q. B. 107, agreed with, and its principle explained, in *Railton* v. *Wood*, 15 App. Cas. 363—P. C.

(*f*) *Hale, Ex parte, Binns. In re*, 1 Ch. D. 285; 45 L. J., Bank. 21; 33 L. T. 706; 24 W. R. 300.

(*g*) *Howell, In re, Mandleberg, Ex parte*, [1895] 1 Q. B. 844; 64 L. J., Q. B. 454; 72 L. T. 472; 43 W. R. 447.

(*h*) *Stevenson* v. *Wood*, 5 Esp. 200.

(*i*) *Ex parte Kennard*, 21 L. T. 684. The payment was at the request of certain creditors.

(*k*) *Griffith, In re, Official Receiver, Ex parte*, 66 L. J., Q. B. 763; 4 Manson, 217.

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default in payment at the reduced rate, and afterwards became bankrupt, when the landlord distrained for the full rent, the court held that the tenant's trustee in bankruptcy could not recover from the landlord the difference between the full and reduced rent, the landlord's rights having revived on non-performance by the tenant of the terms of the agreement (*l*).

Preferential Payments for Rates, Taxes, Wages, &c.

By sub-sect. 4 of sect. 1 of the Preferential Payments in Bankruptcy Act, 1888, 51 & 52 Vict. c. 62, it is provided that:—

In the event of a landlord or other person distraining or having distrained on any goods or effects of a bankrupt or a company being wound up within three months next before the date of the receiving order or the winding up order respectively, the debts to which priority is given by this section (*m*) shall be a first charge on the goods or effects so distrained on, or the proceeds of the sale thereof. Provided, that in respect of any money paid under any such charge the landlord or other person shall have the same rights of priority as the person to whom such payment is made.

See this section discussed, post, Chap. XI., Sect. 16.

### (f) *Proof for Rent, &c.*

Proof for Rent for Broken Period.

By Rule 19 of the second schedule of the Bankruptcy Act, 1883, re-enacting sect. 35 of the Act of 1869, "when any rent falls due at stated periods, and the receiving order is made at any time other than one of those periods, the person entitled to the rent may prove for a proportionate part thereof up to the date of the order as if the rent grew due from day to day."

Proof for Rent in addition to Distress.

We have already seen that a landlord may distrain for six months' rent only, but may prove under the bankruptcy for the surplus due for which the distress may not have been available (*n*), and discussed the question how far the distress is barred by proof (*o*).

Proof for Injury by Disclaimer.

As to proof for injury by disclaimer it is provided by sub-sect. 7 of sect. 55 of the Bankruptcy Act, 1883, that:—

"Any person injured by the operation of a disclaimer under this section shall be deemed to be a creditor of the bankrupt to the extent of the injury, and may accordingly prove the same as a debt against the bankruptcy."

This sub-section re-enacts part of sect. 23 of the Act of 1869. A lessor suffering by the disclaimer of a lease of partnership premises, may, as was held under that section, prove against the separate estate of each partner for the injury (*p*), and, as was also held, if

(*l*) *Smith and Hartogg, In re, Official Receiver, Ex parte*, 73 L. T. 221; 44 W. R. 79; 2 Manson, 400; 15 R. 641, per Vaughan Williams, J.

(*m*) Shortly, the debts are twelve months' rates and taxes; wages or salary of any clerk or servant for services for four months before receiving order, not exceeding 50*l.*; and wages of any labourer, not exceeding 25*l.*, for services for two months before receiving order.

(*n*) Ante, 297.

(*o*) Ante, 298.

(*p*) *Ex parte Corbett, Re Shand*, 14 Ch. D. 122; 49 L. J., Bank. 74; 42 L. T. 164; 28 W. R. 569—C. A.

disclaimed premises, let for a term, can only be re-let at a reduced rent, the landlord is entitled to prove for the difference between the present worth of the agreed rent for the term, or for the period at which it may be by option determinable (*q*), and the present worth of the letting value for the same period (*r*).

Set-off of Rent against Tenant-Right.

Arrears of rent may be set off by the landlord against a claim by trustees in bankruptcy as outgoing tenants for growing crops, &c., by the custom of the county of Norfolk (*s*), and also by virtue of the Apportionment Act, 1870 (*t*).

## Sect. 12.—*Marriage.*

### (a) *Of Female Lessor* (*u*).

The law of this subject has been revolutionised by the Married Women's Property Act, the effect of which has been already given, (ante, Chap. I., Sect. 23), and it is only necessary here shortly to state the effect of the law before that act.

Interest of Husband in Wife's Freeholds.

At common law a husband took a freehold interest during the coverture in such of his wife's freeholds of inheritance as were not put into settlement before the marriage, and he might dispose of such freehold interest by deed without her concurrence (*x*).

Tenancy by the curtesy.

Tenancy by the curtesy, however, appears to have survived the Married Women's Property Act, and if the husband have issue by his wife born alive, who might by possibility have inherited, he will still become tenant by the curtesy for his life of her freeholds of inheritance (including estates tail) (*y*). But such title is only initiate during her life, and will not merge any term of years to which he may be entitled in his own right (*z*). Unless he becomes tenant by the curtesy he cannot distrain or sue for rent of the wife's freeholds which accrues after her death under a demise made by his wife and himself, or by him on her behalf (*a*). If, however, the lease was made by him in his own name only, the tenant would be thereby estopped from denying his title to the subsequent rent during the continuance of the tenancy (*a*).

Arrears of Rent and Breaches of Covenant before the Marriage.

Arrears of rent and other debts due to a female lessor before her marriage, and breaches of covenant, trespasses, &c., before then

(*q*) *Ex parte Blake, Re McEwan*, 11 Ch. D. 572; 40 L. T. 859; 27 W. R. 901—C. A.

(*r*) *Ex parte Llynvi Coal and Iron Co., Re Hide*, L. R., 7 Ch. 28; 41 L. J., Bank. 5; 25 L. T. 609; 20 W. R. 105.

See also *New Oriental Bank Corporation, In re*, [1895] 1 Ch. 753; 64 L. J., Ch. 439; 72 L. T. 419; 43 W. R. 523; 2 Manson, 301.

(*s*) *Wilson, In re, Lord Hastings, Ex parte*, 62 L. J., Q. B. 628; 10 M. B. R. 219.

(*t*) Ib.

(*u*) And see ante, 45.

(*x*) *Robertson* v. *Norris*, 11 Q. B. 916.

(*y*) Co. Lit. 29 a—30 b; Burton, Comp. ss. 348—355.

(*z*) *Jones* v. *Davies*, 5 H. & N. 766; 29 L. J., Ex. 378; 31 Id. 116.

(*a*) *Hill* v. *Saunders*, 2 Bing. 112; *S. C.* (in error), 4 B. & C. 529; *Howe* v. *Searrott*, and *Sharp* v. *Searrott*, 5 H. & N. 723; 28 L. J., Ex. 325.

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committed, were at common law *choses in action*, which could only be sued for by the husband and wife jointly, and not by the husband alone (*b*); nor by the wife alone (*c*).

Leases at Will.

At common law if a feme sole made a lease at will, or was lessee at will, and afterwards married, the marriage was no determination of her will, so as to make the lease void; nor could she herself, without the consent of her husband, determine the lease in either case (*d*); but the Married Women's Property Act would seem to give this right. Where the husband and wife made a lease for years by indenture of the wife's lands, reserving rent, and, the lessee having entered, the husband before any day of payment died; upon which the wife took a second husband, and he at the day accepted the rent and died: it was held, that the wife could not avoid the lease; for that by her second marriage she had transferred the power of avoiding it to her husband, and his acceptance of the rent had bound her, as her own before such marriage would have done; for he, by the marriage, succeeded into the power and place of his wife, and what she might have done, either as to affirming or avoiding the lease before marriage, the husband might do after the marriage (*e*).

### (b) *Of Female Lessee.*

Effect of Marriage on the Leasehold Interest of the Wife.

Marriage was a gift in law to the husband of all the wife's chattels real (not put into settlement),—as a term for years in right of his wife; of which he alone might dispose, or forfeit, or they may be extended for his debts (*f*). If he sublet any of them in his own name only, the rent belonged to his executors or administrators, and not to the wife as survivor (*g*). He might even dispose of them by deed to take effect on his death to the exclusion of the wife (*h*). If lands were demised to a man and his wife, and the husband alone made an underlease, he alone might sue a third person for an injury to the reversion (*i*). If a husband agreed to grant an underlease of the wife's term of years, such agreement was a good disposition in equity of the term, and would bind the wife in case of the husband's death without granting the lease (*k*). But a husband could not assign his wife's reversionary interest in leaseholds, if that interest was of such a nature that it could not possibly vest in the wife in possession during the coverture (*l*).

(*b*) *Milner* v. *Milnes*, 3 T. R. 631.
(*c*) *Caudell* v. *Shaw*, 4 T. R. 361.
(*d*) Bac. Abr. tit. *Baron and Feme* (E.).
(*e*) Bac. Abr. tit. *Leases* (C.).
(*f*) Bac. Abr. tit. *Baron and Feme* (C. 2), (I.).
(*g*) Com. Dig. tit. *Baron and Feme* (E. 2); Co. Lit. 46 b, 361 a; 1 Roll. 343, l. 15; *Blaxton* v. *Heath*, Poph. 145.
(*h*) *Herbin* v. *Chard*, Poph. 96; *Grute* v. *Locroft*, Cro. Eliz. 287.
(*i*) *Wallis* v. *Harrison*, 5 M. & W. 142; 7 Dowl. 395.
(*k*) *Druce* v. *Denison*, 6 Ves. 385.
(*l*) *Day* v. *Duberly*, 5 H. L. Cas. 388.

## Sect. 13.—*Death.*



### (a) *Death of Lessor.*

Law before Land Transfer Act, 1897.

In case of the death of the lessor before the commencement of the Land Transfer Act, 1897, 60 & 61 Vict. c. 65, on 1st January, 1898, all the reversions of the lessor, together with the rest of his real estate, devolved on his devisees to the extent of any express devise of them whether specific or residuary, and in the case of no such express devise, on his heir-at-law or co-heiresses, as the case might be.

Effect of Land Transfer Act, 1897.

The effect of the Land Transfer Act, 1897, s. 1, is that the reversions devolve on the personal representatives of the lessor, that is, on his executors or administrators, who, however, hold them only in trust for the persons beneficially entitled, that is for the devisee, heir-at-law or co-heiresses, as the case may be, to whom they are bound by sect. 3 of the act to transfer them, at any time after the expiration of one year from the death on an order of the court (which the court may make "if it thinks fit"), and are entitled to transfer it at any time after the death, if they so please.

Breach of Covenant after Death of Lessor.

It was held before this act, that where a covenant of the lessee, which runs with the land, has been broken *after* the death of the lessor, the right of action is vested in the person then legally entitled to the reversion (*m*);

Who entitled to Rent, &c., before Birth of Posthumous Child.

that a qualified heir is entitled to the rents and profits of realty which accrue between the death of the ancestor and the birth of the ancestor's posthumous and only child, whether such rents be actually received before such birth or not (*n*);

Action against Heirs.

and that if there had been a breach of the lessor's covenants in his lifetime, his heir was liable if named, if the covenant were real, in respect of his assets by descent; and that he might be sued as an assignee of the reversion (*q*).

Devolution of Reversion on Sub-lease to Executors.

It must be borne in mind, that where the lessor was himself a lessee, the devolution of the reversion expectant on the determination of his sub-lease was always on his personal representatives.

### (b) *Death of Lessee.*

What goes to Executors.

On the death of a lessee, his executors and administrators are entitled, by virtue of their office, to all his leaseholds, as well as to all other his chattels real and personal, notwithstanding a specific bequest of any of them to another person.

(*m*) Com. Dig. tit. *Covenant* (B. 3).
(*n*) *Richards* v. *Richards*, 1 Johns. 754; 29 L. J., Ch. 836.
(*q*) *Derisley* v. *Custance*, 4 T. R. 75.

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A legatee of leaseholds has no complete title until one or more of the executors has assented to the bequest (*r*).

Assent to bequest of leasehold.

Effect of Probate.

The right of an executor to the personal estate and effects of his testator (including chattels real and choses in action) is derived from the will, of which the probate is merely evidence (*s*). He is legally possessed from the time of the testator's death, and before obtaining probate (*t*). The validity of letters of administration cannot be disputed on the ground that there is a will, without first getting them recalled by the Court of Probate (*u*).

Letters of Administration.

The right and power of an administrator is derived wholly from the letters of administration (*x*). He cannot bind the testator's estate by assenting to any application or disposal thereof, before obtaining letters of administration; which do not relate back (*y*). An executor de son tort, to whom administration is subsequently granted, may repudiate an agreement made by him, to surrender a term of years vested in the intestate (*z*).

Executor taking Probate, cannot renounce Term.

If a testator die possessed of a term of years, it will vest in his executor, who cannot waive it although it be worth nothing; for he must renounce the executorship in toto, or not at all (*a*). If he assign it, or assent to a specific bequest of it, he may thereby be guilty of a devastavit, to the extent of its real value. Terms of years belonging to a testator or intestate vest in his executor or administrator without any entry (*b*).

Executor of Tenant from Year to Year.

In the case of a tenancy from year to year as long as both parties please, if the tenant die the tenancy does not come to an end by the death of the tenant, but his personal representative has the same interest in the land as he had (*c*), and though this has not been quite expressly laid down, the continuing interest does not expire at the end of the current year of the tenancy without notice, but continues until the expiration of notice to determine the tenancy given by or to the personal representatives (*d*). Modern precedents generally *ex abundanti cautelâ* provide expressly that the word "tenant" shall include the executors, &c., of a tenant or to the like effect.

(*r*) Ante, Chap. I., Sect. 27.

(*s*) *Hensloe's case*, 9 Co. R. 38 a; *Pemberton* v. *Chapman*, 7 E. & B. 218; 26 L. J., Q. B. 120.

(*t*) *Smith* v. *Milles*, 1 T. R. 480: *Roe* d. *Bendall* v. *Summerset*, 2 W. Blac. 692; 5 Burr. 2608.

(*u*) *Prosser* v. *Wagner*, 1 C. B., N. S. 289; 26 L. J., C. P. 81.

(*x*) Shep. Touch. 474.

(*y*) *Morgan* v. *Thomas*, 8 Exch. 302.

(*z*) *Doe* d. *Hornby* v. *Glenn*, 1 A. & E. 49.

(*a*) *Hellier* v. *Casbard*, 1 Sid. 266; 1 Lev. 127; *Rubery* v. *Stevens*, 4 B. & Ad. 244.

(*b*) *Wollaston* v. *Hakewill*, 3 M. & G. 297; *Atkins* v. *Humphrey*, 2 C. B. 654; 3 D. & L. 612.

(*c*) *Doe* d. *Shore* v. *Porter* (administrator), 3 T. R. 13; 1 R. R. 626; *James* v. *Dean*, 11 Ves. 391; *Mackay* v. *Mackreth* (demise to tenant, his executors, &c.), 4 Doug. 213; *Rex* v. *Great Glenn*, 5 B. & Ad. 188.

(*d*) See Wms. on Executors, vol. i., p. 684, citing *Parker* v. *Constable*, 3 Wils. 25, and see post, Chap. VIII., Sect. 7.

Any one of several executors, without the concurrence of the others, has power to assign the whole of the testator's term and interest in all or any of his leasehold property (*e*); but not after either of them has assented to a bequest of such property to a legatee (*f*).

Power of one of many Executors.

An action for rent, which became due in the lifetime of the lessor, may be brought by his executor or administrator. So he may sue the lessee for breach of a covenant not to fell, stub up, lop or top timber trees, excepted out of the demise, the breach having been committed in the lifetime of the lessor (*g*). So the executor of a tenant for life may sue for breach of a covenant to repair, committed by the lessee in the lifetime of the testator (*h*).

Actions by Executors.

As to distresses by executors or administrators, see Chap. XI., Sect. 3 (d).

Distress.

An executor or administrator may be charged as such for arrears of rent due from the deceased, so far as he has assets, but by the operation of the Administration of Estates Act, 1869, 32 & 33 Vict. c. 46 (Hinde Palmer's Act), the lessor is not entitled to any priority over other creditors (*k*).

Liability of Personal Representatives.

An executor de son tort is liable merely on proof that the term vested in him as such (*l*). For subsequent rent he may be charged either as executor or administrator, during the term (*m*), or personally as an assignee of the term, if he has entered to take possession of the demised premises (*n*). An executor de son tort is liable as assignee upon the covenants of a lease, and the executor of an executor de son tort may himself become executor de son tort in respect of the estate of the original estate. Where the father was executor de son tort with regard to a lease, and the son upon his death acted as agent to the mother till her death, and then continued in possession of the lease for the benefit of himself and the other children, it was held that he became assignee of the lease, and liable upon the covenants therein (*o*).

Liability of Executor *de son tort.*

The husband of an executrix or administratrix could not before the Married Women's Property Act, be sued alone as assignee of the term (*p*), and by s. 18 of that act the executrix or administratrix can be sued alone.

Husband of Executrix.

(*e*) *Hawkins* v. *Williams*, 10 W. R. 692, Q. B.

(*f*) Cole Ejec. 529, 530.

(*g*) *Raymond* v. *Fitch*, 2 C., M. & R. 588.

(*h*) *Rickets* v. *Weaver*, 12 M. & W. 718; *Noble* v. *Cass*, 2 Sim. 343.

(*k*) *Shirreff* v. *Hastings*, 6 Ch. D. 610; 25 W. R. 842.

(*l*) *Paull* v. *Simpson*, 9 Q. B. 365.

(*m*) *Coghil* v. *Freelove*, 3 Mod. 325; *Pitcher* v. *Tovey*, 4 Mod. 71; 1 Wms. Saund. 241 b, note (5).

(*n*) *Rendall* v. *Andreæ*, 61 L. J., Q. B. 630; and 307, infra.

In some early cases it was held that entry was not a condition precedent of liability. See *Wollaston* v. *Hakewill*, 3 M. & G. 297; *Green* v. *Ld. Listowell*, 2 Ir. L. R. 384; *Ackland* v. *Pring*, 2 M. & G. 937.

(*o*) *Williams* v. *Heales*, L. R., 9 C. P. 177; 43 L. J., C. P. 80; 30 L. T. 20; 22 W. R. 317.

(*p*) *Kearsley* v. *Oxley*, 2 H. & C. 896.

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Executor of *assignee* testator may assign over to Pauper.

Executor of *lessee* testator liable notwithstanding assignment.

Qualified liability of Executor for Rent.

*Bowes, In re.*

An executor or administrator of an *assignee* testator may discharge himself from personal liability as assignee of the term by an assignment over, even to a pauper (*q*); and if, not having a sufficiency of assets, he do not so assign, after first offering to surrender, he cannot throw the resulting loss upon beneficiaries (*r*); for it was not only his legal and moral right so to assign, but his duty, as trustee for others (*s*).

The executor of a *lessee* testator, however, continues liable on the covenants of the testator, notwithstanding assignment (*t*).

Where an executor is personally liable for rent, his liability is limited to the actual value of the property from the time of taking possession; and the actual value is the aggregate of what he has actually received and what he might with reasonable diligence have received, provided that such aggregate do not exceed the full amount of rent (*u*). The proper course to be pursued is that pointed out in the Law of Property Amendment Act, 1859, 22 & 23 Vict. c. 35, s. 27 (*x*). In cases in which that act does not apply, or where it is not pursued, an executor or administrator sued as an assignee of the term, and who has not assigned over, may plead—except as to £—— (being the full actual value of the demised premises during the period in respect of which the rent is claimed, and which should be paid into court, or the claim for it be otherwise answered (*y*))—that the term did not vest in him by assignment otherwise than as executor or administrator, and that he has not at any time since the death of the lessee received or derived, nor could he during any part of that time receive or derive, any profit from the said demised premises, except sums amounting to the sum excepted, and that the said demised premises have not since the death of the lessee yielded any profit whatever, except to the amount excepted; and that the defendant had not at the commencement of the action, nor has since had, nor has any goods or chattels which were of the lessee at the time of his death in the hands of the defendant as executor (or administrator) as aforesaid to be administered (*z*).

Form of Pleading.

Whether Executor personally liable for Breach of Covenant to repair, &c.

*Tremeere* v. *Morison.*

*Sleap* v. *Newman.*

But the defences that the premises are worth nothing and that the executor has fully administered the assets appear from *Tremeere* v. *Morison* and *Sleap* v. *Newman* not to be available in an action for non-repair, or for other breaches of covenant running with the land (not being for non-payment of rent (*a*)). Authority seems to

(*q*) *Pitcher* v. *Tovey*, 4 Mod. 71; *Taylor* v. *Shum*, 1 B. & P. 21; 4 R. R. 759.

(*r*) *Rowley* v. *Adams*, 4 Myl. & Cr. 534, per Lord Cottenham, C.

(*s*) Ib.

(*t*) See *Wilson* v. *Wigg*, 10 East, 313.

(*u*) *Bowes, In re*, 37 Ch. D. 128; 36 W. R. 393, per North, J.

(*x*) Post, 310.

(*y*) *Patten* v. *Reid*, 6 L. T. 281, Q. B.

(*z*) *Billinghurst* v. *Spearman*, 1 Salk. 297; *Buckley* v. *Porter*, 1 Salk. 317; *Rubery* v. *Stevens*, 4 B. & Ad. 241; *Wollaston* v. *Hakewill*, 3 M. & G. 297; *Hopwood* v. *Whaley*, 6 C. B. 744; 6 D. & L. 342.

(*a*) *Tremeere* v. *Morison*, 1 Bing. N. C. 89; followed as an authority in *Sleap* v. *Newman*, 12 C. B., N. S. 116; 4 M. & Sc. 603; in which the court expressly abstained

be in favour of this rule, though it may work extreme injustice in particular cases (as, for instance, if an uninsured leasehold house should be burnt down before an executor could have possibly ascertained whether an insurance for which the testator had covenanted was still in force); and though the danger foreseen by Tindal, C.J., in *Tremeere* v. *Morison* (*b*), viz., that the landlord would have no redress though the property went on deteriorating, can rarely arise in practice, as almost all leases have a proviso for re-entry in case of breach of covenants.

No Personal Liability without entry. *Rendall* v. *Andreæ.*

The question of personal liability upon covenants other than the covenant to pay rent (*c*), upon which latter covenant the liability of the executor, though personal, is beyond doubt limited, had not come before the courts for many years when, in 1892, it was raised in *Rendall* v. *Andreæ* (*d*). In that case the lease was a repairing lease at a rent of 100*l.* a year terminating in 1893. The lessee died in September, 1889, and his widow continued in occupation until Christmas, 1889, the rent, and also the rates and taxes, in respect of that occupation being paid by the executors of the lessee, but five quarters' rent due during the lifetime of the lessee remaining unpaid. The executors (who had no assets), being sued for the arrears of rent, and also for breach of covenant to repair, the action was tried before Smith, J., without a jury. The judgment was for the defendants on both claims, on the ground that they had not entered, and therefore were not liable. "Before entry and taking possession," said the learned Judge, "the executor of a lessee cannot be made liable as assignee of the term, but if he does enter and take possession, he may be made liable, as assignee; yet he may then by proper pleading limit his liability for rent to the yearly value the premises might have yielded, though it would seem that he cannot so limit his liability in respect of breach of covenant to repair. See *Tremeere* v. *Morison*."

Personal liability on repairing covenant, after entry.

The law, therefore, is now more than ever clear, *so far as authority goes*, as to the personal liability of an executor, having entered, though he may have no assets, on the repairing covenant. There is

from approving the principle; *Tilney* v. *Norris*, 1 Ld. Ray. 553; but see the dictum of Bayley, B., in *Reid* v. *Lord Tenterden*, 4 Tyr. 111 (cited in *Sleap* v. *Newman*, but not in *Tremeere* v. *Morison*), that an offer to surrender the lease will "help" the executor as to breaches after the offer; also the dictum of Macdonald, C.B., in *Wilkinson* v. *Cawood*, 3 Anst. at p. 909.

In *Tremeere* v. *Morison* the action was against an *administrator*, and the court abstained from saying whether the same law would apply to an executor. In *Sleap* v. *Newman* the action was against an *executrix*, but the distinction (which, it is submitted, has no legal value) was not noticed. Both cases were decided on demurrer.

(*b*) See further the notes to *Dean and Chapter of Bristol* v. *Guyse*, 1 Wms. Saund. 124 (ed. 1871), and *Jevens* v. *Harridge*, Id. 1. The distinction between the liability for rent and that for non-repair appears to have been first clearly laid down in *Tremeere* v. *Morison*.

(*c*) See *Bowes, In re*, supra, note (*u*).

(*d*) *Rendall* v. *Andreæ*, 61 L. J., Q. B. 630. See Law Journal Newspaper for Dec. 31st, 1892.

CH. VII. s. 13. *Death (of Lessee).*

a faint trace of an equity to relieve an executor from legal demands in a case of hardship (*e*); but it is submitted that such an equity is not sufficiently so established as to have been a conflict between law and equity before the Judicature Act, and that looking especially to the remedy provided by the Law of Property Amendment Act, 1859, 22 & 23 Vict. c. 35, insufficient though it is, the court would prefer that of the two innocent parties, the landlord and the executor, the loss should be borne by the executor, and that the Legislature alone can supply a remedy. It is submitted, further, that whether *Tremeere* v. *Morison* be right or wrong, it has now been publicly accepted as law too long for even a Court of Appeal to overrule it (*f*). But from an emphatic note in Lord Wensleydale's copy of 1 B. N. C., at p. 89, where *Tremeere* v. *Morison* is reported, it appears that both Lord Wensleydale and the late Vaughan Williams, J., were strongly of opinion that *Tremeere* v. *Morison* was wrongly decided, and that the late Vaughan Williams, J., when at the bar, had advised an appeal against the judgment.

Calculation of Value.

If issue be taken on the value of the premises the question will be whether they were of any annual value (*g*), or of any value beyond the sum excepted out of the defence and paid into court or otherwise pleaded to. In estimating such value the jury must calculate according to the actual annual value of the premises, supposing them to be kept in proper repair according to the covenants in the lease, and without deducting any loss occasioned by the insolvency of an under-tenant, or the non-payment of the rent by him (*h*).

Continuing Liability of Executors.

An executor or administrator cannot be sued as assignee of the term where the testator or intestate has assigned it: nor for causes of action which accrue after the executor or administrator has himself assigned it over: but (except so far as protected by the Law of Property Amendment Act, 1859, 22 & 23 Vict. c. 35, s. 27) he will continue liable as executor or administrator in respect of any other assets, notwithstanding any such assignment (*i*). Whether "entry" by the executor is a condition precedent to liability, is a point on which some doubt has been thrown (*k*); but the preponderance of authority is strongly in favour of entry being necessary (*l*).

Whether "entry" necessary to Liability.

(*e*) See Story, vol. i., p. 96; *Lady Croft's Executors*, 2 Freeman, 1—a case arising out of the destruction of houses by the great fire in London.

(*f*) See as to the practice of following cases whether right or wrong, *Kelly* v. *Rogers*, [1892] 1 Q. B. 910—C. A.; *Beer* v. *Foakes*, 9 App. Cas. 605.

(*g*) *Rubery* v. *Stevens*, 4 B. & Ad. 241; 1 N. & M. 183.

(*h*) *Hornidge* v. *Wilson*, 11 A. & E. 645; *Rubery* v. *Stevens*, supra; *Reid* v. *Ld. Tenterden*, 4 Tyr. 111.

(*i*) *Hellier* v. *Casbard*, 1 Lev. 127; 1 Sid. 266; *Coghil* v. *Freelove*, 3 Mod. 325; *Wilson* v. *Wigg*, 10 East, 315; *Howse* v. *Webster*, Yelv. 103.

(*k*) See *Williams* v. *Bosanquet*, 1 B. & B. 238; 21 R. R. 585.

(*l*) *Rendall* v. *Andreæ*, 61 L. J., Q. B. 630; *Atkins* v. *Humphrey*, 2 C. B. 654; 2 D. & L. 612; *Kearsley* v. *Oxley*, 2 H. & C. 196; and see Solicitors' Journal for June 18th and 25th, 1892.

If entry be necessary, the mere receipt of rent, or any other act of ownership amounting to constructive entry, would be sufficient, without actual entry.

Only Profits are Assets.

When an executor takes leasehold property nothing is assets but the profits above the rent: as, if the land be worth 10*l.* per annum, and 5*l.* is reserved, in that case nothing is assets but the 5*l.* above the rent (*m*). The profits of the land may be inadequate to the rent: in a variety of cases they may be easily supposed insufficient for a given period, although the lease may on the whole be beneficial; as, for instance, where rent is claimed for the occupation of premises from Michaelmas to Lady-day, where almost the whole profit is taken in the summer: so the profits for a series of years may be less than the amount of the rent, although the lease for the whole term may be of no small value,—as in the case of a lease of woods, which are fellable only once in eight or nine years, and the felling has been very recent (*n*). In these and the like instances, the executor is personally liable only to the extent of the profits; and for such proportion of the rent as shall exceed the profits, he is chargeable merely in the capacity of executor, or, in other words, as far only as he has assets, provided he pleads the whole matter specially and accurately (*o*). The profits of the land are to be applied by the executor, in the first place, to the discharge of the rent, and if that fund prove insufficient, the residue of the rent is payable out of the general assets, and this whether the rent be reserved by lease in writing or by parol.

Insurance.

In *Fry* v. *Fry* a lessee was bound to insure. The insurance expired on the 25th March. He died on 27th March, without having paid the premium. The house was burnt down on the 26th May, his executors (who did not prove till the 17th June) not having paid the premium. It was held, that they were not personally liable to the residuary legatees for neglect in not having kept up the insurance (*p*).

Party-walls.

An administrator of a lessor has been held obliged to contribute as owner towards the rebuilding of a party-wall under the old Building Act, though not otherwise owner than as administrator, and though he had no assets to meet the expenses (*q*).

How Executor may get rid of Personal Liability. 22 & 23 Vict. c. 35, s. 27.

The hardship of the common law upon executors has been somewhat modified by the Law of Property Amendment Act, 1859,

(*m*) *Hargrave's case*, 5 Co. R. 31 b, cited in *Rubery* v. *Stevens*, 4 B. & Ad. at p. 245.

(*n*) See last note.

(*o*) *Buckley* v. *Pirk*, 1 Salk. 317; *Billinghurst* v. *Spearman*, 1 Salk. 297; *Rubery* v. *Stevens*, 4 B. & Ad. 241; 1 N. & M. 183; *Hornidge* v. *Wilson*, 11 A. & E. 645; *Hopwood* v. *Whaley*, 6 C. B. 774; 6 D. & L. 348; *Collins* v. *Crouch*, 13 Q. B. D. 542.

(*p*) *Fry* v. *Fry*, 27 Beav. 146; 28 L. J., Ch. 93.

(*q*) *Thacker* v. *Wilson*, 3 A. & E. 142.

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22 & 23 Vict. c. 35, which enables an executor, *having sufficient assets* and taking advantage of the act, to rid himself completely of his personal liability under any lease or agreement for a lease. The 27th section of this act (*r*) is as follows:—

Law of Property Amendment Act, 1859, s. 27.

Setting apart, by executor, of funds to meet liabilities on lease.

Where an executor or administrator, liable as such to the rents, covenants or agreements contained in any lease or agreement for a lease granted or assigned to the testator or intestate whose estate is being administered, shall have satisfied all such liabilities under the said lease or agreement for a lease as may have accrued due and been claimed up to the time of the assignment hereafter mentioned, and shall have set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the lessee to be laid out on the property demised, or agreed to be demised, although the period for laying out the same may not have arrived, and shall have assigned the lease, or agreement for a lease, to a purchaser thereof, he shall be at liberty to distribute the residuary personal estate of the deceased to and amongst the parties entitled thereto respectively, without appropriating any part, or any further part (as the case may be), of the personal estate of the deceased to meet any future liability under the said lease or agreement for a lease; and the executor or administrator so distributing the residuary estate shall not, after having assigned the said lease or agreement for a lease and having, where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said lease or agreement for a lease.

Right of Lessor to follow Assets.

The section goes on to provide, that "nothing herein contained shall prejudice the right of the lessor, or those claiming under him, to follow the assets of the deceased into the hands of the person or persons to or amongst whom the said assets may have been distributed." Leases made before the act are within this section (*s*), and so are leases assigned to the testator or intestate (*t*), but a lease assigned to a residuary legatee is not (*s*). It is not clear whether an executor should set apart a fund to meet a contingent liability under a lease, which he knows of, but as to which no notice has been given him, or claim made; perhaps he may do so for his own indemnity, but the landlord has no right to bring an action to compel him to do so (*u*).

By sect. 28, the executor has the like power of getting rid of personal liability under conveyances on chief rent or rent-charges, and agreements for such conveyances.

By sect. 29, executors or administrators may advertise for creditors and others to send in their claims against the estate of the testator or intestate, and at the expiration of the time named in the advertisements for sending in claims, may distribute the

(*r*) As to the practice in equity before the Act, see *Fletcher* v. *Stevenson*, 3 Hare, 360.

(*s*) *Dodson* v. *Sammell*, 1 Drew. & Sm. 575; 30 L. J., Ch. 799; *Smith* v. *Smith*, 1 Drew. & Sm. 384.

(*t*) *In re Green*, 2 De Gex, F. & J. 121.

(*u*) *King* v. *Walcott*, 9 Hare, 692.

assets of the testator or intestate amongst the parties entitled thereto.

Following Assets of deceased Lessee.

A lessor is not entitled, in respect of a breach of covenant in a lease, to follow the assets of a deceased lessee, which had been placed in settlement upon the marriage of the lessee's daughter, there being no imputation as to the honesty with which the assets have been dealt with (*x*).

Use and Occupation.

Actions for use and occupation by and against executors and administrators will be treated of hereafter (*y*).

(*x*) *Dilkes* v. *Broadmead*, 2 Giff. 113; 29 L. J., Ch. 310; 30 Id. 268.

(*y*) Chap. XV.

# CHAPTER VIII.

## DETERMINATION OF THE TENANCY.


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## Sect. 1.—*The Modes of Termination.*

In what ways a Lease may be determined.

A tenancy may be determined in various ways, viz.:—1. By effluxion of time, on the expiration of the term granted. 2. By the happening of some event upon which the term is limited conditionally. 3. By a surrender. 4. By merger. 5. By forfeiture and re-entry or ejectment pursuant to some proviso or condition in the lease, for breach of covenant, &c. 6. By a notice to quit, where the tenancy is from year to year, or for other like period (greater or less) determinable by notice. 7. By a notice to determine the term at the end of the first seven or fourteen years thereof, or at some other specified period, pursuant to a power in the lease. 8. By a disclaimer of the reversioner's title, where the tenancy is only from year to year, or other less period, and not for a term of years. 9. By death of the party during the continuance of whose life the contract of tenancy is made.

By Effluxion of Time.

When the term of years granted by a lease expires by effluxion of time, the lessee or his assigns ought thereupon to quit possession (*a*).

(*a*) For the consequences of "Holding Over," see Chap. XX., Sect. 2, post.

## Sect. 2.—*When the Term is limited conditionally.*

*When Term is limited conditionally.*

Sometimes the term itself is limited conditionally, ex. gr. for forty years if the lessee, or some other person or persons therein named, shall so long live. In such case the term will determine at the end of the forty years, or on the death of the person or persons named, which shall first happen (*b*). Where a certain term of years is granted provided the lessee shall so long continue to occupy the premises personally, it will cease whenever he parts with the possession, even by compulsion of law, as by his becoming bankrupt (*c*). It was held in an old case that a lease for twenty-one years, if the lessee continue so long in the service of the lessor, was not determined by the death of the lessor (*d*); and in another old case, that if a lease of a house was made to a widow for forty years, *sub conditione quod si tamdiu vixerit sola et inhabitaverit*, the term passed to her executor upon her death unmarried within the term (*e*): but these rulings seem hardly to be correct, the first because the contract of service terminates with the death of the master, and the second because the meaning of the parties appears to have been that the lease should be for the life of the widow.

Conditional Limitations and Conditions.

Where a testator appointed the defendant to be his agent, "to live rent free in my house as long as he continues agent, that is, as long as he does the business honestly and to the satisfaction of the trustees," it was held that the direction of the testator was only a recommendation to the trustees to continue the defendant as agent, and that they might eject him from the house, unless the defendant could prove the dismissal to be malicious (*f*).

Devise of House Rent free, during good Behaviour.

Upon the breach of any *condition* the lessor or his assigns may re-enter or maintain an ejectment, without any express proviso for re-entry (*g*). A proviso in a lease with no penalty annexed is a condition: but if a penalty is annexed it is a covenant (*h*).

Re-entry on Breach of Condition.

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## Sect. 3.—*Surrender.*

### (a) *Surrender by Express Terms.*

A surrender is the yielding up an estate for life or years to him who has the immediate estate in reversion or remainder, wherein the

What is a Surrender.

(*b*) Cole Ejec. 402; *Hughes and Crowther's case*, 13 Co. R. 66; *Brudnell's case*, 5 Co. R. 9.

(*c*) *Doe* d. *Lockwood* v. *Clarke*, 8 East, 185; 9 R. R. 402.

(*d*) *Wrenford* v. *Gyles*, Cro. Eliz. 643; Noy, 70.

(*e*) *Hardy* v. *Seyer*, Cro. Eliz. 414.

(*f*) *Belaney* v. *Kelly*, 24 L. T. 738.

(*g*) *Harrington* v. *Wise*, Cro. Eliz. 486, cited 8 B. & C. 316; *Earl of Pembroke* v. *Sir H. Berkeley*, Cro. Eliz. 384, 560; *Knight* v. *Mory*, Id. 60; see post, Sect. 5, "Forfeiture."

(*h*) *Simpson* v. *Titterell*, Cro. Eliz. 242.

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estate for life or years may merge, by mutual agreement (*i*). The party making the surrender is called the surrenderor, and the party to whom it is made the surrenderee. It differs from a release in this respect, that the release operates by the greater estate descending upon the less; whereas a surrender is the falling of a less estate into a greater (*k*). The proper operative words of a surrender are "surrender and yield up" (*l*). If a lessee reserves to himself any interest in or part of the estate, it is no surrender (*m*): nor does a surrender, it seems, operate as such unless accepted by the reversioner (*n*).

Every Surrender must be in Writing, and a Surrender of more than 3 Years' Term must be by Deed.

Every surrender, by the act of the parties, must be in writing, and every surrender of a term of more than three years must be by deed. This is the effect of the third section of the Statute of Frauds, and of the third section of the Real Property Act, 1845, 8 & 9 Vict. c. 106, the later enactment providing that if a deed be necessary for the creation of the term, a deed is requisite to its surrender (*o*). By the

Stat. of Frauds, s. 3.

Statute of Frauds (29 Car. 2, c. 3), s. 3, "no leases, estates or interests, either of freehold or of term of years, or any uncertain interest not being copyhold or customary interest, of, in, to or out of any messuages, manors, lands, tenements or hereditaments, shall be assigned, granted or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting or surrendering the same, or their agents thereunto lawfully authorized by writing, or by act and operation of law;" and by the Real Property Act, 1845,

8 & 9 Vict. c. 106.

8 & 9 Vict. c. 106, s. 3, "a surrender *in writing* of an interest in any tenements or hereditaments, not being a copyhold interest, and not being an interest which might by law have been created without writing (*p*), made after the 1st day of October, 1845, shall be void at law unless made *by deed*."

Agreement for Surrender.

An agreement to surrender an existing lease in consideration of the lessor granting a new one, if it fixes no date for the surrender, or for the commencement of the new lease, will not be specifically enforced (*q*).

No Surrender by mere Cancellation.

It has been held that a lease cannot be surrendered by mere cancellation (*r*); and it has been held also, where a lease appeared to have

*Roe* v. *Archbishop of York.*

(*i*) 1 Inst. 337 (b); Smith L. & T. 303 (2nd ed.).

(*k*) *Smith* v. *Mapleback*, 1 T. R. 441; 1 R. R. 247; *Williams* v. *Sawyer*, 3 B. & B. 70.

(*l*) Smith L. & T. 304 (2nd ed.). See Forms of Surrenders, post, Appendix B., Sects. 30, 31, 32, 33.

(*m*) Com. Dig. tit. *Surrender* (H.); Bac. Abr. tit. *Leases* (S. 3); Co. Lit. 337.

(*n*) *Coles* v. *Evanson*, 19 C. B., N. S. 382.

(*o*) See *McGarth* v. *Shannon*, 17 Ir. R., C. L. 128.

(*p*) *I.e.* by sect. 1 of the Statute of Frauds, "a lease not exceeding three years from the making thereof, whereupon the rent reserved unto the landlord shall amount unto two third parts at least of the full improved value."

(*q*) *Oxford, Mayor of* v. *Crow*, 69 L. T. 228, per Romer, J.

(*r*) *Roe* v. *Archbishop of York*, 6 East, 86; 8 R. R. 413; *Ld. Ward* v. *Lumley*, 5 H. & N. 87, 656; 29 L. J., Ex. 322.

had the names of the parties torn off, that there was neither a surrender by operation of law, nor primâ facie evidence of a surrender by deed or note in writing (*s*).

Conditional Surrender.

A lessee may surrender upon condition, and if the condition be broken, the particular estate is revested (*t*); therefore, if a lessee for years surrender his whole term to the original lessor upon condition, he may, upon non-performance of the condition, re-enter and revive the term (*u*).

At what Time a Surrender may be made.

The lessee cannot before entry merge the term by a surrender, because till entry there is no term and no reversion wherein the possession may be merged: but if the lessee enter and assign, the assignee may before entry surrender his term to the lessor (*x*). But it is not necessary that the surrenderor of a lease, to begin at a future day, should be in possession in order to make a surrender before the period of commencement: thus, if a lease be to commence at Michaelmas next, and the lessee take a new lease under seal before Michaelmas, it is a surrender in law of the first lease (*y*). As to surrender of leases in futuro or future interests, there is this distinction to be observed, that a lessee for years of a term to begin at a day to come cannot surrender it by an actual surrender before the day of the term begin, but he may by a surrender in law (*z*). Whenever a deed purporting to be a surrender cannot operate as such, it will probably take effect as an assignment or as a release of the right to the term, *ut res magis valeat quam pereat.*

Requisites of a good Surrender.

In order to make a good surrender of lands by deed, and to make them pass by such a surrender, these things are requisite:—1. That the surrenderor be a person able to surrender, and that he have an estate in possession of the thing surrendered at the time of the surrender made. 2. That the surrender be to him who has the next immediate estate in remainder or reversion, and that there be no intervening estate coming between. 3. That there be a privity of estate between the surrenderor and the surrenderee. 4. That the surrenderee have a higher and greater estate in the thing surrendered than the surrenderor hath, so that the estate of the surrenderor may be drowned therein. 5. That he have the estate in his own right, and not in the right of another. 6. That he be sole seised of this estate in remainder or reversion, and not in joint-tenancy (*a*). 7. That apt, or at all events sufficient, operative words be used.

Terms of Express Surrender.

The words commonly employed are "surrender, grant, and yield up," or "assign and surrender." But no particular words are

(*s*) *Doe* d. *Courtail* v. *Thomas*, 9 B. & C. 288.
(*t*) Co. Lit. 218 b.
(*u*) *Lloyd* v. *Langford*, 2 Mod. 176; Bac. Abr. tit. *Leases* (S. 3).
(*x*) Bac. Abr. tit. *Leases* (S. 2).
(*y*) Shep. Touch. 302.
(*z*) Id. 304; *Ive* v. *Sims*, Cro. Eliz. 521; *Hutchins* v. *Martin*, Cro. Eliz. 605.
(*a*) Shep. Touch. 303; 2 Blac. Com. 336; but see contra, Shep. Touch. 308.

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essential (*b*). Where a deed is not required by the Real Property Act, 1845, 8 & 9 Vict. c. 106, s. 3 (*c*), any instrument in writing duly signed, and expressing an *immediate* purpose of giving up the estate on the part of the tenant, if accepted by the landlord, will be sufficient (*d*). But such acceptance would seem to be necessary (*e*).

Particular instances of Surrenders.

A written instrument in this form :—"We do hereby renounce and disclaim, and also surrender and yield up all right, &c." a tenancy from year to year being in existence, has been held a surrender and not a disclaimer (*f*). A written request by the tenant to his landlord to re-let the premises to some other person may, *when acted on*, amount to a surrender by act and operation of law (*g*). A written notice given by the tenant of his intention to quit at a time when he believed his tenancy to expire, but which is afterwards discovered not to be the time, does not operate as a surrender (*h*).

### (b) *Surrender by Operation of Law.*

Surrender by Acceptance of a new Lease.

Surrenders by "act and operation of law," or implied surrenders, are excepted in the Statute of Frauds (*i*) and are not affected by the Real Property Act, 1845, 8 & 9 Vict. c. 106, s. 3, which only applies to surrenders made in writing (*k*). Of this sort are surrenders created by the acceptance of a new lease from the reversioner either to begin presently, or at any time during the continuance of the first lease; for the acceptance of a valid new lease implies a surrender of the existing lease (*l*), and operates as a surrender thereof by act and operation of law (*m*), but not if the second lease be void or voidable (*n*), or if there be a mere agreement for a future lease, and not an actual demise (*o*). The reason why such acceptance of a new lease operates as a surrender of the first is, because the lessee, by accepting the new lease, has been party to an act, the validity of which he is afterwards estopped from disputing, and which would not be valid if the first lease continued to exist, for he would be estopped from saying that the lessor had not power to make the new lease; and as the lessor

(*b*) See usual Forms of Surrenders, post, Appendix B., Sects. 30—33.

(*c*) Ante, 314.

(*d*) *Farmer* v. *Rogers*, 2 Wils. 26; *Smith* v. *Mapleback*, 1 T. R. 441; 1 R. R. 247; *Weddall* v. *Capes*, 1 M. & W. 50; *Harrison* v. *Blackburn*, 17 C. B., N. S. 679, 680.

(*e*) Per Byles, J., in *Colles* v. *Evanson*, 19 C. B., N. S. 382.

(*f*) *Doe* d. *Wyatt* v. *Stagg*, 5 Bing. N. C. 564.

(*g*) *Nickells* v. *Atherstone*, 10 Q. B. 944.

(*h*) *Lyon* v. *Reed*, 13 M. & W. 285; *Doe* d. *Murrell* v. *Milward*, 3 M. & W. 328; *Bessell* v. *Landsberg*, 7 Q. B. 638.

(*i*) Ante, 314; Shep. Touch. 300; Com. Dig. tit. *Surrender* (L. 1); Perk. c. 9.

(*k*) Ante, 314.

(*l*) *Davison* d. *Bromley* v. *Stanley*, 4 Burr. 2210; Com. Dig. tit. *Surrender* (I.).

(*m*) Roll. Abr. tit. *Surrender*; *Crowley* v. *Vitty*, 7 Exch. 319; 21 L. J., Ex. 136; *Furnivall* v. *Grove*, 8 C. B., N. S. 496; 30 L. J., C. P. 3.

(*n*) Post, 317.

(*o*) *John* v. *Jenkins*, 1 Cr. & M. 227; *Foquet* v. *Moor*, 7 Exch. 870; *Cannan* v. *Hartley*, 9 C. B. 634, 648; *Badeley* v. *Vigurs*, 4 E. & B. 71; 23 L. J., Q. B. 377.

could not grant the new lease until the first lease was surrendered, the acceptance of the new lease is of itself a surrender of the first (*p*).

What is a sufficient new Lease.

If a lessee for twenty years take a lease for ten years to begin at Michaelmas next, there is no doubt but that the term of twenty years is surrendered or determined immediately; for by the lessee's acceptance of the new lease, he admits that the lessor is in a situation to demise to him notwithstanding the existence of the other lease; and, indeed, by such acceptance the lessor has power to make a new lease during the former (*q*). But where a lessee for twenty-one years took a lease of the same lands for forty years, to begin immediately after the death of J. S., it was held that this was not any present surrender of the first term, because J. S. might wholly outlive that term, and then there would be no union to work a surrender: and it was considered that in the meantime, the chances being equal, whether he would survive it or not, the first term should not be hurt till that contingency happened; but that if J. S. died within the first term, then what remained of it was surrendered and gone by the taking place of the second (*r*). Where the lessee for years of a house accepts a grant of the custody of the same house, it is a surrender; for the custody of a thing which was let before, is another interest in the same thing leased, and cannot stand with the first lease (*s*): and if the first lease be of the land itself, and the second lease of the vesture of the same land, it is a surrender of the first lease: so it is if a lessee accept a grant of common, or rent out of the same land, to commence at a certain day within the term (*t*). If the king (or queen regnant) make a demise for years, the acceptance of a new lease is no surrender of the first lease (*u*): so if a lessee accept a grant of a thing consistent with the lease of the land, it is no surrender; as if the lessee of a manor accept the grant of a bailiwick, or the stewardship of the same manor, or if he accept the office of park-keeper of the same park for his life, it is no surrender, for the subsequent grant is merely collateral, and not of the thing itself (*x*); but where a lessee for years of an advowson was presented to the advowson by the lessor it was adjudged to be a surrender of his term (*y*).

What does not create a Surrender.

A recital in a second lease, that it was granted in consideration (amongst other things) of a surrender of a prior lease of the same premises, is not a surrender by deed or note in writing of such prior lease, as it does not purport to be of itself a surrender or yielding up

(*p*) *Lyon* v. *Reed*, 13 M. & W. 285; *Bessell* v. *Landsberg*, 7 Q. B. 638.
(*q*) *Ive* v. *Sams*, Cro. Eliz. 521; *Hutchins* v. *Martin*, Id. 604; Bac. Abr. *Leases* (S. 2); 2 Smith, L. C. 713 (6th ed.).
(*r*) Bac. Abr. tit. *Leases* (S. 3).
(*s*) *Gybson* v. *Searls*, Cro. Jac. 177.
(*t*) Com. Dig. tit. *Surrender* (I. 1); *Mellows* v. *May*, Cro. Eliz. 874.
(*u*) *Brook* v. *Goring*, Cro. Car. 197.
(*x*) *Gie* v. *Rider*, 1 Sid. 75; *Gybson* v. *Searls*, Cro. Jac. 176, 184; *Earl of Arundel* v. *Lord Gray*, 2 Dyer, 200 b; *Woodward* v. *Ashton*, 1 Ventr. 296.
(*y*) *Gybson* v. *Searls*, Cro. Jac. 84, 176.

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of the interest (*z*). A mere agreement for a new lease is not sufficient to create an implied surrender of the previous one (*a*); so an agreement between the lessor and a stranger that the lessee shall have a new lease is no surrender (*b*): and if a lessee accept a new lease in trust for another it is no surrender (*c*). But it seems that if a lessee re-demise to the lessor, for his whole term, reserving a rent, that amounts to a surrender (*d*). A notice to quit at a *future* day cannot operate as a surrender (*e*), but a written request by the tenant to his landlord to re-let the premises to some other person may, when acted on, amount to a surrender by act and operation of law (*f*).

Effect of an invalid new Lease.

No *implied* surrender by the grant of a new lease will take effect, if the new lease be void (*g*): and if the new lease do not pass an interest according to the contract and intention of the parties, an acceptance of it is not an implied surrender of the old lease (*h*). The acceptance of a voidable lease which is afterwards made void contrary to the intention of the parties, but which has operated to pass some part of the term contracted for, is not a surrender of a valid former lease inconsistent therewith: therefore when a tenant for life, with a power of leasing, made a lease of part of some land, which was not a good execution of the power, in consideration of the surrender of two prior leases of the whole of the land, and in order to effectuate an agreement entered into between the lessee and another person for the sale of the remaining part of the land, which the lease recited that it was intended to lease to the vendee by indenture of even date, and which was done; it was held, after the death of the tenant for life, that this new lease as to the premises thereby demised did not operate as a surrender of the two prior leases (*i*). So where a tenant for life, with power of leasing, granted a lease "in consideration of the surrender up" of a former lease, "which surrender is hereby made and accepted," it was held, that the new lease not being a good execution of the power, and therefore voidable by the remainderman, did not operate as a surrender of the prior lease (*k*). Where a voidable bishop's lease, which had been granted in consideration of a surrender by deed executed a few days before of a prior lease, was

(*z*) *Roe* d. *Earl of Berkeley* v. *Archbp. of York*, 6 East, 86; 8 R. R. 413; *Doe* d. *Earl of Egremont* v. *Courtenay*, 11 Q. B. 702.

(*a*) Ante, 316.

(*b*) *Porris* v. *Allin*, Cro. Eliz. 173.

(*c*) Com. Dig. tit. *Surrender* (H) (L. 1).

(*d*) *Lloyd* v. *Langford*, 2 Mod. 175; *Smith* v. *Mapleback*, 1 T. R. 441; 1 R. R. 247.

(*e*) *Doe* d. *Murrell* v. *Milward*, 3 M. & W. 328; *Bessell* v. *Landsberg*, 7 Q. B. 638.

(*f*) *Nickells* v. *Atherstone*, 13 Q. B. 944.

(*g*) *Zouch* d. *Abbott* v. *Parsons*, 3 Burr. 1807; *Wilson* v. *Sewell*, 4 Burr. 1980; *Roe* d. *Earl of Berkeley* v. *Archbp. of York*, 6 East, 86; 8 R. R. 513; *Davison* d. *Bromley* v. *Stanley*, 4 Burr. 2210; *Doe* d. *Earl of Egremont* v. *Courtenay*, 11 Q. B. 702; Smith L. & T. 307 (2nd ed.).

(*h*) Com. Dig. tit. *Estates* (G. 13).

(*i*) *Doe* d. *Biddulph* v. *Poole*, 11 Q. B. 713; *Roe* d. *Earl of Berkeley* v. *Archbp. of York*, 6 East, 86; 8 R. R. 413.

(*k*) *Doe* d. *Earl of Egremont* v. *Courtenay*, 11 Q. B. 702; overruling *Doe* d. *Earl of Egremont* v. *Forwood*, 3 Q. B. 627.

avoided by the successor; it was held that the first lease was not revived by such avoidance (*l*).

Effect of a new Lease of Part only.

If a lessee for years accept a new lease by indenture of part of the lands, it is a surrender for that part only, and not for the whole (*m*); and though a contract for years cannot be so divided, as to be avoided for part of the years and to subsist for the residue, either by act of the party or act in law; yet the land itself may be divided, and the tenant may surrender one or two acres, either expressly or by act of law, and the lease for the residue will stand good and untouched (*n*). If there be two lessees for life, or years, and one of them take a new lease for years, it is a surrender of the moiety (*o*).

By Estoppel. *Lyon* v. *Reed.*

The term "surrender by operation of law" is properly applied to cases where the owner of a particular estate has been party to some act having some other object than that of a surrender, but which object cannot be effected whilst the particular estate continues, and the validity of which act he is by law estopped from disputing (*p*). Such surrender is the act of the law, and takes place independently of, and even in spite of, the intention of the parties (*q*). It is presumed to have *preceded* the act to which the tenant is party (*r*). The acts in pais, which bind parties by way of estoppel, are acts of notoriety, not less formal and solemn than the execution of a deed, as, for instance, livery, entry, acceptance of an estate, and the like (*s*).

By Consent and Acceptance of Possession.

A tenancy from year to year cannot be determined unless there be either a legal notice to quit or a surrender (*t*): and therefore a tenancy from year to year, created by parol, is not determined by a parol licence from the landlord to the tenant to quit in the middle of a quarter, and the tenant's quitting the premises accordingly (*u*); but where upon a tenancy from year to year, determinable at a quarter's notice, the lessor licensed the tenant to quit in the middle of a quarter, and the tenant accordingly quitted, and the lessor accepted possession; it was held to be a surrender by operation of law, destroying the right to rent for the whole or any part of the current quarter (*x*).

By mutual Agreement. *Phené* v. *Popplewell.*

An agreement by landlord and tenant that the term shall be put an end to, acted upon by the tenant's quitting the premises, and the

(*l*) *Doe* d. *Murray* v. *Bridges*, 1 B. & Ad. 847.

(*m*) *Earl of Carnarvon* v. *Villebois*, 13 M. & W. 342; *Morrison* v. *Chadwick*, 7 C. B. 266; 6 D. & L. 567.

(*n*) Bac. Abr. tit. *Leases* (S. 3). See *Jones* v. *Bridgman*, 39 L. T. 500.

(*o*) Shep. Touch. 302.

(*p*) *Lyon* v. *Reed*, 13 M. & W. 285; *Bessell* v. *Landsberg*, 7 Q. B. 638; Com. Dig. tit. *Surrender* (I.).

(*q*) *Lyon* v. *Reed*, 13 M. & W. 285.

(*r*) 9 C. B. 634, note.

(*s*) Id.; *Nickells* v. *Atherstone*, 10 Q. B. 944.

(*t*) *Doe* d. *Read* v. *Ridout*, 5 Taunt. 519.

(*u*) *Mollett* v. *Brayne*, 2 Camp. 10; 11 R. R. 676; *Thompson* v. *Wilson*, 2 Stark. R. 379; 20 R. R. 696.

(*x*) *Grimman* v. *Legge*, 8 B. & C. 324; *Brown* v. *Burtinshaw*, 7 D. & R. 603; *Furnivall* v. *Grove*, 8 C. B., N. S. 496; 30 L. J., C. P. 3; Bac. Abr. tit. *Leases* (S. 2).

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landlord by some unequivocal act taking possession, amounts to a surrender by operation of law (*y*). Where, therefore, a tenant left the key at the counting-house of the landlord, and the latter, though he at first refused to accept it, afterwards put up a board to let the premises, and used the key to show them, and painted out the tenant's name from the front, this was held sufficient evidence of a surrender by operation of law (*z*). In *Reeve* v. *Bird*, the tenant of a house, three cottages, and a stable and yard, let at an entire rent for a term, before the expiration of it, assigned all the premises, the house and cottages being in the possession of subtenants: the landlord accepted a sum of money as rent up to the day of the assignment, which was in the middle of a quarter; the assignee took possession of the stable and yard only; the occupiers of the cottages having left them after the assignment, and before the expiration of the term, the landlord re-let them; the tenant paid no rent after the assignment, but the landlord received rent from the subtenants, and before the expiration of the term he advertised the whole of the premises to be let or sold; it was held that this was a surrender by operation of law of all the premises (*a*).

No Surrender by Acceptance of insufficient Notice to Quit.

But no surrender by operation of law is effected by the mere acceptance of an insufficient notice to quit. This was held in a case where a tenant from year to year by a Lady-day holding, orally agreed with his landlord's agent to quit at the ensuing Lady-day, which was within half a year; and although the premises were re-let by auction, at which the tenant attended and bid, but the new tenant was not let into possession (*b*).

Acceptance of Key.

If the landlord of a house in the middle of a quarter accept the key from his tenant under a parol agreement that upon his then giving up the possession the rent shall cease, and he never afterwards occupy the premises, there is a surrender by operation of law, and the landlord cannot recover in an action for the use and occupation of the house for the time subsequent to his accepting the key (*c*). But there was held to be no such surrender, where A. was tenant to B. of rooms for a term of years, and upon B.'s bankruptcy, A. sent the key of the rooms to the office of the official assignee, where it was left with a clerk, who was told that it was the key of the rooms which A. had occupied, and A. immediately quitted possession, but no further communication took place (*d*). Where two persons demised

(*y*) *Phené* v. *Popplewell*, 12 C. B., N. S. 334; 31 L. J., C. P. 235.

(*z*) Id.; and see *Panther Lead Co., In re*, [1896] 1 Ch. 978; 65 L. J., Ch. 499; 44 W. R. 573; 3 Manson, 165, per Romer, J.

(*a*) *Reeve* v. *Bird*, 1 C., M. & R. 31.

(*b*) *Doe* d. *Hudlestone* v. *Johnston*, 1 M'Clel. & Y. 141; *Johnstone* v. *Hudlestone*, 4 B. & C. 922; 7 D. & R. 411; 4 L. J., K. B. 71; 28 R. R. 505; *Doe* d. *Murrell* v. *Milward*, 3 M. & W. 328.

(*c*) *Whitehead* v. *Clifford*, 5 Taunt. 518; 15 R. R. 579; *Furnivall* v. *Grove*, 8 C. B., N. S. 496; 30 L. J., C. P. 3.

(*d*) *Cannan* v. *Hartley*, 9 C. B. 634.

a house by lease in writing, one of whom, after signing the lease, never further interfered, and the other, before the first quarter's rent became due, accepted the key from the tenant's wife; it was held, that there was a sufficient surrender by the tenant which bound both the lessors, the wife of the tenant acting as his agent, and the lessor, who accepted the key, as the agent of the other (*e*).

Mere Acceptance of key does not affect Surrender.

But the mere fact that the landlord has received the key, and attempted unsuccessfully to re-let the premises, does not estop him from alleging that the tenancy still subsists: and if, afterwards, before the expiration of the term, the landlord re-let, the surrender by operation of law takes effect from such re-letting, and does not relate back to the receipt of the key. So it was held by the Court of Appeal in *Oastler* v. *Henderson* (*f*).

*Oastler* v. *Henderson.*

Letting to another Person, &c.

Where a lessee quitted in the middle of his term apartments which he had taken for a year, and the lessor lent them to another person, so that the lessee could not have come back if he had chosen; it was held that, by so doing, the lessor dispensed with the necessity of a written surrender (*g*). Where the owner of a ferry demised it for a year, but after a few weeks the lessee finding it unprofitable, agreed instead to become servant to the owner, and received daily wages for attending to the ferry for him, it was held to be a surrender by act and operation of law (*h*). Where a tenant from year to year agreed to buy the freehold of the land, it was held, that the agreement, not being absolute, but conditional on a good title being found, did not operate as a surrender of the tenancy by operation of law (*i*).

Acceptance of another Tenant in lieu.

*Thomas* v. *Cook.*

A surrender by operation of law is effected in cases in which a third person has, with the consent of both landlord and tenant, taken possession of the demised premises and been treated by the landlord as his tenant (*k*); but the grant of a new lease with the oral assent merely of the person in possession under a subsisting lease does not operate as a surrender in law of the subsisting lease (*l*).

A tenancy from year to year cannot be surrendered by the mere agreement of the landlord to accept a third person in the place of his

(*e*) *Dodd* v. *Acklom*, 6 M. & G. 672.

(*f*) *Oastler* v. *Henderson*, 2 Q. B. D. 575; 46 L. J., Q. B. 607; 37 L. T. 22.

The retention by the landlord of the key, sent to him by the tenant with the view of surrendering, was, however, held under the circumstances in *Smith* v. *Roberts*, 9 T. L. R. 77—C. A., to warrant the inference that the landlord had accepted the surrender.

(*g*) *Walls* v. *Atcheson*, 3 Bing. 462; 11 Moore, 379; 4 L. J., C. P. 154; 2 C. & P. 268; 28 R. R. 657.

(*h*) *Peter* v. *Kendal*, 6 B. & C. 703; 5 L. J., K. B. 282; 30 R. R. 504.

(*i*) *Doe* d. *Gray* v. *Stanion*, 1 M. & W. 695; *Tarte* v. *Darby*, 15 M. & W. 601.

(*k*) *Thomas* v. *Cook*, 2 B. & Ad. 119. See Smith, L. & T. 308, where this and similar cases are ably discussed, and it is remarked that the whole doctrine is an encroachment on the Statute of Frauds.

(*l*) *Wallis* v. *Hands*, [1893] 2 Ch. 75; 62 L. J., Ch. 586; 68 L. T. 428; 41 W. R. 471; 3 R. 351, per Chitty, J.

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By Acceptance of new Tenant—*cont.*

tenant, unless such agreement be in writing, or the third person actually take possession (*m*): but an oral agreement between a landlord and tenant from year to year, that another tenant shall be substituted in his place, who is accordingly substituted, and thereupon takes possession, is a sufficient surrender to determine the former tenancy (*n*). Where a landlord grants a new lease to a stranger with the assent of the tenant under an existing lease, and the latter gives up his own possession, that is a surrender by operation of law (*o*), and there is a similar surrender if where A. being tenant from year to year sub-let to B., and the original landlord, with the assent of A. accept B. as his tenant (*p*). Where two persons being tenants from year to year of two closes under different lessors agreed verbally to exchange them, which they did, and then the arrangement was mentioned to a person who was steward of both the lessors, and who expressed his assent to it, it was held that this was evidence of new demises, and of a surrender by operation of law of the previous interests of the tenant (*q*). A tenant from year to year died, his widow remained in possession, and continued paying the rent to the landlord, with the knowledge of a person who, above a year after, took out administration; the widow still continued in possession for a year, paying the rent as before; it was held, that this did not amount to a surrender by operation of law of the tenancy from year to year (*r*). A tenant quitted possession of premises, and, on being applied to for rent, stated in a letter to his landlord, that he hoped his landlord would be able to let them to some other person on better terms; this the landlord did a few days after, and the new tenant entered and paid rent: it was held, that these facts amounted to a surrender, but the court declined to consider the effect of the letter as evidence of a surrender by a note in writing within the Statute of Frauds (*s*). Where W. and H., who were partners, by agreement, in March, 1827, became tenants to the plaintiff, and at Midsummer, 1828, W. retired from the partnership, and in January, 1829, H. entered into partnership with S.; and the plaintiff gave receipts for rent as received from H. and W. retired, and as received from H. and S. after S. became a partner: and also

(*m*) *Taylor* v. *Chapman*, Peake Ad. Cas. 19.

(*n*) *Stone* v. *Whiting*, 2 Stark. 235; *Nickells* v. *Atherstone*, 10 Q. B. 944; *Walker* v. *Richardson*, 2 M. & W. 882; *Lawrence* v. *Faux*, 2 F. & F. 435; *Hobson* v. *Cowley*, 26 L. J., Ex. 209.

(*o*) *Davison* v. *Gent*, 1 H. & N. 744; 26 L. J., Ex. 122; *Lawrence* v. *Faux*, 2 F. & F. 435.

(*p*) *Thomas* v. *Cook*, 2 B. & Ad. 119; *Johnstone* v. *Hudlestone*, 4 B. & C. 922; Smith L. & T. 308—310 (2nd ed.); *Wilson* v. *Sewell*, 4 Burr. 1975; *Hall* v. *Burgess*, 5 B. & C. 332; *Walls* v. *Atcheson*, 3 Bing. 462; *Woodcock* v. *Nuth*, 8 Bing. 170; *Lawrence* v. *Faux*, 2 F. & F. 435.

(*q*) *Rees* v. *Williams*, 2 C., M. & R. 581; *Lyon* v. *Reed*, 13 M. & W. 285; Smith L. & T. 310 (2nd ed.).

(*r*) *Doe* d. *Hull* v. *Wood*, 14 M. & W. 682.

(*s*) *Nickells* v. *Atherstone*, 10 Q. B. 944; Smith L. & T. 314 (2nd ed.).

gave H. a letter to his attorney, signifying that a lease might be made to H. and S., but which was kept by H. and not acted upon, and no lease was prepared; it was held, that W. remained liable for the rent accruing at the time of H. and S. (*t*). Where premises had been let to B. for a term determinable by a notice to quit, and, pending the term, A., the landlord, agreed to let C. stand in B.'s place, and C. offered to pay rent; it was held, in an action for use and occupation against C., that he could not set up as a defence that B.'s term had not been determined either by a notice to quit, or a surrender in writing (*u*). Where a sole tenant from year to year, before the termination of his tenancy, entered into an agreement with his landlord for a lease to be granted to him and another jointly, and *both entered* upon and occupied the premises jointly; it was held, that the first tenancy was determined though the lease was never executed pursuant to the agreement (*x*).

### (c) *Operation of Surrender.*

Surrender will not prejudice previous Sub-leases.

The surrender of a lease will not affect or prejudice a sub-lease previously granted (*y*), unless indeed the sub-tenant expressly assents to the surrender and in effect attorns to the surrenderee; to hold of him on new terms, or as his agent or servant (*z*). Where a lessee mortgaged tenant's fixtures, and afterwards surrendered his lease to the lessor, who granted a fresh lease to a third party; it was held, that the mortgagee had a right to enter and sever the fixtures, as it was not competent to the tenant to defeat his grant by the subsequent voluntary act of surrender (*a*).

Operation on Rents reserved in Sub-leases.

Formerly if a lessee for years, who had sub-let for a less term, surrendered his term to the lessor, it followed that the reversion on the sub-lease being gone, the rent and the covenants were gone also (*b*). But the Landlord and Tenant Act, 1730, 4 Geo. 2, c. 28, s. 6, enabled a lessee to surrender his lease for the purpose of taking a new one without a surrender of a sub-lease, and saved to the lessee all the same remedies against the sub-lessee for rents, covenants and duties, and to the original lessor the same remedies for rents and duties reserved by the new lease, so far as they exceed not the

(*t*) *Graham* v. *Wichelo*, 1 Cr. & M. 188; *Woodcock* v. *Nuth*, 8 Bing. 170.

(*u*) *Phipps* v. *Sculthorpe*, 1 B. & A. 50; but see *Hyde* v. *Moakes*, 5 C. & P. 42.

(*x*) *Hammerton* v. *Steed*, 3 B. & C. 478; 5 D. & R. 206; 3 L. J., K. B. 33; 27 R. R. 407.

(*y*) *Mellor* v. *Watkins*, L. R., 9 Q. B. 409; *Doe* d. *Beaden* v. *Pyke*, 5 M. & S. 146; 17 R. R. 296; *Pleasant* d. *Hayton* v. *Benson*, 14 East, 232; 12 R. R. 507; *Torriano* v. *Young*, 6 C. & P. 8; *Piggott* v. *Stratton*, 1 De G., F. & J. 33; 29 L. J., Ch. 1, 7.

(*z*) *Lambert* v. *M'Donnell*, 15 Ir. Com. L. R. 136.

(*a*) *London and Westminster Loan and Discount Co., Limited* v. *Drake*, 6 C. B., N. S. 798; 28 L. J., C. P. 297; and see *Saint* v. *Pilley*, L. R., 10 Ex. 137; 44 L. J., Ex. 33.

(*b*) *Thrér* v. *Barton*, Moore, 94; *Webb* v. *Russell*, 3 T. R. 393; 1 R. R. 725; *Burton* v. *Barclay*, 7 Bing. 756.

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rents and duties reserved in the former one, out of which the sub-lease was derived, as if the original lease were still kept on foot (*c*). And by the Real Property Act, 1845, 8 & 9 Vict. c. 106, s. 9, if a reversion expectant on a lease is surrendered, the estate which confers, as against the tenant, the next vested right to the tenements, is deemed the reversion for the purpose of preserving the incidents to and obligations on the reversion (*d*); so that, by the effect of this statute, the surrenderee becomes assignee of the reversion expectant on the sub-lease.

Surrenderee, assignee of reversion on a sub-lease.

Effect on Rent previously due.

Where a lease containing a personal covenant for the payment of rent is surrendered, the personal covenant is independent of the estate in the property, and as to rent previously due is not affected by the surrender, but the lessor remains a specialty creditor for the rent which accrued before the surrender (*e*), and where there is no personal covenant, the lessee is liable for use and occupation (*f*).

Accruing Rent.

Before the Apportionment Act, 1870 (*g*), rent reserved by the lease at fixed periods, quarterly or otherwise, which was *accruing* when a surrender was made, sank and was entirely lost (*h*); but that act, sect. 3, by the words "re-entry, death or otherwise," seems to include the case of a surrender.

Effect of Surrender of part.

The surrender of a part of the demised premises does not put an end to the tenancy of the remainder (*i*).

By Assignee.

The surrender of part of the demised premises by an assignee, will not relieve the lessee from his covenant to pay rent. So it was held by the Court of Appeal in *Baynton* v. *Morgan* (*k*) without deciding whether the covenant was apportionable or not, and two of the judges (Brett, M.R., and Fry, L.J.), intimating that if the covenant was not apportionable, the lessee was liable for the whole rent. Cave, J., had intimated in the court below that if the liability of the lessee still existed it must exist as a whole on the ground that the law would not imply a modified covenant to suit modified circumstances; and it is submitted to be clear both on authority (*l*) and principle that the liability subsists as a whole and cannot be apportioned.

(*c*) Smith L. & T. 317; *Doe* d. *Palk* v. *Marchetti*, 1 B. & Ad. 715. See *Ecclesiastical Commissioners* v. *Treemer*, 41 W. R. 166, and see 4 Geo. 2, c. 28, s. 6, at length, post, Chap. IX., Sect. 5.

(*d*) Smith L. & T. 316. See p. 328, post.

(*e*) *Att.-Gen.* v. *Cox*, 3 H. L. Cas. 240; Smith L. & T. 317 (2nd ed.).

(*f*) *Shaw* v. *Lomas*, 59 L. T. 477.

(*g*) Post, Chap. X., Sect. 6 (b).

(*h*) *Grimman* v. *Legge*, 8 B. & C. 324; *Slack* v. *Sharp*, 8 A. & E. 366; *Dodd* v. *Acklom*, 6 M. & G. 673; *Doe* d. *Philip* v. *Benjamin*, 9 A. & E. 644; *Furnivall* v. *Grove*, 8 C. B., N. S. 496; 30 L. J., C. P. 3.

(*i*) *Holme* v. *Brunskill*, 3 Q. B. D., at p. 504; 47 L. J., Q. B. 410; 38 L. T. 838—C. A.; *Baynton* v. *Morgan*, infra.

(*k*) *Baynton* v. *Morgan*, 22 Q. B. D. 74; 58 L. J., Q. B. 139; 37 W. R. 148—C. A. affirming Cave, J., 21 Q. B. D. 101; 57 L. J., Q. B. 465; 59 L. T. 478.

(*l*) See per cur. in the considered judgment in *Stevenson* v. *Lambard*, 2 East, 573; 6 R. R. 511.

In the peculiar case of *Southwell* v. *Scotter* (*m*), the plaintiff, having let to the defendant, assigned the reversion, but agreed with the assignee that they should continue to receive rent from the defendant, to whom they gave notice of the agreement. The defendant afterwards surrendered to the assignee of the reversion, and it was held that such a surrender was valid, and that the rent accruing due after it could not be recovered by the plaintiff from the defendant; but it seems that the plaintiff would have had a remedy against the assignee, though it was not necessary to decide that point.

Surrender after assignment of future rent.

(d) *By and to whom Surrender made.*

Those persons who are disabled to grant are unable to surrender; and such persons as are disabled to take by grant are unable to take by a surrender (*n*). Moreover, the surrenderee must be the immediate reversioner (*o*); if therefore A. let to B. for ten years, who lets to C. for five years, C. cannot surrender to A. by reason of the intermediate interest of B.; but in such case B. may surrender to A., and afterwards C. likewise, because then his lease for five years is become immediate to the reversion of A. (*p*). If a husband have a lease or estate for years in right of his wife, he alone, or he and his wife together, may surrender it; but if the husband have an estate for life in right of his wife, who is tenant in dower or otherwise, and he alone, or he and she together, surrender it, the surrender is good only during the life of the husband, unless the deed be acknowledged by the wife pursuant to the Act for the Abolition of Fines and Recoveries.

Surrenderee must be the immediate Reversioner.

One joint tenant cannot *surrender* to another joint tenant, but he may grant, release or assign to him. One of two or more executors may also surrender an estate or lease for years, which the executors have in the right of their testator (*q*). Where the lessee of premises, under a covenant of re-entry if the rent should be in arrear twenty-eight days, died in bad circumstances, and his brother administered de son tort, and then having agreed with the landlord to give him possession and suffer the lease to be cancelled on his abandoning the rent, which was twenty-eight days in arrear, took out letters of administration; it was held, that the agreement of the brother as administrator de son tort did not conclude him as rightful administrator, nor give a right of possession to the landlord who had entered under the agreement, but who had not made any formal demand of the rent, nor taken a regular surrender of the lease (*r*). Where a

Joint Tenants, Executors, &c.

(*m*) *Southwell* v. *Scotter*, 49 L. J., Ex. 356; 44 J. P. 376—C. A.
(*n*) Shep. Touch. 303.
(*o*) *Edwards* v. *Wickwar*, L. R., 1 Eq. 68, 403.
(*p*) Bac. Abr. tit. *Leases* (S. 2).
(*q*) Shep. Touch. 303.
(*r*) *Doe* d. *Hornby* v. *Glenn*, 1 A. & E 49.

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lessee who had paid rent sometimes to a trustee and sometimes to a cestui que trust, gave up possession on the last day of the term, but before it was ended, to the person who had been trustee, and not to the party then having the legal title; it was held, that as the act was equivocal, it did not amount to either a surrender or to a forfeiture (*s*).

Infants.

An infant may make a surrender in law by the acceptance of a new lease, if such new lease increase his term or decrease his rent; but a surrender by an infant lessee by deed is absolutely void.

Sequestrators.

A surrender of a lease cannot be made to sequestrators; it must be to the lessor, or to a party legally entitled under him (*t*).

What Estate Surrender may operate on.

A lessee may surrender to him who has the immediate reversion, either in fee or for any less estate (*u*).

## SECT. 4.—*Merger.*

What amounts to a Merger of a Term.

A lease for years may be determined by merger; that is, when there is a union of the term with the immediate reversion, both being vested at the same time in one person in the same right. In such case the reversion merges or drowns the term, because they are inconsistent and incompatible (*x*). *Nemo potest esse tenens et dominus.* A person cannot be, at the same time, both landlord and tenant of the same premises. It may be laid down as a general rule, that whenever the particular estate and that immediately in reversion are both legal or both equitable, and by any act or event subsequent to the creation of the particular estate become for the first time vested in one person in the same right, their separate existence will cease and a merger will take place. But where a tenant for ninety-nine years purchases the reversion in fee, and takes a conveyance thereof to a trustee for himself, expressly to prevent a merger, the term becomes one in gross, and no merger takes place (*y*). A particular estate will merge in a reversion of a shorter duration than itself (*z*); as if one be lessee for twenty years, and the reversion expectant thereon be granted to another for one year, who grants it to the lessee, it will operate as a merger of the twenty years' term, and the term for one year will begin to run (*a*). Where a lessee made a

(*s*) *Ackland* v. *Lutley*, 9 A. & E. 879.
(*t*) *Cornish* v. *Searell*, 8 B. & C. 471.
(*u*) Bac. Abr. tit. *Leases* (S. 1, 2); *Challoner* v. *Davis*, 1 Ld. Raym. 402; *Hughes* v. *Robotham*, Cro. Eliz. 302.
(*x*) Bac. Abr. tit. *Leases* (R); 2 Blac. Com. 177; *Salmon* v. *Swan*, Cro. Jac. 619; *Burton* v. *Barclay*, 7 Bing. 745; *Lord Dynevor* v. *Tennant*, 13 App. Cas. 279.
(*y*) *Belaney* v. *Belaney*, L. R., 2 Ch. Ap. 138; 36 L. J., Ch. 265.
(*z*) *Hughes* v. *Robotham*, Cro. Eliz. 302; Poph. 30.
(*a*) Cruise, Dig. 96; *Stephens* v. *Bridges*, 6 Madd. 66; 22 R. R. 242.

sub-lease for all his term, except a few days, and then granted the sub-lease and the rent thereby reserved to his lessor for the term mentioned in the sub-lease (but not for the few days so excepted), it was held, that the chattel interest was not merged in the fee (*b*). Where a lessee of premises for a term of twenty-one years, which would expire at Michaelmas, 1809, in December, 1799, took a further lease of the same premises for sixty years, to commence from Michaelmas, 1809; and the lessor died in December, 1800, and devised the premises in question to A., the lessee, for his life, who by lease and release *in* 1806 *conveyed his life estate to B.*:—it was held that A.'s interest in the lease of 1799, which was to commence in 1809, was not merged in his estate for life (*c*). Sir Edward Coke lays it down as a general rule that a person cannot have a term for years in his own right, and a freehold in autre droit, but that his own term shall drown in the freehold; but a man may have a term of years in autre droit, and a freehold in his own right (*d*); and it seems to be agreed, that if a man, being possessed of a term of years in right of his wife, purchase the inheritance, the term for years, though in right of his wife, is merged and extinct, because the purchase was the express act of the husband, and therefore amounts in law to a disposition of the term, by reason of the merger consequent thereupon; but a bare intermarriage of a woman who is a termor with the reversioner will not merge the term, because by the intermarriage the term is cast upon the husband by act of law, without any concurrence or immediate act done by him to obtain the same; and therefore in such case the law will preserve the term in the same plight as it gave it to the husband, till he by some express act destroys it or gives it away (*e*). Where, however, the husband himself is lessee for life, and intermarries with the lessor, this merges his own term, because he thereby draws to himself the immediate reversion, in nature of a purchase by his own voluntary act, and so undermines his own term; whereas in the other case, the term existing in the woman until the marriage, is not thereby so drawn out of her or annexed to the freehold as to merge therein; because that attraction which is only by act of law consequent upon the marriage, would, by merging the term, do wrong to a married woman, and so take the term out of her, though the husband did no express act for that purpose, which the law will not allow. If a husband is possessed of a term of years, and the owner of the reversion in fee devises it to the wife, who has issue, the husband, who in the lifetime of the wife is tenant by the curtesy initiate, holds the

(*b*) *Burton* v. *Barclay*, 7 Bing. 745.

(*c*) *Doe* d. *Rawlings* v. *Walker*, 5 B. & C. 111; 7 D. & R. 487; 4 L. J., K. B. 159; 29 R. R. 184.

(*d*) *Webb* v. *Russell*, 3 T. R. 401; 1 R. R. 725, per Lord Kenyon, C.J.

(*e*) Co. Lit. 338 b; *Lady Platt* v. *Sleap*, Cro. Jac. 275.

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two estates in different rights, without having acquired the freehold by his own act, and consequently there is no merger (*f*).

Administrator.

C. as administrator held certain land for a term of years, which he demised to P. for a shorter term. P. afterwards assigned this land to C. for the shorter term. In the first deed C. was described as administrator, but not in the second. It was held that there had been no merger in equity (*g*).

When Reversion merged, next vested Estate to be deemed Reversion.

Formerly if a tenant for a term of years leased for a less term, and assigned his reversion, and the assignee took a conveyance of the fee, by which his former reversionary interest was merged, the covenants of the sub-lease incident to that reversionary interest were thereby extinguished (*h*). But by the Real Property Act, 1845, 8 & 9 Vict. c. 106, s. 9, "when the reversion expectant on a lease, made either before or after the passing of this act, of any tenements or hereditaments of any tenure, shall, after the 1st of October, 1845, be surrendered or merged, the estate, which shall for the time being confer as against the tenant under the same lease the next vested right to the same tenements or hereditaments, shall, to the extent and for the purpose of preserving such incidents to and obligations on the same reversion as, but for the surrender or merger thereof, would have subsisted, be deemed the reversion expectant on the same lease."

8 & 9 Vict. c. 106, s. 9.

Merger after the Judicature Acts.

By the Judicature Act, 1873, s. 25, sub-s. (4), "there shall not after the commencement of this act (*i*), be any merger by operation of law only of any estate, the beneficial interest of which would not be deemed to be merged or extinguished in equity."

And see as to merger generally the judgment of the House of Lords in the very special case of *Lord Dynevor* v. *Tennant* (*k*).

## SECT. 5.—*Forfeiture.*

### (a) *How incurred generally.*

By Breach of Covenant, where Condition of Re-entry.

A lease may be determined by entry or ejectment for a forfeiture incurred either by (1) breach of a *condition* therein in the lease; or (2) for a breach of any covenant, in case (and in case only (*l*)) the lease contain a condition or proviso for re-entry for a breach of such

(*f*) *Jones* v. *Davies*, 5 H. & N. 766; 7 Id. 507; 29 L. J., Ex. 374.

(*g*) *Chambers* v. *Kingham*, L. R., 10 Ch. D. 743; 39 L. T. 272, per Fry, J.

(*h*) *Webb* v. *Russell*, 3 T. R. 393; 1 R. R. 725; *Thorne* v. *Woolcombe*, 3 B. & Ad. 586.

(*i*) I.e., 1st of November, 1875.

(*k*) *Dynevor (Lord)* v. *Tennant*, 13 App. Cas. 272; 37 W. R. 193.

(*l*) It is of importance that a lease for years should contain a proviso for re-entry for non-payment of rent at any rate, as otherwise the lessor may find himself saddled with an impecunious tenant, and not be able to get rid of him—unless, indeed, he can get judgment signed for rent due, and seize the term of years in execution.

covenant (*m*). The same rule applies to the breach of the terms of an agreement for a lease for years, whether a person has entered and holds as tenant from year to year (*n*), or is considered as actual lessee (*o*). In that case also, if the agreement stipulate for a proviso for re-entry, ejectment can be brought at once. The lessor, having the jus disponendi, may annex whatever conditions he pleases to his grant, provided they be not illegal or repugnant to the grant itself; and upon the breach of any of these conditions may, subject to special statutory provisions for "relief against forfeiture," avoid the lease (*p*).

By what Acts a Forfeiture may be incurred.

Besides incurring a forfeiture by the breach of express conditions, which will be hereafter considered, a lessee may incur a forfeiture for breach of implied conditions, either by matter of record, or by act in pais: 1, by matter of record, where he sues out a writ, or resorts to a remedy which claims or supposes a right to the freehold, or where, in an action by his lessor grounded upon the lease, he resists the demand under the grant of a higher interest in the land; or where he acknowledges in court the fee to be in a stranger; for having thus solemnly protested against the right of his lessor, he is estopped by the record from claiming an interest under him (*q*), but anything of this sort can seldom, if ever, now happen, real actions having been abolished; 2, by act in pais, where he aliens the estate in fee (*r*). Where a tenant delivered up possession of the premises and the lease, in fraud of his landlord, to a person who claimed under an hostile title, with the intention of enabling him to set up that title, not with the intention that he should hold under the lease; it was held, that the term was forfeited (*s*). Where a lessee, who had paid rent sometimes to a trustee and sometimes to a cestui que trust, gave up possession on the last day of the term, but before the term was ended, to the person who had been trustee, and not to the party then having the legal title; it was held, that as the act was equivocal, it did not amount either to a surrender or a forfeiture of the term (*t*). Where a forfeiture may be incurred by a grant or deed, it is necessary that the deed be a valid instrument, for if by reason of any defect it be void, it will not work a forfeiture of the estate (*u*); but granting a lease of the land for more years than he himself has

(*m*) Lit. s. 325; *Doe* d. *Wilson* v. *Phillips*, 2 Bing. 13; 9 Moore, 46; 2 L. J., C. P. 103; 27 R. R. 539; *Doe* d. *Darke* v. *Bowditch*, 8 Q. B. 973.

(*n*) *Doe* d. *Thomson* v. *Amey*, 12 A. & E. 476; *Thomas* v. *Packer*, 1 H. & N. 669; *Hayne* v. *Cummings*, 16 C. B., N. S. 421.

(*o*) See as to this, *Walsh* v. *Lonsdale*, 21 Ch. D. 9, ante, Chap. IV., Sect. 1.

(*p*) *Baylis* v. *Le Gros*, 4 C. B., N. S. 537, 539; 6 Id. 552. As to "relief against forfeiture," see post, Sect. 6.

(*q*) Post, Sect. 8.

(*r*) *Rees* v. *Irvington*, Cro. Eliz. 322.

(*s*) *Doe* d. *Ellerbrock* v. *Flynn*, 1 C., M. & R. 137.

(*t*) *Ackland* v. *Lutley*, 9 A. & E. 879.

(*u*) *Doe* d. *Lloyd* v. *Powell*, 5 B. & C. 308, 312; 8 D. & R. 35; 4 L. J., K. B. 159; 29 R. R. 253.

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is no forfeiture, because it is only a contract between him and his sub-lessee (or rather assignee), which cannot possibly prejudice the interest of the original lessor, and does not even pretend to usurp or touch the freehold or inheritance. A proviso in a lease for re-entry on a condition broken can only operate during the term (*x*). But it will extend to any new implied tenancy from year to year upon the like terms and conditions (*y*).

Time and Place of Performance of Condition.

Where a time certain is appointed in a proviso or condition for the performance of anything, neither party is bound to attend at any other time; and if it is provided that any act is done on a day certain, but no hour in the day is specified wherein the same shall be done, the party must attend such a length of time before and until sunset as may be convenient to do the act. If a place be limited and agreed on by the parties where the condition is to be performed, the party who is to perform is not obliged to seek the party to whom it is due elsewhere, nor is he to whom it is to be performed *obliged* to accept of the performance elsewhere; but he *may* accept it at another place, and it will be good (*z*).

Effect of the Statute of Limitations.

The Real Property Limitation Act, 1874 (37 & 38 Vict. c. 74), bars the party who has a right to enter for a forfeiture, but who neglects to do so for more than *twelve years* after his right accrued (*a*).

Where an ejectment is founded on a particular forfeiture, it must be commenced within twelve years after such forfeiture accrued (*b*). But a lessor is not bound to take advantage of the first or any other forfeiture committed during the term (*c*). Therefore it is no defence to an ejectment commenced after the expiration of the lease that a forfeiture and right of re-entry thereon accrued under the lease more than twelve years before the commencement of the action (*d*).

Estate of Party entering.

It may be laid down for a general rule that he who enters or recovers by ejectment for a condition broken shall be seised or possessed of that estate which the lessor had at the time of the estate made upon condition; and he may avoid all mesne charges and incumbrances (*e*).

### (b) *Construction of Proviso for Re-entry.*

Construction of Proviso for Re-entry.

Provisoes for re-entry in leases are conditions annexed to the term, and are to be construed, like other contracts, according to the intent

(*x*) *Johns* v. *Whitley*, 3 Wils. 127.
(*y*) *Thomas* v. *Packer*, 1 H. & N. 669.
(*z*) Bac. Abr. tit. *Conditions* (O. 4).
(*a*) See *Doe* d. *Tarrant* v. *Hellier*, 3 T. R. 162; 1 R. R. 680.
(*b*) Cole Ejec. 11.
(*c*) *Doe* d. *Sheppard* v. *Allen*, 3 Taunt. 78; 12 R. R. 597; *Doe* d. *Bryan* v. *Bancks*, 4 B. & A. 401; *Doe* d. *Baker* v. *Jones*, 5 Exch. 498.
(*d*) *Doe* d. *Allen* v. *Blakeway*, 5 C. & P. 563; *Doe* d. *Cook* v. *Danvers*, 7 East, 299.
(*e*) Co. Lit. 202; Bac. Abr. tit. *Conditions* (O. 4); Cole Ejec. 68.

of the parties to be collected from the words used, and not with the strictness of conditions at common law (*f*); therefore where there is a proviso in a lease, that on non-payment of rent or non-performance of any of the lessee's covenants the term shall cease, the lessor, and not the lessee, has the option of determining a lease upon a breach made (*g*). A proviso in a lease, that, upon breach of any of the covenants therein on the part of the lessee, the lessor may re-enter on the premises, "and the same have again, as if the said lease had never been made," means, that the lease is to be void from and after re-entry by the lessor, and does not deprive him of the right of bringing an action of covenant for rent which accrued previously: and this principle equally applies to a covenant for repairs or other services to be rendered by the lessee (*h*). An agreement of demise contained a clause that if the rent should be unpaid for ten days, or if the lessee should not observe all the conditions, &c., then it should be lawful for the lessor to enter upon and take possession of the premises, and to expel the lessee, without any legal process, and as effectually as a sheriff might do on a recovery in ejectment; and that, in case of such entry and an action being brought, the defendant might plead leave and licence in bar; it was held, that the lessee's right to possession as tenant continued until the lessor had availed himself of the licence given (*i*). Such a clause does not dispense with a formal demand of the rent (*k*). An agreement to let a house and for the lessee to make certain alterations, and if they were not done that the lessor might retake possession, and that the agreement should be null and void, is voidable only at the election of the lessor if the lessee does not make the alterations (*l*). Where in an agreement amounting to an actual demise there was a clause in the following form, "it is stipulated and conditioned that the lessee shall not underlet;" it was held, that these words created a condition, and being such, upon breach of it the lessor might maintain ejectment, without an express clause of re-entry (*m*). A proviso that the lessee shall pay 120*l*. per annum creates both a covenant and a condition, and therefore for breach of it an ejectment may be maintained without any express power of

(*f*) *Doe* d. *Davis* v. *Elsam*, Moo. & M. 189; *Doe* d. *Muston* v. *Gladwin*, 6 Q. B. 953, 961; *Croft* v. *Lumley*, 5 E. & B. 667; 6 H. L. Cas. 672; 27 L. J., Q. B. 321; *Perry* v. *Davis*, 3 C. B., N. S. 769.

(*g*) *Rede* v. *Farr*, 6 M. & S. 121; 18 R. R. 329.

(*h*) *Hartshorn* v. *Watson*, 4 Bing. N. C. 178; 6 Dowl. 404; see also *Selby* v. *Browne*, 7 Q. B. 620.

(*i*) *Kavanagh* v. *Gudge*, 7 M. & G. 316; 1 D. & L. 928.

(*k*) *Barry* v. *Glover*, 10 Ir. Com. L. R. 113; *Acocks* v. *Phillips*, 5 H. & N. 183.

(*l*) *Doe* d. *Nash* v. *Birch*, 1 M. & W. 402; *Hayne* v. *Cummings*, 16 C. B., N. S. 421.

(*m*) *Doe* d. *Henniker* v. *Watt*, 8 B. & C. 308; *Simpson* v. *Titterell*, Cro. Eliz. 242; *Marsh* v. *Curteys*, Cro. Eliz. 528; Cole Ejec. 402.

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re-entry (*n*). If by a written agreement premises are let for a term, "at and under the rent of 80*l*.," it is an agreement by the lessee to pay that rent; and therefore if there be a power of re-entry in case of breach of "any of the agreements therein contained," the lessor has a right of re-entry on non-payment of rent, although there is no express agreement to pay rent (*o*). A proviso that if buildings should not be completed on a certain day "it shall be lawful for the lessors into the demised premises or any part thereof in the name of the whole [omitting the words 'to re-enter'] and repossess," would seem to give a right of re-entry (*p*). Where a proviso for re-entry was insensible, the court refused to decide its meaning, and nonsuited the plaintiff in an ejectment for a forfeiture (*q*). Where the lessee covenanted to pay the rent, and not to assign without the leave of the lessor, and there was a proviso for re-entry if the rent was in arrear, or if all or any of the covenants *thereinafter* contained on the part of the lessee should be broken; and there were no covenants on the part of the lessee after the proviso, but only a covenant by the lessor that upon the lessee paying the rent, and performing all and every the covenants *thereinbefore* contained on his part to be performed, he should quietly enjoy; it was held, that the lessor could not re-enter for breach of the covenant not to assign, for that the proviso was restrained by the word *thereinafter* to subsequent covenants; and though there were none such, yet the court could not reject the word (*r*). A proviso giving a power of re-entry if the lessee "shall do or cause to be done any act, matter or thing contrary to and in breach of any of the covenants," does not apply to a breach of the covenant to repair, the omission to repair not being *an act done* within the proviso (*s*).

Insensible Proviso.

Proviso for Re-entry for Breach of negative Covenant. *Hyde* v. *Warden.*

It has been said to be a general rule that the proviso for re-entry applies only to the breach of an affirmative and not to the breach of a negative covenant (*t*). If the proviso be expressed to operate in case of "default in performance" or "failure to perform," or the like, this rule would seem to hold good; and indeed in *Hyde* v. *Warden* (*u*), the Court of Appeal was prepared to hold, if it were necessary, that the power of re-entry in the event of the lessee "wilfully failing or neglecting to perform any of the covenants"

(*n*) *Harrington* v. *Wise*, Cro. Eliz. 486; cited 8 B. & C. 316; Cole Ejec. 402.

(*o*) *Doe* d. *Rains* v. *Kneller*, 4 C. & P. 3.

(*p*) *Hunt* v. *Bishop*, 8 Exch. 675.

(*q*) *Doe* d. *Wyndham* v. *Carew*, 2 Q. B. 317; but see *Doe* d. *Darke* v. *Bowditch*, 8 Q. B. 973.

(*r*) *Doe* d. *Spencer* v. *Godwin*, 4 M. & S. 265; 16 R. R. 463.

(*s*) *Doe* d. *Abdy* v. *Stevens*, 3 B. & Ad. 299; Cole Ejec. 407.

(*t*) *West* v. *Dobb*, 39 L. J., Q. B. 190; Exch. Chamb. per Channell, B.; see also *Doe* d. *Paik* v. *Marchetti*, 1 B. & Ad. 715; *Evans* v. *Davis*, 39 L. T. at pp. 392, 394.

(*u*) *Hyde* v. *Warden*, 3 Ex. D. at p. 82.

does not apply to a breach of a negative covenant. But as was pointed out by Blackburn, J., in *Wadham* v. *Postmaster-General* (*x*), the difficulty arises in consequence of the form of the proviso for re-entry. A proviso expressed to operate in case of "breach" or "non-observance" for instance, as well as in case of non-performance, would seem clearly to apply to the breach of a negative covenant.

Proviso for Re-entry for Waste to fixed Value.

Where a lease contained a proviso for re-entry, if the lessee committed waste to the value of 10*s*., and the lessor re-entered, and brought ejectment in consequence of the tenant's having pulled down some old buildings of more than 10*s*. value, and substituted others of a different description: it was held, that the waste contemplated in the proviso was waste producing an injury to the reversion, and that it was a question for the jury whether, under all the circumstances, such waste to the value of 10*s*. had been committed (*y*).

Effect of covenant with penalty on Proviso for Re-entry.

Where there was, amongst others, a covenant not to carry off hay under a penalty, and a clause followed which enumerated all the covenants except that, and provided for re-entry upon breach of any of the covenants; it was held, that the penalty did not prevent the clause of re-entry from applying to the hay covenant, the words being large enough (*z*). Similarly, where the reddendum clause stipulated for an additional rent in case of the lessee carrying on certain trades which he covenanted not to carry on, and a proviso for re-entry for breach of covenants generally, it was held that the lease could not be construed as meaning that the lessee was entitled to carry on the trades in question on payment of the additional rent, and that the right of re-entry might be exercised on breaches upon which the additional rent became payable (*a*).

Proviso for Re-entry in case of Execution.

Where a lease contained a clause of re-entry, in case the term of years thereby granted should be *extended or taken in execution;* and before the end of the term, the sheriff entered the premises under a writ of extent against the lessee at the suit of the crown, held an inquisition, and seized the lessee's interests into the king's hands; it was held, that this proceeding was a *taking in execution* within the latter clause of the condition, and that the term was determined and forfeited to the lessor (*b*); and where the condition was, amongst other things, to be void "if the lessee should incur any debt on

(*x*) *Wadham* v. *Postmaster-General*, L. R., 6 Q. B. at p. 648.

(*y*) *Doe* d. *Earl of Darlington* v. *Bond*, 5 B. & C. 855.

(*z*) *Doe d. Antrobus* v. *Jepson*, 3 B. & Ad. 402.

(*a*) *Weston* v. *Metropolitan Asylums Board*, 9 Q. B. D. 404; 51 L. J., Q. B. 399; 46 L. T. 580; 30 W. R. 623—C. A. aff. 8 Q. B. D. 387; 46 L. T. 166.

(*b*) *Rex* v. *Topping*, M'Clel. & You. 544; 29 R. R. 544.

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which any judgment should be signed, entered up or given against him, and on which any writ of fieri facias, or other writ of execution, should be issued," and the tenant gave a warrant of attorney, on which judgment was entered up and execution issued and the tenant's goods were taken, and the lessor entered; it was held that he was entitled to the emblements (*c*).

Proviso for Re-entry in case of Bankruptcy.

A proviso was, that in case the lessee should commit an act of bankruptcy, whereon a commission or fiat in bankruptcy should or might be issued, and under which he should be *duly* found and declared a bankrupt, the term should determine; the tenant became bankrupt, and was found and declared a bankrupt, but there was not a proper petitioning creditor's debt on which the fiat was founded; it was held by two judges, against the opinion of Parke, B., that the lessee was not *duly* found and declared a bankrupt within the meaning of the proviso (*d*). A proviso was, that if the lessee, his executors, administrators or assigns, should become bankrupt or insolvent, or suffer any judgment to be entered against him by confession or otherwise, or suffer any extent, process or proceedings to be had or taken against him, whereby any reasonable probability might arise of the estate being extended, &c., the estate should determine, and the lessor have a power to re-enter; the tenant died during the term, and by his will devised the premises to his executors on trust, and the surviving executor became a bankrupt; it was held that the lessor's right of re-entry thereupon accrued (*e*). The non-payment of a debt mentioned in an insolvent's schedule was held not to be a continuing insolvency, so as to constitute a new forfeiture of a lease, the former forfeiture by the insolvency having been waived (*f*). A lease for three lives contained a proviso that if the lessee, his heirs, &c., should, during the continuance of the term, happen to become insolvent, and unable in circumstances to go on with the management of the farm, the demise should from thenceforth cease and be absolutely void: the court doubted whether the attainder of the tenant for felony was a forfeiture of the lease; but held, that if it was a breach of the condition, it was not a continuing breach, but was contemporaneous with the conviction (*g*).

Re-entry for Bankruptcy.

Proviso for Re-entry for ceasing to work Mines;

Where a lease of coal mines reserved a royalty rent for every ton of coal raised, and contained a proviso that the lease should be void altogether if the tenant should cease working at any time within two years; but after the working had ceased more than two years

(*c*) *Davies* v. *Eyton*, 7 Bing. 154.

(*d*) *Doe* d. *Lloyd* v. *Ingleby*, 15 M. & W. 465.

(*e*) *Doe* d. *Bridgeman* v. *David*, 1 C., M. & R. 405; *Doe* d. *Williams* v. *Davis*, 6 C. & P. 614.

(*f*) *Doe* d. *Gatehouse* v. *Rees*, 4 Bing. N. C. 384.

(*g*) *Doe* d. *Griffith* v. *Pritchard*, 5 B. & Ad. 765.

the lessor received rent; it was held, that the lease was not absolutely void by the lessees ceasing to work, but voidable only at the option of the lessor; and that he might avoid the lease upon any cessation to work, commencing two years before the day of the devise in the ejectment (*h*).

for Non-production of cestui que vie;

In a lease for years if a person should so long live, there was a covenant to produce that person, or, if he should be in a foreign country, to make it appear by a good and sufficient certificate that he was living, with a proviso for re-entry on default; the person having gone to Brazil, an affidavit that the deponent had three years before seen him, and had often heard from him since, and was convinced that he was alive nine months before when the deponent left Brazil, was held not to be a sufficient certificate within the covenant, and that therefore a forfeiture was incurred (*i*).

for no sufficient Distress;

Under a clause of forfeiture in case no sufficient distress can be found upon the premises, every part of the premises must be searched (*k*).

for Non-payment of Rates.

Where a lessee has broken his covenant to pay rates and taxes, the lessor may avail himself of the proviso for re-entry without proof of any demand made (*l*).

### (c) *Who may avail themselves of a Forfeiture.*

Not the Lessee.

A lessee cannot avail himself of his own act or default to vacate a lease; on the principle that no man shall be permitted to take advantage of his own wrong (*m*). No one can re-enter for a forfeiture but the person then *legally* entitled to the rent or to the reversion (*n*);

The Lessor or his Assigns.

but a lessor who has demised his whole interest, subject to a right of re-entry on breach of a condition, may enter on the condition being broken, though he have no reversion (*o*). A reversioner who has parted with his reversion, either absolutely or by way of mortgage, cannot re-enter or maintain ejectment for a forfeiture (*p*), nor after his reversion has been merged and extinguished (*q*).

Persons having equitable Estates.

It was held before the Judicature Act that a right of entry could not be effectually reserved to a stranger to the legal estate, although he joined in the demise and had some equitable or beneficial estate or interest in the property (*r*). Thus, where by a lease a mortgagee

(*h*) *Doe* d. *Bryan* v. *Bancks*, 4 B. & Ad. 401; *Roberts* v. *Davey*, 4 B. & Ad. 664.

(*i*) *Randle* v. *Lory*, 6 A. & E. 218.

(*k*) *Rees* d. *Powell* v. *King*, Forrest, 19; 2 Brod. & B. 514.

(*l*) *Davis* v. *Burrell*, 10 C. B. 821.

(*m*) *Rede* v. *Farr*, 6 M. & S. 121; 18 R. R. 329.

(*n*) *Hotley* v. *Scott*, Lofft, 319 a; *Doe* d. *Barney* v. *Adams*, 2 C. & J. 232; *Doe* d. *Barker* v. *Goldsmith*, 2 C. & J. 674.

(*o*) *Doe* d. *Freeman* v. *Bateman*, 2 B. & A. 168; *Colville* v. *Hall*, 14 Ir. Com. L. R. 265, C. P.

(*p*) *Fenn* d. *Matthew* v. *Smart*, 12 East, 443; *Doe* d. *Marriott* v. *Edwards*, 5 B. & Ad. 1065; *Doe* d. *Prior* v. *Ongley*, 10 C. B. 25.

(*q*) *Webb* v. *Russell*, 3 T. R. 393, 402; 1 R. R. 725; *Thrér* v. *Barton*, Moore, 94.

(*r*) *Doe* d. *Barber* v. *Lawrence*, 4 Taunt. 23; Lit. s. 347; Co. Lit. 214 b.

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demised, and the executrix of the mortgagor demised and confirmed, and a power of re-entry for breach of covenants was reserved *to them or either of them*, it was held, that the deed operated as a demise by the mortgagee, and a confirmation by the executrix, and that the proviso for re-entry enured only to the mortgagee, and not to both (*s*). The same rule applied where trustees and cestui que trust joined in a lease, reserving rent to the cestui que trust, with a proviso for re-entry on non-payment (*t*), and where the tenant for life and the reversioner joined in a demise (*u*). The effect of the Judicature Act is to allow beneficiaries to avail themselves of a forfeiture (*x*), but in practice they will generally be represented by their trustees (*y*).

Trustees.

Devisees, Coparceners, &c.

Where a power to determine a lease is reserved to the lessor, his heirs, executors or administrators, it will extend to his devisee (*z*). Where a power for re-entry for breach of covenants is reserved, and the reversion descends to coparceners, it seems that one or more of them cannot, without the other or others, maintain ejectment for a forfeiture, the condition or proviso for re-entry not being divisible (*a*). A lease granted under a power contained in a settlement reserved a right of entry to the lessor and his assigns; it was held, that "assigns" meant assigns of the settlor; and that although the right of re-entry could not be well reserved to the lessor, yet that the owners of the reversion under the settlement for the time being were entitled to the advantage of it as "assigns" (*b*). Where a lease was granted of a piece of land with two partly-erected messuages thereon, and the lessee covenanted to complete them within two months, and also to keep the said messuages in repair during the term, with a proviso for forfeiture for breach of any of the covenants, and the messuages were never completed, but after the expiration of the two months, the reversion was assigned to the plaintiff, and afterwards the messuages were much dilapidated in the roofs and other parts; it was held, that whether the plaintiff could or not maintain ejectment for not completing the messuages within the two months, he could certainly do so for the subsequent non-repair (*c*).

Right of Assignee of the Reversion to Re-enter.

32 Hen. 8, c. 34.

At common law, no one but the grantor could re-enter for a forfeiture, and no grantee or assignee of the reversion could take the benefit or advantage of a condition for re-entry (*d*); but by

(*s*) *Doe* d. *Barney* v. *Adams*, 2 C. & J. 232; *Moore* v. *Earl of Plymouth*, 3 B. & A. 66.

(*t*) *Doe* d. *Barker* v. *Goldsmith*, 2 C. & J. 674.

(*u*) *Treport's case*, 6 Co. R. 15; Cole Ejec. 404.

(*x*) Judicature Act, 1873, s. 24.

(*y*) R. S. C. Order XVI., r. 8.

(*z*) *Roe* d. *Bamford* v. *Hayley*, 12 East, 464; 11 R. R. 455.

(*a*) *Doe* d. *Rutzen* v. *Lewis*, 5 A. & E. 277.

(*b*) *Greenaway* v. *Hart*, 14 C. B. 348; 23 L. J., C. P. 115.

(*c*) *Bennett* v. *Herring*, 3 C. B., N. S. 370.

(*d*) Lit. s. 374; Co. Lit. 214.

32 Hen. 8, c. 34, all grantees of the reversion, their heirs, executors, successors and assigns, have the like advantage against the lessees, their executors, administrators and assigns, *by entry for non-payment of rent, or for doing waste or other forfeiture*, and the same remedy by action only for not performing other conditions, covenants and agreements contained in the said leases as the lessors or grantors themselves had (*e*).

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### (d) *Entry of Lessor.*

Generally speaking, where a forfeiture has been incurred for breach of any covenant or condition, the lessor must do some act evidencing his intention to enter for the forfeiture and determine the lease (*f*); and the lease will be avoided *from that time only* (*g*). Perhaps an actual entry should be made *before action* to avoid a lease for lives; but the action itself is sufficient to avoid a lease for years (*h*).

Entry for a Forfeiture generally.

A corporation aggregate cannot, without deed, authorize their servant or agent to enter into land on their behalf for a condition broken (*i*).

Entry by Corporations aggregate.

### (e) *For Non-payment of Rent.*

No ejectment can be maintained for non-payment of rent unless the reservation amount to a condition, or there is an express proviso in the lease giving the landlord a right to re-enter and determine it for non-payment (*k*).

In Ejectment Proviso for Re-entry necessary.

Such condition or proviso for re-entry may and should, and in modern leases almost invariably does, by express words dispense with the necessity of a formal demand of the rent; as where it says, "although no formal demand shall have been made thereof," or to that effect (*l*). If the proviso be for re-entry on default in payment of rent within twenty-one days, *being demanded*, the demand must be made after the twenty-one days have elapsed (*m*); and it has been said that the mere insertion of "being demanded" is equivalent to express words substituting *any* demand for the *formal* demand (*n*).

Demand of Rent dispensed with by Agreement.

A not uncommon form of the proviso is that the landlord may re-enter if *and whenever* a quarter's rent be in arrear, and no

Proviso for Re-entry if and whenever Rent in arrear, and no distress.

(*e*) As to the application of this act, see Chap. VII., Sect. 3, "Assignment of Reversion," ante, p. 262.

(*f*) *Arnsby* v. *Woodward*, 6 B. & C. 519; *Roberts* v. *Davey*, 4 B. & Ad. 664; *Baylis* v. *Le Gros*, 4 C. B., N. S. 537; 6 Id. 552.

(*g*) Cole Ejec. 408.

(*h*) Cole Ejec. 403.

(*i*) 1 Roll. 514.

(*k*) *Doe* d. *Dixon* v. *Roe*, 7 C. B. 134; *Hill* v. *Kempshall*, Id. 975.

(*l*) *Doe* d. *Harris* v. *Masters*, 2 B. & C. 490; *Goodright* d. *Hare* v. *Cater*, 2 Doug. 477, 486.

(*m*) *Phillips* v. *Bridge*, L. R., 9 C. P. 48; 43 L. J., C. P. 13; 29 L. T. 692.

(*n*) Ib., per Keating and Brett, JJ.; but it is submitted that this dictum is opposed to the opinion of the majority of the court in *Doe* d. *Scholefield* v. *Alexander*, 2 M. & S. 525; 15 R. R. 338, and also to the maxim "*expressio eorum quæ tacite insunt nihil operatur.*"

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"If and whenever rent in arrear, and no distress found." *Shepherd* v. *Berger.*

sufficient distress be found on the premises. In *Shepherd* v. *Berger* (*o*) the proviso for re-entry operated "if and whenever any one quarter's rent hereby reserved, or any part thereof, shall be in arrear for twenty-one days, and no sufficient distress can be had or levied for the same." On the 25th March three quarters' rent was due, the yearly rent being 150*l*. On the 25th April, the landlord distrained, and soon afterwards selling realized 59*l*. only, thus leaving more than one quarter's rent in arrear, and on the 25th May sued on the proviso for re-entry. The Court of Appeal held that the landlord had a right to appropriate, and had appropriated, the proceeds of the distress to the first two quarters' rent, so that there was a quarter's rent in arrear and no sufficient distress at the time of commencing the action, and gave judgment for the plaintiff (*o*).

Formal demand dispensed with by C. L. P. Act.

By the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 210 (re-enacting 4 Geo. 2, c. 28, s. 2), a formal demand of the rent is rendered unnecessary in all cases between landlord and tenant when one half-year's rent is in arrear, and no sufficient distress is *to be found* on the demised premises, or any part thereof, countervailing the arrears then due; and the lessor has power to re-enter for non-payment thereof (*p*).

To what Cases C. L. P. Act applies.

1. Assignee, &c.

The above enactment only applies—1. As between landlord and tenant. But the assignee of a lessee, whether by way of mortgage or otherwise, is a "tenant" within the meaning of the enactment (*q*); so is a mere sub-lessee, because he is a person "claiming or deriving under the lease" (*r*).

2. Rent in Arrear.

2. One half-year's rent at the least must be in arrear (*s*).

3. No sufficient Distress to be found.

3. No sufficient distress to be found on the demised premises, or any part thereof, countervailing the arrears due (*t*); i.e., *all* the arrears, and not merely half-a-year's rent where more is due (*u*). But a strict search must be made on the demised premises after the last day for saving the forfeiture, and before the writ issues (or at all events before the writ is served) (*x*), to ascertain that there is no sufficient distress on any part of the demised premises (*y*). Unripe growing crops may amount to a sufficient distress (*z*). A distress is

(*o*) *Shepherd* v. *Berger*, [1891] 1 Q. B. 597; 60 L. J., Q. B. 395; 64 L. T. 435; 39 W. R. 330; 55 J. P. 532—C. A.

(*p*) See post, Chap. XXII., Sect. 1.

(*q*) *Doe* d. *Whitfield* v. *Roe*, 3 Taunt. 402; *Williams* v. *Bosanquet*, 1 Brod. & B. 238; 21 R. R. 585.

(*r*) *Doe* d. *Wyatt* v. *Byron*, 1 C. B. 623; 3 D. & L. 31.

(*s*) *Hill* v. *Kempshall*, 7 C. B. 975; *Cotesworth* v. *Spokes*, 10 C. B., N. S. 103; 30 L. J., C. P. 220; 2 F. & F. 390.

(*t*) *Doe* d. *Forster* v. *Wandlass*, 7 T. R. 117.

(*u*) *Cross* v. *Jordan*, 8 Exch. 149; overruling *Doe* d. *Powell* v. *Roe*, 9 Dowl. 548.

(*x*) *Doe* d. *Dixon* v. *Roe*, 7 C. B. 134.

(*y*) *Rees* d. *Powell* v. *King*, Forrest, 19, cited 2 Brod. & B. 514; *Doe* d. *Forster* v. *Wandlass*, 7 T. R. 117; 4 R. R. 393; *Doe* d. *Smelt* v. *Fuchau*, 15 East, 286; 13 R. R. 472; *Doe* d. *Haverson* v. *Franks*, 2 C. & K. 678; *Price* v. *Worwood*, 4 H. & N. 512; 28 L. J., Ex. 329; *Wheeler* v. *Stevenson*, 6 H. & N. 155; 30 L. J., Ex. 46.

(*z*) Ex parte *Arnison*, L. R., 3 Ex. 56; 37 L. J., Ex. 57.

not to be "found" on the demised premises where it cannot be got at by reason of the tenant having locked the outer doors, &c. (*a*), nor unless the goods are so visibly there that a broker going to distrain would, using reasonable diligence, find them so as to be able to distrain them (*b*). If a distress be found on the demised premises sufficient to satisfy so much of the rent as would reduce the arrears to less than half-a-year's rent, and it is wished to bring ejectment, no distress should be taken (*c*); but clear proof should be obtained as to the insufficiency of the distress to satisfy *all* the arrears (*d*). A distress for rent under which part was recovered, will not prevent an ejectment for the residue, provided such residue amount to half-a-year's rent, or more, and there be no sufficient distress on the premises to satisfy such residue (*e*); but it is otherwise where the proceeds of the distress reduce the arrears to less than half-a-year's rent (*f*).

Distress no waiver. *Brewer* v. *Eaton.*

We shall see presently (post, p. 342), that in ordinary cases distress waives a forfeiture up to the day of distress itself. Is it also a waiver in cases under the statute? *Brewer* v. *Eaton* (*g*) is strong to the effect that it is not, on the ground that as the landlord must prove that no sufficient distress was to be found, an actual distress is necessary to complete his title under the statute, and therefore inconsistent with the presumption derivable from distress in ordinary cases that the landlord intended the tenancy to continue, i.e., waived the forfeiture; and the same view is taken by the Court of Appeal in *Thomas* v. *Lulham* (*h*), although the statute does not in terms require actual distress, and the insufficiency may be proved without actual distress.

4. Right of re-entry.

4. The landlord or lessor to whom the arrears are due must have "right by law to re-enter for non-payment thereof" (*i*). The right to re-enter must be a right to enter *and determine the lease* for non-payment of the rent, and not merely a right to enter and hold the premises until the arrears are paid: otherwise this section will not apply (*k*). The twenty-one days or other specified period mentioned in the proviso must have elapsed before any forfeiture can accrue for

(*a*) *Doe* d. *Chippendale* v. *Dyson*, 1 Moo. & M. 77; *Doe* d. *Cox* v. *Roe*, 5 D. & L. 272; 6 R. R. 850; *Hammond* v. *Mather*, 3 F. & F. 151.

(*b*) *Doe* d. *Haverson* v. *Franks*, 2 C. & K. 678.

(*c*) *Cotesworth* v. *Spokes*, 10 C. B., N. S. 103; 30 L. J., C. P. 220; 2 F. & F. 390.

(*d*) *Doe* d. *Haverson* v. *Franks*, 2 C. & K. 678.

(*e*) *Brewer* d. *Ld. Onslow* v. *Eaton*, 3 Doug. 230.

(*f*) *Cotesworth* v. *Spokes*, 10 C. B., N. S. 103; 30 L. J., C. P. 220.

(*g*) *Brewer* d. *Ld. Onslow* v. *Eaton*, 3 Doug. 230.

(*h*) *Thomas* v. *Lulham*, [1895] 2 Q. B. 400; 64 L. J., Q. B. 720; 73 L. T. 146; 43 W. R. 689; 14 R. 692—C. A., reversing Mathew, J., and inconsistent with *Shepherd* v. *Berger*, in the Divisional Court, except so far as it proceeded on the authority of *Cotesworth* v. *Spokes*, 30 L. J., C. P. 220.

(*i*) *Brewer* d. *Lord Onslow* v. *Eaton*, 3 Doug. 230, cited 6 T. R. 220.

(*k*) *Doe* d. *Darke* v. *Bowditch*, 8 Q. B. 973.

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non-payment of the rent (*l*). Although the proviso contain the words "being lawfully demanded," the landlord does not lose the benefit of the statute; no demand will be necessary if it be proved that half-a-year's rent was due before action brought, and no sufficient distress to be found on the demised premises (*m*). Service of the writ of ejectment under the above circumstances is by s. 210 of the statute sufficient "without any formal demand or re-entry." The statute makes such service a substitute for, and equivalent to, a formal demand of the rent according to the strict rules of the common law (*n*). And the right of re-entry by virtue of the statute must be taken to have accrued on the day when the forfeiture would have accrued at common law if a demand of payment had been duly made, and not when the writ of ejectment was served (*o*). The statute merely authorizes an action of ejectment in those cases to which it applies, but it will not justify the landlord or lessor in making an actual entry for non-payment of the rent (*p*).

Demand of Rent according to the Common Law.

Unless there are express words in the lease or agreement dispensing with a formal demand of the rent, or the case falls within the above enactment, no entry or ejectment can be maintained for non-payment of rent without a previous formal demand thereof made according to the strict rules of the common law (*q*). Such rules are as follow:

Prior demand *at common law.*

1. The demand must be made by the landlord or by his agent duly authorized in that behalf (*r*).

By whom.

When.

2. It must be made on the *very last day* to save the forfeiture. Therefore, if the proviso for re-entry be on non-payment of rent for thirty days after it becomes due, the demand must be made on the thirtieth day *after* the rent became due (exclusive of the day on which it became due), and not on any other day before or afterwards (*s*).

3. It must be made *a convenient time before and at sunset* (*t*). It must be continued actively or constructively until sunset (*u*).

Where.

4. It must be made *at the proper place*. Therefore, if the lease specify the place at which the rent is to be paid, the demand must be made there and not elsewhere (*x*). But if no place be so

(*l*) *Doe* d. *Dixon* v. *Roe*, 7 C. B. 134.

(*m*) *Doe* d. *Scholefield* v. *Alexander*, 2 M. & S. 525; 15 R. R. 338; *Doe* d. *Earl of Shrewsbury* v. *Wilson*, 5 B. & A. 364 (4th point); Id. 384, 394; Cole Ejec. 417.

(*n*) Cole Ejec. 417; *Hassell* d. *Hodgson* v. *Gowthwaite*, Willes, 500, 507.

(*o*) *Doe* d. *Lawrence* v. *Shawcross*, 3 B. & C. 752.

(*p*) Cole Ejec. 69.

(*q*) *Molineux* v. *Molineux*, Cro. Jac. 144; *Doe* d. *Forster* v. *Wandlass*, 7 T. R. 117; 4 R. R. 393; *Acocks* v. *Phillips*, 5 H. & N. 183; *Barr* v. *Glover*, 13 Ir. Com. L. R. 113.

(*r*) *Toms* v. *Wilson*, 32 L. J., Q. B. 33; Id. 382.

(*s*) *Doe* d. *Dixon* v. *Roe*, 7 C. B. 134; *Doe* d. *Forster* v. *Wandlass*, 7 T. R. 117; 4 R. R. 393; *Smith and Bustard's case*, 1 Leon. 141; Plow. 70; Co. Lit. 202 a.

(*t*) Co. Lit. 202 a; 1 Wms. Saund. 287; Cole Ejec. 413.

(*u*) *Wood and Chiver's case*, 4 Leon. 179; *Acocks* v. *Phillips*, 5 H. & N. 183.

(*x*) *Borrough's case*, 4 Co. R. 73; *Buskin* v. *Edmunds*, Cro. Eliz. 415; Co. Lit. 202 a.

appointed, the demand must be made upon the land, and at the most notorious place of it (*y*). Therefore, if there be a dwelling-house upon the land, the demand must be made at the front door; but it is not necessary to enter the house, although the door be open (*z*). If the premises consist of a wood only, the demand must be made at the gate of the wood, or at some highway leading through it, or other most notorious place. If one place be as notorious as another, the lessor has election to demand it at which he will (*a*). Such demand must be actually made, although there be no person present on behalf of the tenant to answer it (*b*). Or it may be made on a sub-tenant (*c*).

Amount to be claimed (no previous Arrears).

5. The demand must be made of *the precise sum* then payable, and not one penny more or less (*d*). If the rent be payable quarterly, and more than one quarter is due, only the last quarter's rent should be demanded, and not the previous arrears, otherwise the demand will be altogether bad (*e*).

Relief.

As to relief against forfeiture for *non-payment of rent*, which is distinct from relief against forfeiture on other grounds, see p. 356, post.

### (f) *Waiver of Forfeiture.*

Acknowledgment of continuance of Tenancy is Waiver of Forfeiture.

Courts of law always lean against forfeitures; therefore, whenever a landlord means to take advantage of any breach of covenant or condition so that it should operate as a forfeiture of the lease, he must take care not to do anything which may be deemed an acknowledgment of the continuance of the tenancy, and so operate as a waiver of the forfeiture.

Lying by.

Merely lying by and witnessing the breach is no waiver: some positive act must be done (*f*). The general rule is, that if a lessor, or other person legally entitled to the reversion, knowing that a forfeiture has been incurred by the breach of any covenant or condition, *does any act* whereby he *acknowledges the continuance of the tenancy at a later period*, he thereby waives such forfeiture (*g*).

What Acts amount to Waiver.

Thus, the following acts amount to a waiver:—Demand of rent accruing due after the forfeiture, if the demand be absolute and unqualified (*h*). Acceptance of rent accruing due after the forfeiture (*i*). Such an acceptance operates as matter of law to waive all forfeitures then known to the lessor, *notwithstanding any*

(*y*) Cole Ejec. 413.
(*z*) Co. Lit. 201 b; 1 Wms. Saund. 287.
(*a*) Co. Lit. 202 a.
(*b*) *Kidwelly* v. *Brand*, Plow. 70 a, 70 b; Co. Lit. 201 b.
(*c*) *Doe* d. *Brook* v. *Brydges*, 2 D. & R. 29.
(*d*) *Fabian and Winsor's case*, 1 Leon. 305; *Fabian* v. *Winston*, Cro. Eliz. 209.
(*e*) *Scot* v. *Scot*, Cro. Eliz. 73; *Tomkins* v. *Pinsent*, 7 Mod. 97; 1 Salk. 141; *Doe* d. *Wheeldon* v. *Paul*, 3 C. & P. 613.
(*f*) *Doe* d. *Sheppard* v. *Allen*, 3 Taunt. 78; 12 R. R. 597.
(*g*) *Dendy* v. *Nicholl*, 4 C. B., N. S. 376; 27 L. J., C. P. 220; *Pellatt* v. *Boosey*, 31 L. J., C. P. 281; *Ward* v. *Day*, 4 B. & S. 337; 5 Id. 359; 33 L. J., Q. B. 3, 254.
(*h*) *Doe* d. *Nash* v. *Birch*, 1 M. & W. 402, at p. 408, per Parke, B.
(*i*) *Doe* d. *Gatehouse* v. *Rees*, 4 Bing. N. C. 384; *Doe* d. *Griffith* v. *Pritchard*, 5 B. & Ad. 765.

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Protest.

*protest on his part against such waiver* (*k*); but the subsequent receipt of rent due *prior* to the forfeiture is no waiver (*l*). Action for rent accruing due after the forfeiture (*m*), or distress for rent (*n*), also amount to waiver.

A forfeiture of a lease by a lessee's insolvency has been held to be waived by acceptance of rent from him after his discharge under the Insolvent Act (*o*).

Waiver of Forfeiture by Pleading.

Forfeiture may be waived by a pleading, as was held in a case where a landlord, suing in respect of breaches of covenants agreed to be inserted in a lease contracted for, claimed an injunction and possession, but stated in his pleadings that he was willing to grant the lease (*p*).

Waiver by Distress.

It is well settled that a forfeiture is waived by distress (*q*); and as was pointed out by Crompton, J., in *Ward* v. *Day* (*r*), the doctrine of waiver by distress depends on a different principle from that of waiver by other acts—the principle that distress can only be levied on a tenant—so that a distress waives any forfeiture not only up to the day on which the rent distrained for was due, as had been previously held in *Cotesworth* v. *Spokes* (*s*), but up to the day of the distress itself. A case in the Year Books appears to show this (*t*); it may be laid down as undoubted law (*u*).

Waiver by Distress where no sufficient Distress to be had.

In *Shepherd* v. *Berger*, the proviso for re-entry was, "*if and whenever*" a quarter's rent or part thereof was in arrear for 21 days, "*and* no sufficient distress could be had or levied for the same," the rent being payable on the usual quarter days. The landlord distrained in April for three quarters' rent in arrear at Lady Day, and the distress being insufficient (by more than one quarter's rent) brought ejectment in May. It was held in the High Court, that the distress was a waiver, and that the action could not be maintained (*x*). But in the Court of Appeal this judgment was reversed, not on the question of waiver, but on the ground that the effect of the words "if and whenever" in the proviso was to give a right of re-entry as often as the two conditions named therein existed (*y*).

(*k*) *Croft* v. *Lumley*, 5 E. & B. 648; 6 H. L. Cas. 672; 27 L. J., Q. B. 321; *Davenport* v. *Reg.*, L. R., 3 App. Cas. 115, P. C.; *Strong* v. *Stringer*, 61 L. T. 470, per Kekewich, J.

(*l*) *Marsh* v. *Curteys*, Cro. Eliz. 528; *Price* v. *Worwood*, 4 H. & N. 512; 28 L. J., Ex. 329.

(*m*) *Dendy* v. *Nicholl*, 4 C. B., N. S. 376; 27 L. J., C. P. 220.

(*n*) *Cotesworth* v. *Spokes*, 10 C. B., N. S. 103; 30 L. J., C. P. 220.

(*o*) *Doe* d. *Gatehouse* v. *Rees*, 4 Bing. N. C. 384.

(*p*) *Evans* v. *Davis*, L. R., 10 Ch. D. 747; 48 L. J., Ch. 223; 39 L. T. 391; 27 W. R. 285.

(*q*) *Cotesworth* v. *Spokes*, supra.

(*r*) *Ward* v. *Day*, 4 B. & S. 336; 33 L. J., Q. B. 11; Smith L. & T. (3rd ed.) 151; 1 Sm. L. C. (8th ed.) 61; *Cotesworth* v. *Spokes* was not cited in *Ward* v. *Day*.

(*s*) Supra, note (*n*).

(*t*) 14 Ed. 3, 3rd Ass. cited in *Ward* v. *Day*, by Blackburn, J.

(*u*) See *Doe* d. *Flower* v. *Peck*, 1 B. & Ad. at p. 437.

(*x*) *Shepherd* v. *Berger*, [1891] 1 Q. B at p. 598.

(*y*) *Shepherd* v. *Berger*, [1891] 1 Q. B. 597; 60 L. J., Q. B. 395; 64 L. T. 435; 39 W. R. 330—C. A.

If ejectment be brought on a forfeiture of a lease, and after the bringing of such ejectment the landlord accept rent (*z*), or distrain (*a*), or set up as a cause of forfeiture a subsequent non-payment of rent (*b*), it is no waiver. This best appears from *Grimwood* v. *Moss*, where a landlord brought ejectment on the 21st of July, and after action brought, distrained for rent due on the 24th of June. It was held that, in the action of ejectment, he might rely on a forfeiture accruing before the 24th of June, and it was said that the distress was a simple act of trespass (*c*). Of course, if there be an intention to waive, it is otherwise, as was held on demurrer in a case where the facts pleaded amounted to an agreement for a new tenancy on the terms of an old lease (*d*).

No Waiver by acceptance of Rent, &c., after Ejectment.

*Grimwood* v. *Moss.*

Though an acceptance of rent or other act of waiver may make a voidable lease good, it cannot make valid a deed or a lease which was actually void at first; but where a lease for years contains the common proviso "that it shall and may be lawful for the lessor to re-enter," or a proviso "that the term shall cease and determine if the lessor please," the lease will be only voidable by a breach of covenant; and the forfeiture may be waived by a subsequent acknowledgment of a tenancy (*e*).

In order to render acceptance of rent or any other act a waiver of a forfeiture, the lessor must have notice or knowledge of the forfeiture at the time of the supposed waiver (*f*), unless the forfeiture be of such a nature as to be equally within the knowledge of both the lessor and lessee (*g*). The act which is insisted on as amounting to a waiver is matter of evidence only, to show with what intent it was done, to be left to the jury under the circumstances of the case (*h*). Where a lessor was too ill to attend to business, and it did not appear that he knew of a forfeiture, his son, who collected the rents, was held not to have authority to waive a forfeiture (*i*). If A., tenant for life, subject to forfeiture, with a remainder over to B., lease to C. for a term, and afterwards apprehending that he has forfeited, acquiesce in B.'s claim to and receipt of the rent from C., his executor may, on showing that he acquiesced under a false apprehension, recover from C. the amount of the rent erroneously

Lessor must have Notice of Forfeiture.

(*z*) *Doe* d. *Moorecraft* v. *Meux*, 4 B. & C. 606; 1 C. & P. 346; *Jones* v. *Carter*, 15 M. & W. 718.

(*a*) *Grimwood* v. *Moss*, L. R., 7 C. P. 360; 41 L. J., C. P. 239; 27 L. T. 768.

(*b*) *Toleman* v. *Portbury*, 41 L. J., Q. B. 98, Ex. Ch.

(*c*) *Grimwood* v. *Moss*, ubi supra, per Willes, J.

(*d*) *Evans* v. *Wyatt*, 43 L. T. 176.

(*e*) *Doe* d. *Bristow* v. *Old*, Ad. Ejec. 155 (4th ed.).

(*f*) *Pennant's case*, 3 Co. R. 63 b; *Duppa* v. *Mayo*, 1 Wms Saund. 288 a, b, note (16); *Harvie* v. *Oswel*, Cro. Eliz. 563, 572; *Goodright* d. *Walker* v. *Davids*, 2 Cowp. 803.

(*g*) *Roe* d. *Gregson* v. *Harrison*, 2 T. R. 425; 1 R. R. 513.

(*h*) *Doe* d. *Cheney* v. *Batton*, Cowp. 243; 9 R. R. 570.

(*i*) *Doe* d. *Nash* v. *Birch*, 1 M. & W. 402.

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paid to B.; for in order to constitute a confirmation of the payment, some act ought to have been done by A. with the knowledge of his own situation (*k*).

Continuing Breach.

Where the breach is of a continuing nature, the waiver of any forfeiture up to a certain day will afford no defence to an ejectment for a subsequent breach (*l*); as where the covenant is to keep the demised premises in repair during the term (*m*), or to keep them insured in a certain manner from loss or damage by fire during the term (*n*), or not to use certain rooms in a particular manner (*o*). Acceptance of rent which becomes due pending a notice to repair, is no waiver of a subsequent forfeiture occasioned by non-compliance with such notice (*p*). Indeed, it would seem that acceptance of rent due after the expiration of the notice will not bar an ejectment if the premises continue subsequently unrepaired (*q*).

*Penton* v. *Barnett.*

In *Penton* v. *Barnett* (*r*), premises being out of repair in breach of covenant, the plaintiff gave notice on September 22nd, 1896, under s. 14 of the Conveyancing Act (post, p. 349), requiring execution of repairs within three months. The notice not being complied with, the plaintiff issued a writ on January 14th, 1897, claiming possession and rent up to December 25th, 1896. It was held by the Court of Appeal that the claim of rent was no waiver, and that the plaintiff was entitled to possession, inasmuch as (1) the breach being continuous, he could rely on the breaches between December 25th and January 14th, and (2) the premises being in the same disrepair at the commencement of the action as at the giving of the notice, the notice was sufficient.

Distress only acknowledges Tenancy up to Day of Distress.

A distress and continuance in possession may be a waiver of a forfeiture existing at the time (*s*); but a distress is only an acknowledgment of a tenancy to the day of the distress, and a waiver of any forfeiture to that time (*t*). Where the plaintiff, after the service of a writ in ejectment for non-payment of rent, distrained for rent which subsequently became due; and by the notice of distress stated that such distress was made without prejudice to the year's

(*k*) *Williams* v. *Bartholomew*, 1 Bos. & P. 326; 4 R. R. 81.
(*l*) Cole Ejec. 409.
(*m*) *Doe* d. *Baker* v. *Jones*, 5 Exch. 498.
(*n*) *Doe* d. *Muston* v. *Gladwin*, 6 Q. B. 953, 956; *Penniall* v. *Harborne*, 11 Q. B. 368, 374; *Hyde* v. *Watts*, 12 M. & W. 254; 1 D. & L. 479; *Doe* d. *Flower* v. *Peck*, 1 B. & Ad. 428.
(*o*) *Doe* d. *Ambler* v. *Woodbridge*, 9 B. & C. 376.
(*p*) *Doe* d. *Rankin* v. *Brindley*, 4 B. & Ad. 84; *Doe* d. *Baker* v. *Jones*, 5 Exch. 498, 505.
(*q*) *Fryett* d. *Harris* v. *Jeffreys*, 1 Esp. 393; Cole Ejec. 409.
(*r*) *Penton* v. *Barnett*, [1898] 1 Q. B. 276; 67 L. J., Q. B. 11; 46 W. R. 33, and p. 351, infra—C. A., reversing Ridley, J., who had followed *Bevan* v. *Barnett*, 13 T. L. R. 310.
(*s*) *Doe* d. *Taylor* v. *Johnson*, 1 Stark. 411; 18 R. R. 791; *Zouch* d. *Ward* v. *Willingale*, 1 H. Blac. 311; 2 R. R. 770.
(*t*) *Doe* d. *Flower* v. *Peck*, 1 B. & Ad. 428; *Ward* v. *Day*, 4 B. & S. 337; 33 L. J., Q. B. 54; *S. C.* in error, 5 B. & S. 359.

rent due on the 25th of March, and for which ejectment proceedings were then pending; it was held, that such distress did not operate as a waiver of the ejectment (*u*).

Breach of Covenant to repair.

A forfeiture incurred by breach of a covenant to repair generally, is waived by a notice given by the landlord, under a special covenant that he should enter and do the repairs, and distrain for the expenses (*x*). A forfeiture, by omission to repair after notice, is suspended but not waived by an agreement to allow further time to repair (*y*). When the landlord does any act amounting to a constructive eviction of the tenant, he cannot maintain an ejectment for a forfeiture for not repairing during the continuance of such eviction (*z*).

Of Covenant not to sub-let.

The acceptance of rent with knowledge of a written sub-letting for a time certain is a waiver of a forfeiture for the breach of a covenant not to sub-let, and the breach is not a continuing breach, although the covenant be that the lessee "will not permit any person to occupy" (*a*).

Of Covenant not to carry on Trade, &c.

If a lessee exercise a trade on the demised premises by which his lease is forfeited, the landlord does not, by merely lying by and witnessing the act, waive the forfeiture (*b*), as some positive act of waiver, as by receipt of rent (*c*), is necessary; but if he permit the tenant to expend money in improvements, it would seem that it is evidence to be left to a jury of his consent to the alteration of the premises (*d*); and if a lessor after a forfeiture advise a person to purchase the term of his lessee, he cannot maintain an ejectment for a forfeiture against such purchaser; but he may do so if the party have an interest, viz. an annuity secured on the premises, and the advice is merely "to take to them" (*e*).

To build houses.

Where land was demised with a covenant by the lessee to build and complete thereon houses within a year, and a proviso that if he did not, the lease should be void; the houses not being completed, it was held, that the forfeiture was not waived by the steward of the lessor having permitted the lessee to employ workmen in completing the houses for a short period after the forfeiture (*f*).

A. demised land with a covenant by the lessee to finish certain houses thereon, and with a power of re-entry in case of default, and

(*u*) *Bailey* v. *Mason*, 2 Ir. Rep., N. S. 582.

(*x*) *Doe* d. *Reutzen* v. *Lewis*, 5 A. & E. 277; *Roe* d. *Goatley* v. *Paine*, 2 Camp. 520.

(*y*) *Roe* d. *Rankin* v. *Brindley*, 4 B. & Ad. 84.

(*z*) *Pellatt* v. *Boosey*, 3 L. J., C. P. 281.

(*a*) *Walrond* v. *Hawkins*, L. R., 10 C. P. 342; 44 L. J., C. P. 116; 32 L. T. 119. It is doubtful whether the principle of this case would be held to apply to the case of a covenant not to use the demised premises in a particular way. Per Bramwell, L.J., in *Lawrie* v. *Lees*, L. R., 14 Ch. D. at p. 262.

(*b*) *Doe* d. *Sheppard* v. *Allen*, 3 Taunt. 78; 12 R. R. 597.

(*c*) *Griffin* v. *Tomkins*, 42 L. T. 359.

(*d*) *Doe* d. *Sheppard* v. *Allen*, ubi sup., per Mansfield, C.J.

(*e*) *Doe* d. *Sore* v. *Eykins*, 1 C. & P. 154; Ry. & Moo. 29.

(*f*) *Doe* d. *Ld. Kensington* v. *Brindley*, 12 Moo. 37.

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by another indenture between A. and the plaintiff, reciting that A. had made sub-leases of the land in question, A. assigned the land to the plaintiff subject to the sub-leases; the court inclined to think that if the condition had been broken, the assignment, subject to the sub-leases, would have been a waiver of the forfeiture although the forfeiture was not known to A. (*g*).

23 & 24 Vict. c. 38, s. 6. Actual Waiver does not operate as general Waiver.

By the Law of Property Amendment Act, 1860, 23 & 24 Vict. c. 38, s. 6, "where any actual waiver of the benefit of any covenant or condition in any lease on the part of any lessor, or his heirs, executors, administrators or assigns, shall be proved to have taken place after the passing of this act in any one particular instance, such actual waiver shall not be assumed or deemed to extend to any instance or any breach of covenant or condition other than that to which such waiver shall specially relate, nor to be a general waiver of the benefit of any such covenant or condition, unless an intention to that effect shall appear."

Express Waiver.

A forfeiture may be expressly waived, and if the waiver be without consideration, or the right of re-entry arise on a lease by deed, it would seem that the waiver should be by deed.

Costs of express Waiver.

The Conveyancing Act, 1892, 55 & 56 Vict. c. 13, s. 2, provides for the costs of an express waiver as follows:—

> A lessor shall be entitled to recover as a debt due to him from a lessee, and in addition to damages (if any) all reasonable costs and expenses properly incurred by the lessor in the employment of a solicitor and surveyor or valuer, or otherwise in reference to any breach giving rise to a right of re-entry or forfeiture which at the request of the lessee is waived by the lessor by *writing under his hand.*

It is submitted that this enactment does not dispense with a deed where a deed is required at common law as above stated, but the point is a doubtful one.

## SECT. 6.—*Relief against Forfeiture.*

### (a) *The Law before the Conveyancing Act.*

Equitable Relief.

An unqualified proviso for re-entry in case of breach of any covenant has long been usually inserted as a common form in leases, and the courts of law, though "leaning against forfeiture," invariably gave effect to such proviso upon a breach being clearly proved, however great the hardship to the lessee (*h*). Courts of equity were, therefore (before the Judicature Acts), frequently (*i*) applied to for

(*g*) *Hunt* v. *Bishop*, 8 Exch. 675; *Hunt* v. *Remnant*, 9 Exch. 635.

(*h*) See *Doe* v. *Gladwin*, 6 Q. B. at p. 961.

(*i*) See the whole series of cases up to 1847 reviewed in "Platt on Leases," Vol. 2, at pp. 485 et seq.

relief by injunction to restrain actions of ejectment. In the case of the breach of the covenant to pay rent, relief was granted from very early times, the statute 4 Geo. 4, c. 28, only regulating the mode of granting the relief, and not originating it (*k*). As for forfeiture by other breaches, the early cases are not quite uniform.

No Equitable Relief for "Wilful" Breach.

They will be found reviewed by Lord Erskine in *Sanders* v. *Pope* (*l*), and by Lord Eldon in *Hill* v. *Barclay* (*m*), and in *Reynolds* v. *Pitt* (*n*). In *Sanders* v. *Pope*, Lord Erskine granted relief against forfeiture of a public-house lease incurred by not laying out a particular sum in repairs within a given time, and declared the result of the prior authorities to be that the court had jurisdiction to grant relief in all cases where full compensation could be made, although the breach might have been wilful. But in *Hill* v. *Barclay*, Lord Eldon, though distinguishing *Sanders* v. *Pope* (*o*), distinctly disapproved of the doctrine that relief could be given in case of a wilful breach, and refused relief in a case of non-repair in which the landlord had given a notice which had not been complied with. But, as was pointed out by Stuart, V.-C., in *Bamford* v. *Creasy* (*p*), Lord Eldon expressly recognized the exceptions in case of accident or surprise, and accordingly relief was granted in a case (*q*) where it appeared that out of twenty-two items of repair twenty had been proceeded with, and fourteen completed, and that the repairs had been partially delayed by the weather; Stuart, V.-C., mentioning "as an equity always recognized" the equity of a tenant who has bound himself by a covenant to repair, and who can show to the court *equitable circumstances sufficient* to entitle him either to a relief from a strict performance of the lease, or to ensure him against a forfeiture by reason of the neglect to perform them.

*Hill* v. *Barclay.*

The rule of *Hill* v. *Barclay* was recognized in *Gregory* v. *Wilson* (*r*) by Turner, V.-C., in refusing to grant specific performance of an agreement for a lease. In *Nokes* v. *Gibbon* (*s*), Kindersley, V.-C., refused relief where the breach consisted in a failure to construct certain drains, and in *Job* v. *Banister* (*t*), where a lease was granted with a covenant for perpetual renewal by the lessor, provided the lessee's covenants should be kept, Wood, V.-C., refused to compel the lessor to renew or to restrain him from ejecting the lessee for breaches of covenant to repair and insure, although the lessee had expended large sums of money on the premises, and their value was

(*k*) *Green* v. *Bridges*, 4 Sim. 96.
(*l*) *Sanders* v. *Pope*, 12 Ves. 262.
(*m*) *Hill* v. *Barclay*, 18 Ves. 56; 11 R. R. 147.
(*n*) *Reynolds* v. *Pitt*, 19 Ves. 134.
(*o*) *Sanders* v. *Pope*, 12 Ves. 262.
(*p*) *Bamford* v. *Creasy*, 3 Giff. 675. In this case the lessor had obtained judgment by default in ejectment.
(*q*) *Bargent* v. *Thompson*, 4 Giff. 473.
(*r*) *Gregory* v. *Wilson*, 9 Hare, 683.
(*s*) *Nokes* v. *Gibbon*, 26 L. J., Ch. 433.
(*t*) *Job* v. *Banister*, 6 K. & J. 374.

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much increased, the lessee losing about 5,000*l.* for a breach of covenant which might be amply remedied by 500*l.*

Lunatic.

In one case, however—subsequent to *Hill* v. *Barclay*—Lord Eldon granted relief against an ejectment for non-repair brought by the committee of a lunatic, on the principle that harsh proceedings would not be for the benefit of the lunatic's estate (*u*); but there does not seem to be any direct authority upon the question how far trustees neglecting to take advantage of a forfeiture would be protected by the court.

Trustees.

Result of Modern Cases before Conv. Act.

The result of the modern cases before the Conveyancing Act appears to be that accident and surprise afford the only instances in which relief was given, and that the fact that a landlord gained ever so large an improved value by insisting on the forfeiture was not taken into account.

Statutory Relief against Failure to insure.

The covenant to insure is one which from its nature may be broken without producing the slightest injury to the reversion, and yet a court of law allowed a lessor to re-enter on the smallest breach of it (*x*). And for a long period no relief could have been obtained in a court of equity against an ejectment for a forfeiture by not insuring (*y*), unless there had been fraud or misleading on the part of the lessor (*z*). But by sects. 4 to 9 of the Law of Property Amendment Act, 1859, 22 & 23 Vict. c. 35, which sections are now repealed and superseded by the Conveyancing Act, 1881, power was given to a court of equity to relieve in a case where no loss had happened, and the breach had been committed without fraud or gross negligence, and there was an insurance on foot at the time of the application to the court. The court was required to direct a record of the relief having been granted, and had not power to relieve the same person more than once in respect of the same covenant or condition, nor to grant any relief where a prior forfeiture had been already waived out of court in favour of the person seeking the relief. By the Common Law Procedure Act, 1860, 23 & 24 Vict. c. 126, this relief might be granted by a court of law.

### (b) *Relief against Forfeiture, for Breach of Covenant other than for Rent, under the Conveyancing Act.*

Except as above stated, that is, except in the case of non-payment of rent, and failure to insure, and except in rare cases of accident and surprise, no relief against forfeiture could be given until the year 1882. The Conveyancing and Law of Property Act, 1881,

(*u*) *Ex parte Vaughan*, 1 Turn. & Russ. 434.

(*x*) *Doe* v. *Gladwin*, 6 Q. B. 953; post, Chap. XVII., Sect. 1.

(*y*) *White* v. *Warner*, 2 Meriv. 459; *Green* v. *Bridges*, 4 Sim. 96, cited 6 Q. B. 961; *Gregory* v. *Wilson*, 9 Hare, 683.

(*z*) *Meek* v. *Carter*, 4 Jur. N. S. 992.

44 & 45 Vict. c. 41, which by sect. 2 took effect from and after the 31st December, 1881, by s. 14 (1) restricts the landlord's right of forfeiture for breach of covenant *other than for rent*, and (2) empowers the High Court to "relieve" against its exercise in the following general, retrospective, and compulsory terms (*a*) :—

Forfeiture not enforceable without Notice and failure to Compensate.

(1) A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise (*b*), unless and until the lessor serves on the lessee a notice (*c*) specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach.

Relief by Court against Forfeiture.

(2) Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the court (*d*) for relief; and the court may grant or refuse relief, as the court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the grant of an injunction to restrain any like breach in the future, as the court, in the circumstances of each case, thinks fit.

[See p. 355.]

"Lease" includes under-lease, &c.

(3) For the purposes of this section a lease includes an original or derivative under-lease, also a grant at a fee farm rent, or securing a rent by condition; and a lessee includes an original or derivative under-lessee (*e*), and the heirs, executors, administrators, and assigns of a lessee, also a grantee under such a grant as aforesaid, his heirs and assigns; and a lessor includes an original or derivative under-lessor, and the heirs, executors, administrators, and assigns of a lessor, also a grantor as aforesaid, and his heirs and assigns.

Act of Parliament.

(4) This section applies although the proviso or stipulation under which the right of re-entry or forfeiture accrues is inserted in the lease in pursuance of the directions of any act of parliament (*f*).

Length of Term.

(5) For the purposes of this section a lease limited to continue as long only as the lessee abstains from committing a breach of covenant shall be and take effect as a lease to continue for any longer term for which it could subsist, but determinable by a proviso for re-entry on such a breach.

(*a*) See *Greenfield* v. *Hanson*, 2 T. L. R. 876, as cited by North, J., in *Lock* v. *Pearce*, infra (*d*).

(*b*) *E.g.*, by peaceable re-entry, without action.

(*c*) By s. 67 of the Act, infra, p. 355, the notice must be in writing, and may be addressed to the lessee by that designation, and served either by leaving it at the last place of abode, or by sending it in a registered letter by post, addressed to the lessee by name.

(*d*) That is, by s. 2 (xviii.), and s. 69 (1) of the Act, the Chancery Division of the High Court; but the Queen's Bench Division has jurisdiction to relieve in an action before it.

The application cannot be made on originating summons, see *Lock* v. *Pearce*, [1892] 2 Ch. 328.

(*e*) See, further, Conveyancing Act, 1892, s. 4, post.

(*f*) See, *e.g.*, Settled Estates Act, 1856, 19 & 20 Vict. c. 120, s. 32; 10 Geo. 4, c. 50, s. 27; 8 & 9 Vict. c. 124.

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(6) This section does not extend—

(i) To a covenant or condition against the assigning, under-letting, parting with the possession, or disposing of the land leased (*g*); or to a condition for forfeiture on the bankruptcy (*h*) of the lessee, or on the taking in execution of the lessee's interest; or—

For assignment without licence, bankruptcy, &c.

(ii) In case of a mining lease (*i*) to a covenant or condition for allowing the lessor to have access to or inspect books, accounts, records, weighing machines, or other things, or to enter or inspect the mine or the workings thereof.

Repeal.

(7) The enactments described in Part I. of the second schedule to this act (*k*) are hereby repealed.

Non-payment of Rent.

(8) This section shall not affect the law relating to re-entry or forfeiture or relief in case of non-payment of rent. [See p. 356, infra.]

Section retrospective and compulsory.

(9) This section applies to leases made either before or after the commencement of this act, and shall have effect notwithstanding any stipulation to the contrary.

Effect of s. 14 of Conv. Act, 1881.

The effect of this section is first to interpose in favour of the tenant the requirement, which did not exist at common law, that the landlord shall, before proceeding to enforce a supposed right of re-entry, give fair notice of his intention to do so, in order that the parties may settle the matter between themselves, without any resort to the court; and secondly, in case of the parties so failing to settle the matter, to allow the tenant (not the landlord, whose course will be, if he wishes to push the matter to extremity, to decline to be satisfied with the compensation offered) to apply for an adjustment of differences to a court having the most absolute and comprehensive discretion. The landlord's right is not taken away, but only modified (*l*).

Notice of intention to re-enter.

Application to Court for relief.

Relief outside section, on general equitable grounds.

It seems from *Barrow* v. *Isaacs* that the section does not form an exhaustive code as to relief against forfeiture, but that relief can still be given, on general equitable grounds, in cases not comprehended by the section. In that case the lessee's solicitor's clerk had omitted to obtain the consent of a lessor to a sub-lease, and the court held, upon the lessor bringing ejectment for breach of covenant not to sub-let without consent, that the lessees were responsible for their solicitor's negligence, and that the case was not a proper one for

(*g*) See *Barrow* v. *Isaacs*, infra, and Chap. XVII., Sect. 2, post.

(*h*) See p. 353, post. By s. 2, sub-s. (xv.), of the act, "bankruptcy includes liquidation by arrangement, and any other act or proceeding in law having, under any act for the time being in force, effects or results similar to those of bankruptcy."

A "deed of arrangement" under the Deeds of Arrangement Act, 1887, 50 & 51 Vict. c. 57, may be an act of bankruptcy: see s. 17 of that act.

(*i*) By s. 2, sub-s. (xi.) of the act "a mining lease is a lease for mining purposes, that is, the searching for, winning, working, getting, making merchantable, carrying away, or disposing of mines and minerals, for purposes connected therewith, and includes a grant or licence for mining purposes."

(*k*) See the effect of these enactments (22 & 23 Vict. c. 35, ss. 4 to 9, and 23 & 24 Vict. c. 126 (C. L. P. Act, 1860), s. 2), which relate to relief against forfeiture for non-insurance, p. 348, ante.

(*l*) See *Creswell* v. *Davidson*, 56 L. T. 811.

relief; but it appears to have been assumed throughout that in a proper case relief might have been granted (*m*).

Decisions on s. 14 of Conv. Act.

It has been laid down that the landlord's notice under sub-s. 1 must expressly require the tenant to remedy the breach complained of (*n*); but that a notice is not bad for not requiring compensation in money (*o*), that relief cannot be granted under sub-s. 2 where the landlord has actually re-entered (*p*), that although no notice may have been given, the court has an absolute discretion to refuse relief (*q*), and that for relief to be grantable, it is not necessary that it should have been claimed in the defendant's pleading (*r*). In the case of a public-house lease, Charles, J., expressed his readiness to grant relief for the breach of a covenant not to endanger the licence (*s*).

Form of Notice. *Fletcher* v. *Nokes.*

It was held by North, J., in *Fletcher* v. *Nokes* (*t*) that the notice ought to be such a notice as will enable the tenant to understand with reasonable certainty what it is that he is required to do, and so distinct as to direct the attention of the tenant to the particular things of which the landlord complains in order that the tenant may have an opportunity of remedying them before an action for forfeiture is brought against him. In that case the lease was of six houses for 35 years, at a yearly rent of 42*l.*, and contained a covenant amongst others to keep the premises in good condition and complete tenantable repair, with a proviso for re-entry on any breach of any covenant. The notice was that the tenant had broken the covenants for repairing the inside and outside of the houses, and was required to repair the said houses in accordance with the said covenants forthwith, and to pay 20*l.* as compensation for breach and expenses. The notice was held bad for not indicating in which of the houses default had been made, or whether it had been made on all of them, but mainly on the ground that if the plaintiff had proceeded for a forfeiture before the passing of the Act of 1881, he would have had to give particulars of breaches, and that the 14th section was intended to place the tenant in a better position than he was in before. Subsequently, in *Penton* v. *Barnett* (*tt*), it was observed by Collins, L.J., that "the words 'particular breach' ought to be

(*m*) *Barrow* v. *Isaacs*, [1891] 1 Q. B. 417; 60 L. J., Q. B. 179; 64 L. T. 686; 39 W. R. 338—C. A.

(*n*) *North London Land Co.* v. *Jaques*, 32 W. R. 283; 49 L. T. 659 (relief granted for failure to complete a house within a given time).

(*o*) *Lock* v. *Pearce*, [1893] 2 Ch. 271; 62 L.J., Ch. 582; 68 L. T. 569; 41 W. R. 369—C. A.

(*p*) *Rogers* v. *Rice*, [1892] 2 Ch. 170; 66 L. T. 640; 40 W. R. 489—C. A.; and see *Quilter* v. *Mapleson*, L. R., 9 Q. B. D. 675, C. A.

(*q*) *Scott* v. *Matthew Brown and Co.*, 51 L. T. 746 (relief refused).

(*r*) *Mitchison* v. *Thompson*, 1 C. & E. 72 (relief granted for non-repair, though premises in very dilapidated condition).

(*s*) *Fleetwood* v. *Hull*, 23 Q. B. D. 35, and p. 174, ante.

(*t*) *Fletcher* v. *Nokes*, [1897] 1 Ch. 271; 66 L. J., Ch. 177; 76 L. T. 107; 45 W. R. 471; 61 J. P. 232.

(*tt*) *Penton* v. *Barnett*, [1898] 1 Q. B. at 281, and see p. 344, ante.

For form of notice, see Appendix C., sect. 15, post.

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Form of Notice of Intention to Re-enter—*contd.*

construed according to the obvious intention of the Legislature, which was that the tenant should be informed of the particular condition of the premises which he was required to remedy; that the expression 'breach' means the neglect to deal with the condition of the premises as so pointed out, and not merely failure to perform the covenants of the lease; and that the common sense of the matter is, that the tenant is to have full notice of what he is required to do."

Continuing Breach.

In the same case it was, as we have seen (ante, p. 344), held by the whole court that in the case of a continuing breach, a second notice need not be given in respect of non-repair existing after the expiration of the time specified in the notice.

Section 14 of Conv. Act applicable to Agreement for Lease.

*Swain* v. *Ayres.*

It was ruled by Huddleston, B., in *Coatsworth* v. *Johnson* (*x*), that the section does not apply to an agreement for a lease, but the point was expressly left open in the Court of Appeal (*y*), which subsequently held in *Swain* v. *Ayres* (*z*) that if the section applies to an agreement for a lease, it applies only to an agreement of which a decree for specific performance would be granted, and as such a decree is not granted if the covenants in the intended lease have been broken (*a*), and the covenant for repair had been broken in the case before them, the court held that the section did not apply, and that no notice was necessary. It is conceived that the Act of 1881 *of itself* applies to all agreements for leases of which specific performance would be granted and to no others. But however this may be, it is now expressly provided by s. 5 of the Conveyancing Act, 1892, 55 & 56 Vict. c. 13, that in s. 14 of the Act of 1881, as amended by that act, "lease" shall include an agreement for a lease *where the lessee has become entitled to have his lease granted*, and so of an under-lease. It is submitted that the words "but for the forfeiture sued upon" ought to be understood as following the word "entitled," inasmuch as the committal of an act of forfeiture is one of the recognized grounds for the refusal of a decree of specific performance (*b*).

Conveyancing Act, 1892, s. 5.

Relief to sub-lessee.

*Burt* v. *Gray.*

It was held in *Burt* v. *Gray* that relief is not grantable to a sub-lessee of part of the demised premises, and, notwithstanding the definition of sub-s. 3, that "lessee" includes "an original or derivative under-lessee," it was clearly intimated, though not expressly held, that relief is not grantable even to a sub-lessee of

(*x*) *Coatsworth* v. *Johnson*, 54 L. T. 520, "on further consideration."

(*y*) See per Lord Esher, M.R., and Lopes, L.J., 54 L. T., at pp. 523 and 524; 55 L. J., Q. B. at p. 223.

(*z*) *Swain* v. *Ayres*, 21 Q. B. D. 289; 57 L. J., Q. B. 428; 36 W. R. 798—C. A., affirming Charles, J.; and see per Kekewich, J., in *Strong* v. *Stringer*, 61 L. T. 470.

(*a*) See *Hill* v. *Barclay*, 18 Ves. 63, 11 R. R. 147.

(*b*) See *Lewis* v. *Bond*, 18 Beav. 85, and ante, Chap. IV., Sect. 5.

the whole of the demised premises, on the ground that it was not intended by the act to create a privity where there was no privity before (*c*).

But the effect of *Burt* v. *Gray* is got rid of by s. 4 of the Conveyancing Act, 1892, 55 & 56 Vict. c. 13, which expressly protects sub-lessees,—of a part as well as of the whole—as follows:—

Special protection of Sub-lessee by section 4 of the Conveyancing Act, 1892.

> Where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under any covenant, proviso, or stipulation in a lease, the court may, on application by any person claiming as under-lessee any estate or interest in the property comprised in the lease, *or any part thereof*, either in the lessor's action (if any), or in any action brought by such person for that purpose, make an order vesting for the whole term of the lease, or any less term, the property comprised in the lease or any part thereof in any person entitled as under-lessee to any estate or interest in such property upon such conditions, as to execution of any deed or other document, payment of rent, costs, expenses, damages, compensation, giving security, or otherwise, as the court in the circumstances of each case shall think fit, but in no case shall any such under-lessee be entitled to require a lease to be granted to him for any longer term than he had under his original sub-lease.

This section, which is not a mere amendment of s. 14 of the Act of 1881, but an independent enactment (*d*), extends to cases of forfeiture, as for bankruptcy (*e*) or assignment without licence (*f*), in which the court has no power to relieve the lessee himself. The sub-lessee may claim a vesting order by counter-claim and defence. Both the granting of the relief and the terms seem to be in the discretion of the court, but Charles, J., has doubted whether the court has jurisdiction to raise the rent (*g*).

Assignment without licence by lessee, Relief of Sub-lessee against Forfeiture for. *Imray* v. *Oakshette.*

The jurisdiction to relieve a sub-lessee against forfeiture arising from the breach by the lessee of the covenant against assignment without licence, is undoubted, but it is clearly discretionary, and must be exercised with caution and sparingly, and the sub-lessee asking for its exercise must show that he is blameless and has taken all precautions which a reasonably cautious and careful person would take. Where, therefore, the defendant purchased a sub-lease under a contract which gave him no right to call for the title of the lessee (so as to be barred by s. 3 (1) of the Conveyancing Act, 1881, from calling for it), who had covenanted not to assign without licence, and he purchased with the intention of expending money on the

(*c*) *Burt* v. *Gray*, [1891] 2 Q. B. 98; 60 L. J., Q. B. 664; 65 L. T. 229; 39 W. R. 429, per Mathew and Williams, JJ.

(*d*) *Imray* v. *Oakshette*, [1897] 2 Q. B. 218; 66 L. J., Q. B. 544; 76 L. T. 632; 45 W. R. 681—C. A.

(*e*) *Highgate School* v. *Sewell*, infra.

(*f*) *Imray* v. *Oakshette*, supra.

(*g*) *Highgate School* v. *Sewell*, [1893] 2 Q. B. 254; 62 L. J., Q. B. 476; 69 L. T. 118; 41 W. R. 637; 5 R. 301. In this case the terms imposed were that the sub-lessee should pay all rent due and execute a deed with covenants with the lessor similar to those of the head lease.

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premises, the court held that he had been negligent in entering into such a contract as to be precluded from investigating the title, and that relief against a forfeiture by the lessee for breach of the covenant ought not to be granted to the defendant (*h*).

Costs of Solicitor and Surveyor.

The cost incurred by the lessor in consulting a solicitor and surveyor in respect of the preparation of the notice required to be served on the lessee, was held in *Skinners' Co.* v. *Knight* (*i*), not to be demandable as "compensation" under sub-s. 1 of s. 14 of the Act of 1881, but it was also held in *Bridge* v. *Quick* (*k*), that the principle of this case did not apply to cases within sub-s. 2 of the section so as to exclude the discretionary jurisdiction of the court to award such expenses in granting relief under sub-s. 2. Since, and obviously in consequence of these decisions, it has been enacted by s. 2 (1) of the Conveyancing, &c., Act, 1892, 55 & 56 Vict. c. 13, that,—

Conveyancing Act, 1892, s. 2 (1).

> A lessor shall be entitled to recover as a debt due to him from a lessee (*l*) and in addition to damages (if any) all reasonable costs and expenses properly incurred by the lessor in the employment of a solicitor and surveyor or valuer, or otherwise, in reference to any breach giving rise to a right of re-entry or forfeiture, which at the request of the lessee is waived by the lessor by writing under his hand, *or from which the lessee is relieved*, under the provisions of the Conveyancing and Law of Property Act, 1881, or of this act.

This section appears to affirm both the cases above referred to, so that (1) the lessor is barred of his right to re-enter if the lessee pays compensation, exclusive of the expenses mentioned, and fails to remedy the breach within a reasonable time, &c., but that (2) the court is bound, if it decrees relief, to award to the lessor the expenses mentioned, as a debt due to him.

Relief, within year, against Forfeiture for Bankruptcy. or Execution.

Sub-sect. 6 of s. 14 excludes from the operation of that section, as we have seen (ante, p. 350), "a condition for forfeiture on the bankruptcy of the lessee or on the taking in execution of the lessee's interest." This sub-section is amended by sub-s. 2 of s. 2 of the Conveyancing, &c., Act, 1892, 55 & 56 Vict. c. 13, as follows :—

Conv. Act, 1892, s. 2, sub-s. 2.

> Sub-section six of section fourteen of the Conveyancing and Law of Property Act, 1881, is to apply to a condition for forfeiture on bankruptcy of the lessee, or on taking in execution of the lessee's interest, only after the expiration of one year from the date of the bankruptcy or taking in execution, and provided the lessee's interest be not sold within such one year, but in case the lessee's interest be sold within such one year, sub-section six shall cease to be applicable thereto.

(*h*) *Imray* v. *Oakshette*, supra.

(*i*) *Skinners' Co.* v. *Knight*, [1891] 2 Q. B. 542 ; 60 L. J., Q. B. 629 ; 65 L. T. 240 ; 40 W. R. 57—C. A., aff. Charles, J., 63 L. T. 698.

(*k*) *Bridge* v. *Quick*, 61 L. J., Q. B. 375 ; 67 L. T. 54.

(*l*) But not from a sub-lessee : *Nind* v. *Nineteenth Century Building Society*, [1894] 2 Q. B. 226 ; 63 L. J., Q. B. 636 ; 70 L. T. 831 ; 42 W. R. 481 ; 9 R. 468—C. A.

By sub-s. 3 of the same section, agricultural, mining, public-house and furnished house leases are excluded from the operation of sub-s. 2, as also is a lease of "any property with respect to which the personal qualifications of the tenant are of importance for the preservation of the value or character of the property, or on the ground of neighbourhood to the lessor, or any person holding under him."

Agricultural, mining, furnished house, &c., leases excluded from Act of 1892.

The effect of this amendment is by no means obvious at first sight. When carefully read with sub-s. 6 of s. 14 of the Act of 1881, the effect of it appears to be (1) to restrict the exclusion of s. 14 thus prescribed by sub-s. 6 thereof, during one year from bankruptcy or execution, (2) to abolish the exclusion as from the date of the sale of the lessee's interest within the year, but (3) after the year, if there has been no sale within the year to revive the exclusion, so as to allow the lessor, without notice given, to re-enter either upon the trustee in bankruptcy or his assignees.

Service of Notice.

As to the service, &c., of the notice under sub-sect. 1, sect. 67 of the Conveyancing Act, 1881, 44 & 45 Vict. c. 41, provides that—

(1) Any notice required or authorized by this act to be served shall be in writing.

(2) Any notice required or authorized by this act to be served on a lessee or mortgagor shall be sufficient although only addressed to the lessee or mortgagor by that designation, without his name, or generally to the persons interested, without any name, and notwithstanding that any person to be affected by the notice is absent, under disability, unborn, or unascertained.

At place of abode of party served.

(3) Any notice required or authorized by this act to be served shall be sufficiently served if it is left at the last known place of abode or business in the United Kingdom, of the lessee, lessor, mortgagee, mortgagor, or other person to be served, or, in case of a notice required or authorized to be served on a lessee or mortgagor, is affixed or left for him on the land or any house or building comprised in the lease or mortgage, or, in case of a mining lease, is left for the lessee at the office or counting-house of the mine.

By post, in registered letter.

(4) Any notice required or authorized by this act to be served shall also be sufficiently served, if it is sent by post in a registered letter addressed to the lessee, lessor, mortgagee, mortgagor, or other person to be served, by name, at the aforesaid place of abode or business, office, or counting-house, and if that letter is not returned through the post office undelivered; and that service shall be deemed to be made at the time at which the registered letter would in the ordinary course be delivered.

Proceedings in Court.

(5) This section does not apply to notices served in proceedings in the court.

Construction of sub-s. 2 of s. 14 of Act of 1881.

The words "by action or *otherwise*" in sub-s. 2 of s. 14 of the Act of 1881, seem intended to include a peaceable re-entry without action, and also to prolong the time within which the lessee may apply to the court to restrain the delivery of the writ of possession into

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the hands of the sheriff. The words "injunction to restrain" seem to apply to a breach of negative covenants only.

Procedure by Originating Summons.

Procedure to obtain relief cannot be by originating summons (*m*).

(c) *Relief against Forfeiture for Non-payment of Rent.*

Relief against Forfeiture for non-payment of Rent.

The law relating to relief against forfeiture for non-payment of rent is expressly excepted from the operation of the 14th section of the Conveyancing Act by the 8th sub-section.

Prior to the Landlord and Tenant Act, 1730, 4 Geo. 2, c. 28, the tenant might at an indefinite time after he was evicted have filed his bill and been relieved against the effect of the mere non-payment of rent (*n*); but this statute, which is re-enacted in substance by sect. 210 of the Common Law Procedure Act, 1852, confined the tenant to a period of six months after execution executed, within which he might obtain relief, in order to relieve the landlord from the inconvenience of continuing liable to an uncertainty of possession from its remaining in the power of the tenant to offer him a compensation at *any* time, in order to found an application for relief in equity, and to *limit and confine* the tenant to six calendar months after execution executed for his doing this (*o*). The 210th section of the Common Law Procedure Act, 1852, provides that unless the tenant proceed for relief in equity within six months after execution he shall be "barred and foreclosed from all relief or remedy in law or equity," the 211th that the tenant shall not have relief without payment of rent and costs, and the 212th that the tenant may stay proceedings at any time *before trial*, by paying the rent and costs.

Relief summarily, and either before or after trial.

The 1st section of the Common Law Procedure Act, 1860, 23 & 24 Vict. c. 126, extends these provisions by allowing the court or a judge to give relief in a summary manner either before or *after* the trial up to and within the six months after execution executed.

The original lessee must be made party to the proceedings if a mortgagee by sub-demise applies (*p*).

A defendant against whom judgment had been obtained, in an action in which the plaintiff had been deprived of costs, might, under this section, obtain relief after trial upon payment of rent and costs of application for relief, without being required to pay the costs of the action (*q*).

Relief refused within the six months.

It may be inequitable to grant relief even within the six months, the statute merely saying that no relief may be granted *after* the six

(*m*) *Lock* v. *Pearce*, [1893] 2 Ch. 271; 62 L. J., Ch. 582; 68 L. T. 569; 41 W. R. 369; 2 R. 403.

(*n*) *Bowser* v. *Colby*, 1 Hare, 125.

(*o*) *Doe* d. *Hitchins* v. *Lewis*, 1 Burr. 619, per Lord Mansfield, C.J., and Wilmot, J. And see *Bowser* v. *Colby*, 1 Hare, 109.

(*p*) *Hare* v. *Elms*, [1893] 1 Q. B. 604; as to which and for the enactments, see more fully post, Chap. XXII., Sect. 2 (b).

(*q*) *Croft* v. *London and County Banking Co.*, 54 L. J., Q. B. 277, C. A.

months. And relief was refused as inequitable in a case where the landlord had been keeping up a colliery at great expense, and had agreed to re-let it to a new tenant who had incurred expense in plant and been let into possession, and the old tenant applied for relief just before the end of the six months (*r*).

Relief against resumption of premises without process of law.

Relief, if applied for within six months, will extend to a case where there has been peaceable resumption of premises without process of law, but no compensation can be granted in respect of the time during which the applicant has been kept out of possession (*s*).

See further Chap. XXII., Sect. 2 (b), post.

Relief of mortgagee.

A mortgagee of a lease is entitled to relief if he be willing to pay rent and perform all covenants, except in the case where a third party has acquired rights between the forfeiture and the application for relief (*t*).

## Sect. 7.—*Notice to Quit.*

### (a) *Nature and Operation of.*

Nature of Notice to Quit.

The notice to quit which it is here proposed to consider is the certain reasonable notice required by law, or by custom, or by special agreement, to enable either the landlord or tenant, or the assignees or representatives of either of them, *without the consent of the other*, to determine a tenancy from year to year, or month to month, &c. The term is also applied to the notice given in exercise of an option to determine a lease, which is considered hereafter (*u*). Without such notice, or an actual or implied surrender (*x*) or merger (*y*), a tenancy of the above nature would continue in the tenant and his assigns or representatives; and the immediate reversion would continue in the landlord and his assigns or representatives (*z*), until extinguished by the Statute of Limitations (*a*).

Special Stipulations as to Notice to Quit.

The right to determine a tenancy from year to year by a notice to quit is a *necessary incident* to such tenancy: a stipulation against any such notice being given by one party or by the other is repugnant to the nature of the tenancy, and therefore void, and mere surplusage (*b*). Thus, an agreement to let at a fixed yearly rental, and not to give notice to quit so long as the rent is paid, constitutes more than a yearly tenancy, and gives the tenant a right to stay in,

(*r*) *Stanhope* v. *Haworth*, 3 T. L. R. 34, C. A. affirming judgment below.

(*s*) *Howard* v. *Fanshawe*, [1895] 2 Ch. 581; 64 L. J., Ch. 666; 73 L. T. 77; 43 W. R. 645; 13 R. 663, per Stirling, J.

(*t*) *Newbolt* v. *Bingham*, 72 L. T. 852; 14 R. 526—C. A.

(*u*) Post, Sect. 8.

(*x*) Ante, Sect. 3.

(*y*) Ante, Sect. 4.

(*z*) *Maddon* d. *Baker* v. *White*, 2 T. R. 159; 1 R. R. 453.

(*a*) 3 & 4 Will. 4, c. 27; *Doe* d. *Landsell* v. *Gower*, 17 Q. B. 589.

(*b*) *Doe* d. *Warner* v. *Browne*, 8 East, 165; 9 R. R. 397.

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so long as the landlord's interest continues and the tenant pays rent (*c*). The tenancy may generally be determined by half-a-year's notice expiring at the end of the first or any subsequent year at the term (*d*), but the parties may expressly stipulate for a longer or shorter notice to quit than that usually required by law (*e*); or for a notice expiring at some other period of the tenancy than at the end of the first or some other year, ex. gr. at the end of any quarter (*f*); or at some particular quarter (*g*); or at any time of the year, upon the expiration of a certain specified previous notice (*h*). But as the power of determining the tenancy at any time of the year is generally attended with inconvenience to one or both parties, the language conferring such power must be clear and explicit (*i*). Therefore, on a letting from year to year "to quit at a quarter's notice," such notice must expire *at the end* of the first or some other year of the tenancy, and not at any other part of the year; such stipulation merely substituting a three months' notice for the usual six months' notice (*k*). It seems, that where a "six months' notice" on either side is contracted for, a six lunar months' notice will be sufficient (*l*). Where a tenant is "*always* to be subject to quit at three months' notice," he will be deemed a quarterly tenant, and the notice to quit must expire with some quarter, and not at any other part of the year (*m*). Where premises are let at so much per quarter (not saying for what period), that creates a quarterly tenancy, and not a yearly tenancy at a rent payable quarterly (*n*). So where premises are let not for any definite period, but the tenant is to give up possession at any time on one month's notice, that creates a tenancy from month to month (*o*). But where premises are let for an indefinite period, at a yearly rent, payable weekly, with power to determine the tenancy at three months' notice from any quarter day, that creates a yearly tenancy, determinable at the end of any quarter (*p*). The parties to a demise may expressly stipulate that in a certain event the tenant may quit without any notice (*q*). An agreement for a

(*c*) *King's Leasehold Estates, Re*, L. R., 16 Eq. 521; 29 L. T. 288; 21 W. R. 881.

(*d*) *Doe* d. *Clarke* v. *Smaridge*, 7 Q. B. 957; *Doe* d. *Plumer* v. *Mainby*, 10 Q. B. 473.

(*e*) See, *e.g.*, *Rogers* v. *Kingston-upon-Hull Dock Co.*, 34 L. J., Ch. 165.

(*f*) *Kemp* v. *Derrett*, 3 Camp. 510; 14 R. R. 820; *Rex* v. *Herstmonceaux*, 7 B. & C. 551; *Collett* v. *Curling*, 10 Q. B. 785; *Bird* v. *Defonville*, 2 C. & K. 415, 418.

(*g*) *Doe* d. *Rigge* v. *Bell*, 5 T. R. 471; 2 R. R. 642.

(*h*) *Doe* d. *King* v. *Grafton*, 18 Q. B. 496; 21 L. J., Q. B. 276; *Bridges* v. *Potts*, 17 C. B., N. S. 314.

(*i*) Cole Ejec. 31.

(*k*) *Doe* d. *Pitcher* v. *Donovan*, 1 Taunt. 555; 2 Camp. 78; *Brown* v. *Burtenshaw*, 7 D. & R. 603.

(*l*) *Rogers* v. *Kingston-upon-Hull Dock Co.*, 34 L. J., Ch. 165.

(*m*) *Kemp* v. *Derrett*, 3 Camp. 510; 14 R. R. 820.

(*n*) *Wilkinson* v. *Hall*, 3 Bing. N. C. 508.

(*o*) *Doe* d. *Landsell* v. *Gower*, 17 Q. B. 589.

(*p*) *Rex* v. *Inhbts. of Herstmonceaux*, 7 B. & C. 551; *Overseers of Willesden*, app., *Overseers of Paddington*, resp., 3 B. & S. 593; *Guardians of Hastings Union* v. *Guardians of St. James, Clerkenwell*, 35 L. J., M. C. 65.

(*q*) *Bethell* v. *Blencowe*, 3 M. & G. 119.

weekly tenancy of a house determinable by a week's notice, accompanied by a memorandum that the tenant might have the house until the landlord required it for the purpose of pulling it down, has been held to be terminable by a week's notice, although the landlord did not require the house for the purpose of pulling it down (*r*).

Insufficient Notice to Quit does not become sufficient by assent.

An insufficient notice to quit given by the tenant, though assented to by the landlord, will not determine the tenancy, nor operate as a surrender on the expiration of such notice (*s*). A tenancy from year to year created by parol is not determined by a parol licence from the landlord to quit in the middle of a quarter, and the tenant quitting the premises accordingly, without the landlord taking possession (*t*). An agreement for a new lease upon different terms (not amounting to an actual demise) will not be sufficient, without a notice to quit, to determine a previous yearly tenancy (*u*).

Effect of a sufficient Notice to Quit.

Upon the expiration of a notice to quit duly given by either party *the tenancy ceases*, and, unless a fresh tenancy be afterwards created, the landlord cannot distrain for *subsequent* rent, notwithstanding the tenant continues in possession for a year or more after the expiration of the notice (*x*). The remedy in such case is by action for use and occupation (*y*), or for double value or double rent (*z*).

### (b) *When necessary.*

When necessary.

A notice to quit is necessary—1. Where there is some express stipulation on the subject. 2. By local custom. 3. By the common law.

By express Stipulation.

Where there is any express stipulation as to the notice to be given by either party to determine the tenancy, such notice, whether more or less than that usually required by law, must be given and will be sufficient (*a*). But less than the stipulated notice will be bad (*b*). Where a "six months'" notice on either side is to be given, it seems that a six lunar months' notice is sufficient (*c*).

By local Custom.

Where there is a special local custom regulating the notice to be given to determine the tenancy, and there is no express stipulation on the subject, such custom will be deemed part of the contract as

(*r*) *Cheshire Lines Committee* v. *Lewis*, 50 L. J., Q. B. 120 ; 44 L. T. 293, C. A.

(*s*) *Doe* d. *Hudlestone* v. *Johnstone*, 1 M'Clel. & Y. 141 ; *Johnstone* v. *Hudlestone* (parol notice), 4 B. & C. 922 ; 7 D. & R. 411 ; 4 L. J., K. B. 71 ; 28 R. R. 505 ; *Doe* d. *Murrell* v. *Milward* (notice in writing), 3 M. & W. 328 ; *Bessell* v. *Landsberg*, 7 Q. B. 638. As to whether insufficient written notice, assented to in writing, will amount to a surrender, see per Bayley, J., in *Johnstone* v. *Hudlestone*, and per Parke, B., in *Doe* d. *Murrell* v. *Milward*.

(*t*) *Mollett* v. *Brayne*, 2 Camp. 103 ; 11 R. R. 676.

(*u*) *John* v. *Jenkins*, 1 Cr. & M. 227 ; *Jones* v. *Reynolds*, 1 Q. B. 506.

(*x*) *Alford* v. *Vickery*, Car. & M. 280.

(*y*) Chap. XIV., post.

(*z*) Chap. XX., post.

(*a*) *Doe* d. *Green* v. *Baker*, 8 Taunt. 281 ; 19 R. R. 502 ; *Doe* d. *Robinson* v. *Dobell*, 1 Q. B. 806.

(*b*) *Doe* d. *Peacock* v. *Raffan*, 6 Esp. 4.

(*c*) *Rogers* v. *Kingston-upon-Hull Dock Co.*, 34 L. J., Ch. 165.

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an *implied* term or condition thereof, and notice to quit must be given accordingly (*d*), but any express stipulation at variance with a custom will override it, as was held in a case where the lease provided for six months' notice, and a Durham custom allowed a few days less than six months (*e*). The custom of the country is not admissible to prove that a notice to quit served on the 3rd of April is a good notice to quit by reason of the tenancy being a Michaelmas tenancy, but it must be proved by direct evidence that such is the case (*f*).

By the Common Law—General Rule.

Where a tenancy from year to year is created by express agreement, and there is no special stipulation or local custom providing for the determination of the tenancy, the usual notice to quit required by law, *i.e.* half-a-year's notice to quit at the end of the first or some other year of the tenancy, must be given (*g*). The same rule applies where a tenancy from year to year is *implied by law* from the payment and acceptance of rent, or from other circumstances (*h*), as where a person enters under a void lease (*i*). Similarly, where a tenant for a term of years holds over and continues to pay rent as before, which the landlord accepts (*k*); or where a lease becomes void upon the death of the lessor (a tenant for life), and the remainderman accepts subsequent rent, whereby a new implied tenancy is created (*l*); any such new tenancy will be deemed to have commenced from the same day of the year as the original term, and the notice to quit should be given accordingly (*m*).

Time of Day for Quitting.

The tenant is entitled to retain possession till midnight of the same day of the year on which the tenancy commenced; a notice to quit at noon of such day is bad (*n*).

Notice to Quit under Agricultural Holdings Act.

The common law rule, that in all cases of yearly tenancies, the tenant is entitled to half-a-year's notice expiring at that period of the year at which the tenancy commenced, is altered in favour of tenants of agricultural or pastoral holdings or market gardens by

(*d*) *Tyley* v. *Seed*, Skin. 649; *Roe* d. *Henderson* v. *Charnock*, Peake, 6. As to proof of Custom, see *Doe* d. *Brown* v. *Wilkinson*, Co. Lit. 270 b, note (228).

(*e*) *Travers* v. *Mason*, 45 W. R. 77.

(*f*) *Hogg* v. *Norris*, 2 F. & F. 246.

(*g*) *Parkes* d. *Walker* v. *Constable*, 3 Wils. 25; *Right* d. *Flower* v. *Darby*, 1 T. R. 159; 1 R. R. 169; *Doe* d. *Shaw* v. *Porter*, 3 T. R. 13; 1 R. R. 626; *Doe* d. *Martin* v. *Watts*, 7 T. R. 85; 4 R. R. 387.

(*h*) *Doe* d. *Waven* v. *Horn*, 3 M. & W. 333; *Doe* d. *Cater* v. *Somerville*, 6 B. & C. 126, 132.

(*i*) *Doe* v. *Bell*, 5 T. R. 471; 2 R. R. 642. As to whether an entry under an agreement for a lease constitutes a tenancy from year to year only, or gives a title to the lease, see *Walsh* v. *Lonsdale*, 21 Ch. D. 9, and Chap. IV., Sect. 1, ante.

(*k*) *Hyatt* v. *Griffiths*, 17 Q. B. 570. See ante, 233.

(*l*) *Doe* v. *Watts*, 2 Esp. 501; 7 T. R. 83; 4 R. R. 387.

(*m*) *Doe* d. *Jordan* v. *Ward*, 1 H. Blac. 96; *Doe* d. *Collins* v. *Weller*, 7 T. R. 478; 4 R. R. 496; *Humphreys* v. *Franks*, 18 C. B. 323.

(*n*) *Page* v. *More*, 15 Q. B. 684.

the 33rd section of the Agricultural Holdings Act, 1883 (*p*), which doubles the length of notice required, by enacting that:—

Agricultural Holdings Act, s. 33.

Where a half-year's notice, expiring with a year of tenancy, is by law necessary and sufficient for determination of a tenancy from year to year, in the case of any such tenancy under a contract of tenancy made either before or after the commencement of this act, a year's notice so expiring shall by virtue of this act be necessary and sufficient for the same, unless the landlord and tenant of the holding, by writing under their hands, agree that this section shall not apply, in which case a half-year's notice shall continue to be sufficient; but nothing in this section shall extend to a case where the tenant is adjudged bankrupt, or has filed a petition for a composition or arrangement with his creditors.

One year's notice, unless section excluded.

This section applies only to the common case where a half-year's notice is necessary by implication of law (*q*), and has no application to the case where a half-year's notice, much less where six months' notice (*r*), is expressly stipulated for (*s*). Such is the effect of *Wilkinson* v. *Calvert*, decided upon precisely similar words in sect. 51 of the repealed Agricultural Holdings Act, 1875, and of *Barlow* v. *Teal* (*t*), decided upon sect. 33 of the Act of 1883 in a case where the stipulation in a contract of tenancy made in 1871, was "to hold from year to year, until six months' notice is given in the usual way;" and in *Barlow* v. *Teal* all the members of the Court of Appeal intimated that (as it was put by Brett, M.R.), sect. 33 "applies where there is no express stipulation as to the termination of the tenancy, and does not apply where there is an express stipulation."

*Barlow* v. *Teal.*

Notice under Agricultural Holdings Act to Quit Part of Holding.

The 41st section of the same act provides that on a tenancy from year to year a notice to quit, which relates to part only of the holding, and would therefore be wholly bad at common law (*u*), shall be good as to such part if given with a view to the use of land for the erection of labourers' cottages, the providing of gardens for labourers, the planting of trees, the working of coal, "the obtaining of brick earth, gravel, or sand," the making of a watercourse or road, or other purposes therein enumerated, the tenant to be entitled to a proportionate reduction of rent. The notice must "so state," *i.e.* must state its purpose. The same section provides that "the tenant shall further be entitled at any time within *twenty-eight* days after service of the notice to quit, to serve on the landlord a notice in writing to the

(*p*) 46 & 47 Vict. c. 61. See this act set out at length Appendix A., post, and for its exact application, see p. 362, infra.

(*q*) See *Right* d. *Flower* v. *Darby*, 1 T. R. 159; 1 R. R. 169; and the other cases, ante (*g*).

(*r*) *Wilkinson* v. *Calvert*, 3 C. P. D. 360; 47 L. J., C. P. 679; 38 L. T. 813; 26 W. R. 829, per Lord Coleridge, C.J.

(*s*) See Id.

(*t*) *Barlow* v. *Teal*, 15 Q. B. D. 501; 54 L. J., Q. B. 564; 54 L. T. 63; 34 W. R. 54, C. A. It will be observed, although it is not so stated in the judgments in that case, that the express stipulation need not be in writing.

(*u*) *Doe* d. *Rodd* v. *Archer*, 14 East, 245; 12 R. R. 509.

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effect that he (the tenant) accepts the same as a notice to quit the entire holding, to take effect at the expiration of the then current year of tenancy; and the notice to quit shall have effect accordingly." This last provision, which it is purely optional with the tenant to avail himself of, seems intended to give him the benefit of giving up the part of the holding to which the notice applies sooner than he would be entitled to do in the ordinary course of things; for if the tenant should not avail himself of the provision the notice will be a "year's notice, expiring with a year of tenancy" (in accordance with sect. 33), and not with the "current year."

Application of Agricultural Holdings Act.

The Agricultural Holdings Act, 1883, 46 & 47 Vict. c. 61, by sects. 54 and 61 applies to the following and no other holdings:—

"*Holdings, either wholly agricultural or wholly pastoral, or partly agricultural and partly pastoral, or wholly or partly cultivated as market gardens, held under a landlord for a term of years or for lives, or for lives and years, or from year to year, by a tenant holding no employment under such landlord.*"

Service of Notice to Quit under Agricultural Holdings Act.

It is enacted by sect. 28 of the Agricultural Holdings Act, that "any notice under this act" may be served by registered letter through the post; but it is submitted that a notice to quit is not a notice under the act, and that sect. 33 merely lengthens the notice required at common law (*x*).

What Tenancies are determinable by Notice at the End of the first Year.

A tenancy "from year to year so long as both parties please" is determinable at the end of the first, as well as of any subsequent year, unless in creating such tenancy the parties use words showing that they contemplate a tenancy for two years at least (*y*). But a tenancy created for "one year (*z*), and so on from year to year" until determined by three months' notice, has been held to be a tenancy for two years at the least, and not determinable by notice to quit at the end of the first year, but only by notice to quit at the end of the second or any subsequent year of the tenancy (*a*); whereas it had been previously ruled that a tenancy "for twelve months *certain* and six months' notice afterwards" might be determined by notice to quit at the end of the first year (*b*). A demise "not for one year only, but from year to year," constitutes a demise for two years at

Twelve months certain.

(*x*) See the act, post, Appendix A., and for one instance out of many of a notice "under the act" see s. 7. A contrary opinion to that in the text is given in Roscoe on Evidence, ed. 16, at p. 1012.

(*y*) *Doe* v. *Smaridge*, 7 Q. B. 957; *Doe* v. *Nainby*, 10 Q. B. 473.

(*z*) In editions of this work prior to the 14th the word "certain" was printed by mistake after "one year."

(*a*) *Doe* d. *Chadborn* v. *Green*, 9 A. & E. 658; 1 P. & D. 454, distinguishing *Thompson* v. *Maberley*, infra, on the ground that the word "certain" occurred in that case, and in conformity with *Birch* v. *Wright*, 1 T. R. 37; 1 R. R. 223; "and other cases." *Doe* v. *Green* must now be taken to be settled law.

(*b*) *Thompson* v. *Maberley*, 2 Camp. 573, See also as to "certain," *Brown* v. *Symons*, 8 C. B., N. S. 208; 29 L. J., C. P. 251; *Langton* v. *Carleton*, L. R., 9 Ex. 57.

least (*c*); but a tenancy for six months, and so on from six months to six months until determined by either party, is a tenancy for one year at least (*d*). So a lease for three years, and so on from three years to three years, makes one term for six years (*e*). Such tenancy may be determined by a half-year's notice to quit expiring at the end of the first six years, or of any subsequent period of three years, but not at any other time (*f*). A demise for a "term of three years determinable on a six months' previous notice to quit, otherwise to continue from year to year until the term shall cease by notice to quit at the usual times" is a demise for three years certain, determinable only at the end of that period by six months' previous notice; and if not then determined, a subsisting tenancy from year to year. Such a demise cannot be determined by a notice to quit at the end of the first or second of the three years (*g*).

By Husband.

Prior to the Married Women's Property Act it was held that a husband could not maintain ejectment for his wife's lands, let from year to year with his express or implied assent, without first giving due notice to quit (*h*). The effect of that act would seem to be that the notice to quit need be given in the wife's name only.

By Infant.

An infant must give the same notice to quit as if he were of full age (*i*).

After Death or Assignment.

A notice to quit is not rendered unnecessary by the death of the landlord (*k*), or of the tenant (*l*), nor by an assignment of the term (*m*), or of the reversion (*n*). But in all such cases notice to quit should be given by or to the person or persons for the time being legally entitled to the term, or to the reversion, as the case may be (*o*).

Subsequent Reversioners may avail themselves o previous Notice.

Where notice to quit is duly given by the landlord, or other person for the time being legally entitled to the reversion, and he afterwards assigns his reversion, the assignee may avail himself of the notice (*p*). So the churchwardens and overseers of a parish may avail themselves of a notice to quit duly given by their predecessors (*q*).

Notice by Tenant binds Assignee.

A proper notice to quit given to the tenant or his assignee will operate against any subsequent assignee (*r*).

(*c*) *Dean* d. *Jacklin* v. *Cartwright*, 4 East, 31.
(*d*) *Reg.* v. *Chawton*, 1 Q. B. 247.
(*e*) *Hennings* v. *Brabason*, 2 Lev. 45.
(*f*) Cole Ejec. 35; *Roe* d. *Bree* v. *Lees*, 2 W. Blac. 1171; *Hennings* v. *Brabason*, 2 Lev. 45; *Jones* v. *Nixon*, 1 H. & C. 48.
(*g*) *Jones* v. *Nixon*, 1 H. & C. 48; 31 L. J., Ex. 505; *Brown* v. *Trumper*, 26 Beav. 11.
(*h*) *Doe* d. *Leicester* v. *Biggs*, 1 Taunt. 367; 2 Id. 109; 11 R. R. 533.
(*i*) *Maddon* d. *Baker* v. *White*, 2 T. R. 159; 1 R. R. 453; *Doe* d. *Miller* v. *Nodon*, 2 Esp. 530.
(*k*) *Maddon* d. *Baker* v. *White*, 2 T. R. 159; 1 R. R. 453.
(*l*) *Doe* d. *Shore* v. *Porter*, 3 T. R. 13; 1 R. R. 626; *Doe* d. *Hull* v. *Wood*, 14 M. & W. 682.
(*m*) *Doe* d. *Castleton* v. *Samuel*, 5 Esp. 173; 8 R. R. 845.
(*n*) *Birch* v. *Wright*, 1 T. R. 378; 1 R. R. 223; *Burrowes* v. *Gradin*, 1 D. & L. 213, 218.
(*o*) Cole Ejec. 35.
(*p*) *Doe* d. *Earl of Egremont* v. *Forwood*, 3 Q. B. 627.
(*q*) *Doe* d. *Higgs* v. *Terry*, 4 A. & E. 274; *Doe* d. *Hobbs* v. *Cockell*, Id. 478.
(*r*) *Doe* d. *Castleton* v. *Samuel*, 5 Esp. 173; 8 R. R. 845.

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(c) *When unnecessary.*

Demise for specific Term.

Where the contract of tenancy specifies the term or event upon which the tenancy is to determine, no notice to quit is necessary (*s*); as where the demise is for one year (*t*): or for any certain number of years (*u*): or till a particular day (*x*). Similarly, if a tenant enter under an agreement for a lease for seven years, which lease is never executed, at the end of the seven years the tenancy from year to year, created by the payment and acceptance of rent during that period, determines without any notice to quit (*y*). But if there be an agreement for a lease of twenty-one years, determinable at the end of the first seven or fourteen years, the tenant cannot quit at the end of the first seven years without giving any notice (*z*).

Agreement for Lease for specific Term.

When Term limited till specified Event.

If a term is granted which in the lease is limited by the happening of a certain event, the term will end on the happening of the event without any notice to quit being required. Thus where there is a lease or agreement for a lease "during the joint lives of A. and B.;" upon the death of either of them the term determines without any notice to quit (*a*); and where a house or part of a house is occupied by one of several partners "during the continuance of the partnership;" upon a dissolution thereof he may be ejected without any notice to quit (*b*). So where premises are occupied by a servant and his family as part of the remuneration for his services, whenever such service is determined, an ejectment may be maintained against the servant without notice to quit (*c*). And where an intended purchaser is let into possession until a given day on terms the same rule will apply (*d*).

Where Notice to Quit is expressly dispensed with.

It may be expressly stipulated that the tenant may quit *without notice*, at any time, upon the happening or discovery of a particular event or fact (which happens), ex. gr. "if he finds anything that may at all lead him to suspect that there is any embarrassment in his landlord" (*e*).

Where the tenancy is otherwise than yearly, and there is no local custom or special stipulation as to notice, it is very doubtful what

(*s*) *Right* d. *Flower* v. *Darby*, 1 T. R. 162; 1 R. R. 169.

(*t*) *Cobb* v. *Stokes*, 8 East, 358, 361; 9 R. R. 464; *Strickland* v. *Maxwell*, 2 Cr. & M. 539.

(*u*) *Messenger* v. *Armstrong*, 1 T. R. 54; 1 R. R. 148; *Roberts* v. *Hayward*, 3 C. & P. 432.

(*x*) *Doe* d. *Leeson* v. *Sayer*, 3 Camp. 8.

(*y*) *Doe* d. *Tilt* v. *Stratton*, 3 C. & P. 164; 4 Bing. 446; *Berrey* v. *Lindley*, 3 M. & G. 498, 514; *Doe* d. *Davenish* v. *Moffatt*, 15 Q. B. 257, 265; *Tress* v. *Savage*, 4 E. & B. 36.

(*z*) *Chapman* v. *Towner*, 6 M. & W. 100; and see *Brown* v. *Trumper*, 26 Beav. 11.

(*a*) *Doe* d. *Bromfield* v. *Smith*, 6 East, 530.

(*b*) *Doe* d. *Waithman* v. *Miles*, 1 Stark. 181; 16 R. R. 805; *Doe* d. *Colnaghi* v. *Black*, 8 C. & P. 464.

(*c*) *Doe* d. *Hughes* v. *Corbett*, 9 C. & P. 494.

(*d*) *Doe* d. *Moore* v. *Lawder*, 1 Stark. 308; *Right* d. *Lewis* v. *Beard*, 13 East, 210.

(*e*) *Bethell* v. *Blencowe*, 3 M. & G. 119.

notice to quit is necessary. A notice corresponding with the period of tenancy, ex. gr. a week's notice in case of a weekly tenancy, is clearly sufficient (*f*), but whether it is necessary is not settled. It was ruled by Parke, B., at nisi prius (*g*), in an action for use and occupation, that the well-known rule that a yearly tenancy cannot be determined without a half-a-year's notice "cannot be applied to a weekly taking," inasmuch as "the effect of it would be to show that half-a-week's notice was necessary to put an end to such a tenancy;" that a week's notice to quit is not implied as part of the contract in a weekly taking, and that a tenant who quitted on the same day of the week on which he entered was not bound to pay rent for the week subsequent. But in *Jones* v. *Mills* (*h*), the Court of Common Pleas held that a tenancy from week to week does not determine without *some reasonable notice:* and that an ejectment cannot be maintained against such tenant without any previous notice. Both these cases being decided in favour of the tenant, they are not so conflicting as has been generally supposed. On the whole, the law appears to be that, in the case of weekly tenancies, the landlord is entitled to such reasonable notice, not exceeding a week, as will enable him to get a new tenant, and the tenant to such reasonable notice, not exceeding a week, as will give him a reasonable time to remove his property from the premises (*i*). After notice given the tenant appears to be entitled in strict law to stay until *midnight* of the day on which the notice expires, at whatever hour of the day the tenancy may have commenced, or the notice may have been given;—for the law takes no account of fractions of a day. This seems to follow from the authority (*k*) in which a notice to quit at noon (of the proper day) was held bad in the case of a tenancy from year to year; but a custom to quit at a more convenient time, if it could be proved in fact, would no doubt be good in law.

Monthly or Weekly Tenancy. *Jones* v. *Mills.*

After Notice, Tenant may stay till Midnight.

The onus of proof of any custom (where a custom is relied on) lies on the party asserting its existence (*l*). If there be any such local custom or special stipulation, notice to quit must be given accordingly (*m*), and such notice will of course be sufficient (*n*).

Proof of Custom.

(*f*) See *Doe* d. *Peacock* v. *Raffan*, 6 Esp. 4.

(*g*) *Huffell* v. *Armistead*, 7 C. & P. 56, 58.

(*h*) *Jones* v. *Mills*, 10 C. B., N. S. 788; 31 L. J., C. P. 66, followed in *Bowen* v. *Anderson*, [1894] 1 Q. B. 164; 42 W. R. 236; 10 R. 47. In *Jones* v. *Mills*. Williams, J., thought that a week's notice, and Willes, J., that half-a-week's notice, was necessary.

(*i*) See per Erle, C.J., in *Jones* v. *Mills*, ubi supra, citing *Thunder* d. *Weaver* v. *Belcher*, 3 East, 449.

(*k*) *Page* v. *Moore*, 15 Q. B. 66.

(*l*) Cole Ejec. 33, 37.

(*m*) *Doe* d. *Peacock* v. *Raffan*, 6 Esp. 4; *Doe* d. *Finlayson* v. *Bayley*, 5 C. & P. 67.

(*n*) *Doe* d. *Parry* v. *Hazell*, 1 Esp. 94; 5 R. R. 722; *Doe* d. *Campbell* v. *Scott*, 6 Bing. 362.

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A notice to quit is unnecessary to determine a strict tenancy at will (*o*). But such tenancy must be duly determined by a "demand of possession," or by entry, or by something equivalent, on or *before* the date of the plaintiff's alleged title in an ejectment (*p*).

Tenants at Will.

Implied tenancies at will frequently change into tenancies from year to year, upon payment of rent, &c. (*q*), in which case the usual notice to quit must be given.

Tenants on Sufferance.

A tenant on sufferance is not entitled to any notice to quit, nor even to a demand of possession, before an ejectment can be maintained against him (*r*). But such tenancy will easily change into a tenancy at will, or into a tenancy from year to year, whereupon a demand of possession, or a regular notice to quit, will become necessary (*s*).

Intruders.

If a man get into possession of a house to be let, without the privity of the landlord, and they afterwards enter into negotiations for a lease, but differ upon the terms, the landlord may maintain ejectment to recover possession of the premises without notice to quit (*t*). But possession should be demanded before action, to put an end to any implied tenancy at will, arising from the negotiations (*u*).

Mortgagors.

A mortgagor who is suffered to remain in possession, or in receipt of the rents and profits of the property mortgaged, not being a tenant of the mortgagee, but in the nature of a bailiff to receive the rents, and thereout pay the interest, and keep the surplus for his own use (*x*), is not entitled to any notice to quit, nor even to a demand of possession, before ejectment (*y*).

Tenants of Mortgagor before Mortgage.

Tenants from year to year of the mortgagor, whose tenancies commenced *before* the mortgage, are entitled to the usual notice to quit (*z*); and tenants under leases are entitled to such notice as may be stipulated for in the lease under which they hold.

Tenants of Mortgagor *after* Mortgage.

But if the tenancy, whether by lease for any term however long, or from year to year, commenced *after* the mortgage, the tenants are not entitled to any notice to quit, nor even to a demand of possession (*a*), unless a new tenancy has been created as between the

(*o*) *Doe* d. *Tomes* v. *Chamberlaine*, 5 M. & W. 14; *Doe* d. *Milburn* v. *Edgar*, 2 Bing. N. C. 498; *Doe* d. *Jones* v. *Jones*, 10 B. & C. 718; *Doe* d. *Hall* v. *Wood*, 14 M. & W. 682 (2nd point); *Doe* d. *Hollingsworth* v. *Stennett*, 2 Esp. 717; 5 R. R. 769.

(*p*) See *Doe* d. *Nicholls* v. *M'Kacy*, 10 B. & C. 721, and ante, 240.

(*q*) *Clayton* v. *Blakey*, 8 T. R. 3; 4 R. R. 575, and see ante, 231.

(*r*) *Doe* d. *Moore* v. *Lawder*, 1 Stark. R. 308; *Doe* d. *Leeson* v. *Sayer*, 3 Camp. 8; *Doe* d. *Roby* v. *Maisey*, 8 B. & C. 767.

(*s*) Cole Ejec. 38.

(*t*) *Doe* d. *Knight* v. *Quigly*, 2 Camp. 505; 11 R. R. 780.

(*u*) Cole Ejec. 58.

(*x*) *Trent* v. *Hunt*, 9 Exch. 14.

(*y*) *Doe* d. *Roby* v. *Maisey*, 8 B. & C. 767; *Doe* d. *Fisher* v. *Giles*, 5 Bing. 421; 2 M. & P. 749; 7 L. J., C. P. 134; 30 R. R. 686; *Doe* d. *Snell* v. *Tom*, 4 Q. B. 615; *Doe* d. *Wilkinson* v. *Goodier*, 10 Q. B. 957; *Doe* d. *Garrod* v. *Olley*, 12 A. & E. 481; and see ante, 246.

(*z*) *Doe* d. *Bowman* v. *Lewis*, 13 M. & W. 241; 2 D. & L. 667.

(*a*) *Keech* v. *Hall*, 1 Doug. 21; 1 Smith, L. C.; *Thunder* d. *Weaver* v. *Belcher*, 3 East, 450; *Doe* d. *Parker* v. *Boulton*, 6 M. & S. 148.

mortgagee and the tenant (*b*), or unless the 18th section of the Conveyancing Act (Chap. I., Sect. 29 b, ante), or the Tenants' Compensation Act, 1890, applies to their case.

Application of Tenants' Compensation Act.

The Tenants' Compensation Act, 1890, 53 & 54 Vict. c. 57, seems to apply to the occupiers of land (*c*) only, and gives to such occupiers if occupying under a contract with the mortgagor, (whether made before or after the act) which is not binding on the mortgagee, in addition to rights to compensation (as to which see Chap. XX., Sect. 8, post) a right to six months' notice from the mortgagee before being deprived of possession otherwise than in accordance with his contract of tenancy with the mortgagor; but this provision applies only where such contract is for a tenancy from year to year, or for not more than twenty-one years at a rack rent.

Corporations.

According to the old authorities, notice to quit need not be given by or to a corporation aggregate where there has been no demise *under seal*, and either party may determine the tenancy at any time without notice (*d*); but the later view is that an implied tenancy from year to year is created by such a demise (*e*), whence it seems to follow that the ordinary half-year's notice to quit must be given. A notice to quit (when necessary) may be given by the steward of the corporation without his being authorized so to do under the common seal (*f*). If given to a corporation it must be directed to them, and not to their head officers (*g*).

Claim by Title paramount.

Where the plaintiff claims by title paramount to the tenancy from year to year notice to quit is unnecessary (*h*).

Disclaimer.

A disclaimer by a tenant from year to year of the reversioner's title renders any notice to quit unnecessary (*i*).

### (d) *By whom and to whom given.*

By whom. Agents.

A notice to quit may be given either by the landlord or by the tenant, or by the authorized agent of either party (*k*). The agent, who, if acting generally, may give the notice in his own name, but not if he is acting specially (*l*), ought to have sufficient authority when the notice is given, or, at the latest, when it begins to operate:

*Jones* v. *Phipps.*

(*b*) *Doe* v. *Bucknell*, 8 C. & P. 566; *Doe* d. *Whittaker* v. *Hales*, 7 Bing. 322.

(*c*) See the preamble, from which, it is submitted, a "contrary intention appears" within the meaning of s. 3 of the Interpretation Act, 1889, 52 & 53 Vict. c. 63, whereby "land" includes houses, &c., "unless the contrary intention appears."

(*d*) *Finlay* v. *Bristol and Exeter R. Co.* 7 Exch. 409.

(*e*) *Ecclesiastical Commissioners* v. *Merral*, L. R., 4 Ex. 162; 38 L. J., Ex. 93; 20 L. T. 573; 17 W. R. 676. As to power, without seal, to demise from year to year, see Companies Clauses Act, 1845, s. 97; Companies Act, 1867, s. 37.

(*f*) *Roe* d. *Dean and C. of Rochester* v. *Pierce*, 2 Camp. 96; 11 R. R. 673; *Doe* d. *Birmingham Canal Co.* v. *Bold*, 11 Q. B. 127.

(*g*) *Doe* d. *Earl of Carlisle* v. *Woodman*, 8 East, 228; 9 R. R. 422.

(*h*) *Doe* d. *Putland* v. *Hilder*, 2 B. & A. 782; Cole Ejec. 40.

(*i*) Post, Sect. 8; Cole Ejec. 41.

(*k*) See Forms, Appendix C., Nos. 3, 5.

(*l*) *Jones* v. *Phipps*, infra.

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a subsequent recognition is not sufficient (*m*). Where the trustees of a marriage settlement left the entire control and management of the trust estates to their cestui que trust, who was tenant for life in possession, it was held, that he was their general agent in that behalf, and had power to give notices to quit, and that such a notice given in his own name only was sufficient (*n*).

Tenant for life Agent for Trustees.

Agency generally.

But when a notice to quit is given by a particular agent, having a limited authority only, such notice should be given in the name of the principal, or expressly on his behalf (*o*). A notice given by an agent in the names of W. and B. "and others" is valid as a notice from W. and B. only (*p*). A notice by an agent of an agent is not generally sufficient (*q*).

Assignees, Devisees, Heirs, Executors, &c.

Any person for the time being legally entitled to the immediate reversion of and in the demised premises, ex. gr. as assignee, devisee, heir, executor or administrator of the landlord, may give notice to quit (*r*). One of several executors or administrators is competent to give a notice to quit on behalf of all (*s*). Any subsequent owner deriving title through or under the party giving the notice may avail himself of it (*t*).

Subsequent Mortgagee.

A mortgagee whose mortgage is *subsequent* to the commencement of a tenancy from year to year created by the mortgagor is an assignee of the reversion, and he may give the tenant the usual notice to quit (*u*). But a *prior* mortgagee need not give any notice to quit (*x*).

Partners.

Where A. demises to a mining company, and afterwards becomes a member of that company, he may nevertheless give the company notice to quit, and afterwards maintain ejectment against them (*y*). Where a brewer demised to a publican upon a yearly tenancy, determinable at any time by three months' notice, after which the brewer took in two new partners, and the subsequent receipts for rent were given in the name of the firm: held, that a notice to quit given by the lessor in his own name only was sufficient, and that it was not to be presumed from the receipts that the *legal* estate in the reversion had vested in the firm (*z*).

(*m*) *Doe* d. *Mann* v. *Walters*, 10 B. & C. 626; *Doe* d. *Lyster* v. *Goldwin*, 2 Q. B. 143, 146; *Doe* d. *Rhodes* v. *Robinson*, 3 Bing. N. C. 677.

(*n*) *Jones* v. *Phipps*, L. R., 3 Q. B. 303; 37 L. J., Q. B. 173; 18 L. T. 655; 16 W. R. 1018.

(*o*) *Doe* d. *Lyster* v. *Goldwin*, 2 Q. B. 143, 146; *Buron* v. *Denman*, 2 Exch. 188; Cole Ejec. 44.

(*p*) *Doe* d. *Bailey* v. *Foster*, 3 C. B. 215.

(*q*) *Doe* d. *Rhodes* v. *Robinson*, 3 Bing. N. C. 677; Cole Ejec. 45.

(*r*) Cole Ejec. 43.

(*s*) Id. 43.

(*t*) *Doe* d. *Earl of Egremont* v. *Hellings*, 6 Jur. 821, Q. B.; *Doe* d. *Earl of Egremont* v. *Forwood*, 3 Q. B. 627; *Doe* d. *Higgs* v. *Terry*, 4 A. & E. 274.

(*u*) *Burrowes* v. *Gradin*, 1 D. & L. 213, 218; *Rawson* v. *Eicke*, 7 A. & E. 451; *Burton* v. *Dickenson*, 17 L. T. 246.

(*x*) Ante, 366.

(*y*) *Doe* d. *Harvey* v. *Francis*, 4 M. & W. 331.

(*z*) *Doe* d. *Green* v. *Baker*, 8 Taunt. 241; 19 R. R. 502.

Joint Tenants.

Where several joint tenants demise from year to year, such of them as give notice to quit may severally recover their respective shares (*a*). A notice to quit signed by one of several joint tenants on behalf of himself and the others (whether authorized by them or not) is sufficient to determine a tenancy from year to year as to all; because the tenant holds *the whole premises of all* so long as he and all shall please, and a notice to quit given by any one effectually puts an end to that tenancy (*b*). And therefore also a notice to quit given on behalf of several joint tenants by a person authorized by one of them to give such notice is sufficient to determine the tenancy as to all (*c*). A notice given by an agent in the names of W. and B. "and others" is valid as a notice from W. and B. only (*d*).

Tenants in Common.

A notice to quit given by one of several tenants in common may be to quit his undivided part or share (*e*). Where they *demise jointly* they seem to stand on the same footing as joint tenants, and notice to quit may accordingly be given by either of them on behalf of himself and the others (*f*).

Receivers.

A receiver, whether appointed by the High Court, or by a private individual *with a general authority to let* the lands to tenants from year to year, has thereby implied authority to determine such tenancies by a regular notice to quit (*g*). But a person authorized to manage the affairs of another during his absence abroad, and to receive his rents, has no authority *implied by law* to determine a tenancy by notice to quit; but it is a question of fact for the jury whether he had such authority (*h*). "A mere receiver of rents, as such, has no authority to determine a tenancy" (*i*).

To whom given—by Landlord.

A notice to quit given by the landlord should be given to his immediate tenant, or to his assignee, &c., in whom the term is then vested, and not to a mere sub-tenant (*k*). A notice addressed to the tenant, but served upon the sub-tenant upon the premises, is insufficient (*l*). The notice should be directed to the tenant, and may be delivered to his solicitor or agent (*m*). In *Tanham* v. *Nicholson* (*n*) it was held by the House of Lords that service upon a person whose

*Tanham* v. *Nicholson.*

(*a*) *Doe* d. *Whayman* v. *Chaplin*, 3 Taunt. 120; 12 R. R. 615.

(*b*) *Doe* d. *Aslin* v. *Summersett*, 1 B. & Ad. 135, 140; *Doe* d. *Kindersley* v. *Hughes*, 7 M. & W. 141; *Alford* v. *Vickery*, Car. & M. 210.

(*c*) *Doe* d. *Kindersley* v. *Hughes*, 7 M. & W. 141.

(*d*) *Doe* d. *Bailey* v. *Foster*, 3 C. B. 215.

(*e*) *Cutting* v. *Derby*, 2 W. Blac. 1075; *Doe* d. *Robertson* v. *Gardiner*, 12 C. B. 323. See the form, post, Appendix C.

(*f*) Cole Ejec. 44.

(*g*) *Wilkinson* v. *Colley*, 5 Burr. 2696, 2698; *Doe* d. *Marsack* v. *Read*, 12 East, 57; *Doe* d. *Manvers* v. *Mizen*, 2 Moo. & R. 56.

(*h*) *Doe* d. *Mann* v. *Walters*, 10 B. & C. 626.

(*i*) Id. 633, Parke, J.; *Doe* d. *Rhodes* v. *Robinson*, 3 Bing. N. C. 677; *Hascler* v. *Lemoyne*, 5 C. B., N. S. 550; *Pearse* v. *Boulter*, 2 F. & F. 133.

(*k*) *Pleasant* d. *Hayton* v. *Benson*, 14 East, 234; 12 R. R. 507; *Doe* d. *Morris* v. *Williams*, 6 B. & C. 41.

(*l*) *Doe* d. *Mitchell* v. *Levi*, Ad. Ejec. 92, note (*b*).

(*m*) *Doe* d. *Prior* v. *Ongley*, 10 C. B. 25, 34.

(*n*) *Tanham* v. *Nicholson*, L. R., 5 H. L. 561; 6 Ir., C. L. 188.

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duty it would be to deliver the notice to the tenant was sufficient to sustain ejectment, although in fact the notice was never delivered to the tenant: in this case the tenant was imbecile, and the notice was delivered to his daughter, who lived in the house and managed it. If the notice be served upon the tenant personally, it need not be directed to him by name (*o*). The tenant on being served with the notice should give a similar notice to his sub-tenant, and will be liable to an ejectment if his sub-tenant hold over (*p*). In the absence of proof to the contrary, a person who has obtained possession from a tenant will be presumed to be in possession as assignee of the term, and not as a mere sub-tenant (*q*). Where on the death of a tenant from year to year his widow remained in possession, and a notice to quit was given to her, this was held sufficient in the absence of any evidence of a probate or letters of administration granted to some other person (*r*). Where there are two or more joint lessees, a notice to quit given to one of them, even by parol, is sufficient for all (*s*). Where a corporation aggregate is the tenant, and a notice to quit is necessary, it should be addressed to the corporation, and not to its officers (*t*).

Notice served but not delivered to Tenant.

Joint Lessees.

Corporation.

To whom given—by Tenant.

A notice to quit given by the tenant should be given to his *immediate landlord* or his assigns, and not to the ground landlord or other person through whom the immediate landlord derives his title (*u*). If the immediate landlord is dead, or has assigned his reversion, the notice should be given to the person or persons for the time being *legally entitled to the immediate reversion*, ex. gr. to the heir, executor, administrator, devisee or assignee of such landlord, as the case may be (*x*). Or it may be given to the attorney or agent duly authorized in that behalf of such landlord, or other person so entitled as aforesaid (*y*); but not to a mere collector of rents who has no actual authority to receive such notices (*z*).

### (e) *Form and Service of.*

Parol Notice to Quit generally sufficient.

A parol notice to quit is generally sufficient, whether given by or on behalf of the landlord (*a*), or the tenant (*b*); even when given on

(*o*) *Doe* d. *Matthewson* v. *Wrightman*, 4 Esp. 5; 6 R. R. 834.

(*p*) *Roe* v. *Wiggs*, 2 Bos. & P., N. R. 330.

(*q*) *Doe* d. *Morris* v. *Williams*, 6 B. & C. 41; *Roe* d. *Blair* v. *Street*, 2 A. & E. 329, 331; *Hindley* v. *Rickerby*, 5 Esp. 4.

(*r*) *Rees* d. *Mears* v. *Perrot*, 4 C. & P. 230.

(*s*) *Doe* d. *Ld. Macartney* v. *J. and W. Crick*, 5 Esp. 196 (the marginal note of this case is incorrect); 8 R. R. 848; *Doe* d. *Ld. Bradford* v. *Watkins*, 7 East, 551; 8 R. R. 670.

(*t*) *Doe* d. *Ld. Carlisle* v. *Woodman*, 8 East, 228; 9 R. R. 422.

(*u*) *Woods* v. *Hyde*, 31 L. J., Ch. 295; 10 W. R. 339.

(*x*) *Woods* v. *Hyde*, 31 L. J., Ch. 295; 10 W. R. 339.

(*y*) *Doe* d. *Prior* v. *Ongley*, 10 C. B. 25 (last point); *Papillon* v. *Brunton*, 5 H. & N. 518; 29 L. J., Ex. 265.

(*z*) *Pearse* v. *Boulter*, 2 F. & F. 133.

(*a*) *Doe* d. *Ld. Macartney* v. *Crick*, 5 Esp. 196; 2 C. & K. 420; 8 R. R. 848.

(*b*) *Timmins* v. *Rawlinson*, 3 Burr. 1603; 1 W. Blac. 533; *Bird* v. *Defonvielle*, 2 C. & K. 415.

behalf of a corporation aggregate by their steward or agent (*e*), if any notice be necessary in such case (*d*). A good parol notice will not be waived by a subsequent insufficient notice in writing (*e*).

Notice in Writing.

Generally speaking, notice to quit is given in writing (*f*). No particular form is necessary; but if given by or on behalf of the landlord, it must in substance and effect request the tenant, or other the person for the time being legally entitled to the term (not a mere sub-tenant (*g*)), to quit and deliver up possession of *all* the demised premises *at the proper time*: if given by or on behalf of the tenant, it must in substance and effect inform the landlord, or other the person or persons for the time being legally entitled to the immediate reversion, that the tenant will quit and deliver up possession of *all* the demised premises *at the proper time* (*h*).

Certainty of Notice to Quit. *Ahearn* v. *Bellman.*

A notice to quit must be clear and certain, so as to bind the party who gives it, and to enable the party to whom it is given to act upon it at the time when he ought to receive it (*i*). And in conformity with the interpretation usually given to a dictum of Lord Mansfield (in a case in which the court held the particular notice before them to be good) (*k*), it was also laid down in some prior editions of this work, and in the text books generally (*l*), that a notice to be good must not be optional, *i.e.* must not give the noticee an option to enter into a new contract of tenancy. But in *Ahearn* v. *Bellman* (*m*) the majority of the Court of Appeal held that a notice might be optional, and yet good. In that case the tenant held at 150*l.* a year, and the notice was this:—"I hereby give you notice to quit and deliver up possession of the shop, premises, and show rooms situate and being 20, Moss Street, Liverpool, and now held by you as tenant from me, on or before the 1st day of May, 1878. *And I hereby further give you notice that should you retain possession of the premises after the date before mentioned, the annual rental of the premises now held by you from me will be* 160*l.*, *payable quarterly in advance.*" The court (Brett, L.J., dissenting) held that the words in italics did not invalidate the notice. "It has been said, and truly said," observed

What certainty required—Optional notice. *Ahearn* v. *Bellman.*

(*e*) *Roe* d. *D. and C. of Rochester* v. *Pierce*, 2 Camp. 96; 7 Q. B. 577; 11 R. R. 673.

(*d*) *Finlay* v. *Bristol and Exeter R. Co.*, 7 Exch. 409; *Copper Miners' Co.* v. *Fox*, 16 Q. B. 229; *Doe* d. *Pennington* v. *Taniere*, 12 Q. B. 998; *Pennington* v. *Cardale*, 3 H. & N. 656.

(*e*) *Doe* d. *Ld. Macartney* v. *Crick*, 5 Esp. 196; 8 R. R. 848.

(*f*) See the Forms, post, Appendix C., Nos. 1—7.

(*g*) Ante, 370 (*q*).

(*h*) Cole Ejec. 46, 47.

(*i*) See *Doe* d. *Lyster* v. *Godwin*, 2 Q. B. 143.

(*k*) *Doe* d. *Matthews* v. *Jackson*, 1 Dougl. 175. The words were, "I desire you to quit, or I shall insist on double rent."

(*l*) See Smith's Landlord and Tenant, 2nd ed. 326; Adams on Ejectment, 95; Cole on Ejectment, 46.

(*m*) *Ahearn* v. *Bellman*, 4 Ex. D. 201; 48 L. J., Ex. 681; 40 L. T. 711; 27 W. R. 928—C. A., reversing the ruling of Lopes, J., at Liverpool Assizes; *Roberts* v. *Hayward*, 3 C. & P. 432.

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Cotton, L.J., "that a notice to determine the tenancy must be clear and unambiguous; but that does not at all mean that a notice otherwise sufficient is made insufficient by its being accompanied by something else." The principle of this case has since been applied to a case in which a lessee under a lease for 21 years determinable by six months' notice at the end of the first 7 or 14, wrote to the lessor more than six months before the expiration of the first 7 years, that he would not be able to stop unless some reduction in his rent should be made; and inconclusive negotiations for reduction followed (*n*); and it is submitted, though with some little doubt, that this ruling would equally apply to the case of a tenancy from year to year.

"Take Notice that I intend to Surrender."

The rule that the notice must be unambiguous has been applied in a case where the expression was "take notice that I intend to surrender" on the ground that a surrender can only take place by mutual consent, and the word surrender could not incontrovertibly be taken to have been used in the popular sense of giving up, wherefore the notice was held to be bad (*o*). This decision must always stand as an authority for the strict construction of notices, but whether it would be followed if the same words had to be construed (which is unlikely) may be doubted. It is submitted that an intention to do what is impossible in law, and according to the presumption of law known to be impossible, ought not to have been assumed, and that the word "surrender" ought to have been construed in its popular sense.

"I wish to go: Tell me when my Tenancy will expire."

Where the tenant wrote to the landlord's agents on January 11th, 1892, that he wished to terminate his tenancy, and asked them to let him know when it would expire, and they replied on the 13th that six months' notice must be given, to terminate on the 1st of July in any year, and that he therefore held till July, 1893, this was held a good notice for July, 1893 (*p*).

A notice given by the grantor of a licence to mine, that *unless* the grantee kept a certain number of miners at work, as he was bound to do, the grantor *would* re-enter, is not a good notice to avoid the licence, which the grantor was entitled to give (*q*). A notice desiring the tenant to "quit the premises which you hold under me, your term therein having long since expired," does not recognize a subsisting tenancy from year to year, subsequent to the term, but is a mere demand of possession (*r*). A notice to quit and give up possession, but not stating to whom, is sufficient (*s*).

(*n*) *Bury* v. *Thompson*, [1895] 1 Q. B. 696; 64 L. J., Q. B. 500; 72 L. T. 187; 43 W. R. 338; 14 R. 299—C. A.

(*o*) *Gardner* v. *Ingram*, 61 L. T. 729, per Lord Coleridge, C.J., and Bowen, L.J. (in the High Court).

(*p*) *General Assurance Co.* v. *Worsley*, 64 L. J., Q. B. 253; 72 L. T. 358; 15 R. 328.

(*q*) *Muskett* v. *Hill*, 5 Bing. N. C. 694.

(*r*) *Doe* d. *Godsell* v. *Inglis*, 3 Taunt. 54.

(*s*) *Doe* d. *Bailey* v. *Foster*, 3 C. B. 215.

The notice must extend to *all* the demised premises, and *not to a part only*, otherwise it will be bad (*t*). But the court will if possible construe the notice as a good notice for the whole, rather than as a bad notice for part only. Therefore a notice to quit "Town Barton, &c." is sufficient for other lands having distinct names held therewith (*u*). So a notice to quit "all that messuage, tenement or dwelling-house, farm, lands and premises, with the appurtenances, which you rent of me in the parish of S.," is sufficient to include the great and small tithes held therewith under a parol demise (*x*). A joint tenant or tenant in common may give notice to quit *all his part or share* of the demised premises (*y*). A mere misdescription of the property in a notice to quit is not fatal if the tenant be not misled by it. Thus where the premises were fully and accurately described, except that they were called "The Waterman's Arms" instead of "The Bricklayer's Arms" (*z*), and where the premises were described as situate in the parish of D. (instead of the parish of H.), in the county of York (*a*), both these notices were held sufficient.

Must extend to *all* the demised Premises.

Misdescriptions, when immaterial.

The notice must require the tenant to quit, or give notice of his intention to quit, *at the proper time*. This is the point with respect to which mistakes are most frequently made; and such mistakes are fatal to the validity of the notice (*b*). A good instance of this well accepted rule is afforded by *Doe* d. *Murrell* v. *Milward* (*c*). There a tenant from year to year, believing that his tenancy had commenced (and therefore would be determinable) at Midsummer, gave a written notice to quit at that period, which the landlord made no objection to. Afterwards finding out that his tenancy had commenced (and therefore would be determinable) at Christmas, he gave a fresh notice to quit at Christmas. It was held that the landlord could not maintain an ejectment as for a determination at Midsummer.

When the Notice must expire in ordinary Cases.

In the case of an implied tenancy from year to year, or an express tenancy from year to year which is silent as to notice, if the holding be agricultural, a year's notice expiring with a year of tenancy must be given, unless the Agricultural Holdings Act, 1883, has been excluded by mutual agreement in writing (*d*). Where that act does not apply, or has been excluded, the law requires half-a-year's notice to quit at the end of the first or some other year of the tenancy, and

Tenancy from Year to Year.

(*t*) *Right* d. *Fisher* v. *Cuthell*, 5 East, 498; *Doe* d. *Rodd* v. *Archer*, 14 East, 244; 12 R. R. 509.

(*u*) *Doe* d. *Rodd* v. *Archer*, 14 East, 244; 12 R. R. 509.

(*x*) *Doe* d. *Morgan* v. *Church*, 3 Camp. 71.

(*y*) Ante, 369.

(*z*) *Doe* d. *Cox* v. ——, 4 Esp. 185.

(*a*) *Doe* d. *Armstrong* v. *Wilkinson*, 12 A. & E. 743.

(*b*) *Doe* d. *Castleton* v. *Samuel*, 5 Esp. 173; 8 R. R. 845; *Doe* d. *Spicer* v. *Lea*, 11 East, 312; *Doe* d. *Finlayson* v. *Bayley* (weekly tenancy), 5 C. & P. 67.

(*c*) *Doe* d. *Murrell* v. *Milward*, 3 M. & W. 328; and see *Johnstone* v. *Hudlestone*, 4 B. & C. 922, and 359, ante.

(*d*) See sect. 33 of that act, ante, 361.

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not at any other period (*e*), whether the demised premises consist of land or houses (*f*).

Mining Lease.

In a *mining* lease, where the lessees are to be at liberty to determine it at any time upon a six months' notice, such notice may expire at any time and not merely at the end of the year (*g*).

Weekly, &c., Tenancies.

The peculiar case of weekly, &c. tenancies has been already dealt with (*h*).

Customary Half-Year's Notice. *Morgan* v. *Davies.*

If the tenancy commence on one of the ordinary feast days, a notice on or before one of the feast days in the earlier half of the tenancy to quit on the feast day at the conclusion of the tenancy is sufficient and necessary, although the period between the two feast days should exceed or fall short of the number of days which constitute a half-year (*i*). Thus a notice served on or before Michaelmas-day to quit on the following Lady-day (from which day the tenancy commenced) is sufficient (*k*), though there are fewer than 183 days between the 28th September and the 25th March. So a notice to quit on the 24th of June served on the preceding Christmas-day is sufficient (*l*); but a notice served on the 26th of March to quit on the 29th of September then next is insufficient (*m*), although there are more than 183 days between the 26th of March and the 29th of September. Where the tenancy commenced from some day in the year other than one of the usual quarter days, a full half-year's notice (183 days), expiring on such day, must be given (*n*). But where a "six months'" notice on either side is expressly agreed for, it seems that a six lunar months' notice is sufficient (*o*).

New Style or Old Style.

A notice to quit at "Michaelmas next" prima facie means Michaelmas, new style (29th of September); but it will be sufficient for a tenancy commencing at Michaelmas, old style (11th of October), because the tenant cannot have been misled or prejudiced by it (*p*). But a notice to quit "on the 11th of October, Old Michaelmas-day," is bad, if the tenancy commenced at New Michaelmas (*q*). Upon

(*e*) *Parker* d. *Walker* v. *Constable*, 3 Wils. 25; *Right* d. *Flower* v. *Darby*, 1 T. R. 159; 1 R. R. 169; *Doe* d. *Murrell* v. *Milward*, 3 M. & W. 328.

(*f*) *Roe* d. *Brown* v. *Wilkinson*, Co. Lit. 270 b, note (228): *Right* d. *Flower* v. *Darby*, 1 T. R. 162; 1 R. R. 169.

(*g*) *Bridges* v. *Potts*, 17 C. B., N. S. 314; 33 L. J., C. P. 338.

(*h*) Ante, p. 365.

(*i*) *Morgan* v. *Davies*, 3 C. P. D. 260; 26 W. R. 816: *Doe* v. *Kightley*, 7 T. R. 63; 4 R. R. 375; *Howard* v. *Wemsley*, 6 Esp. 53; 9 R. R. 806.

(*k*) *Roe* d. *Durant* v. *Doe*, 6 Bing. 574; *Doe* d. *Matthewson* v. *Wrightman*, 4 Esp. 5; 6 R. R. 834; *Doe* d. *Ld. Bradford* v. *Watkins*, 7 East, 551; 8 R. R. 670; *Papillon* v. *Brunton*, 5 H. & N. 518; 29 L. J., Ex. 265.

(*l*) *Doe* d. *Buddle* v. *Lines*, 11 Q. B. 402.

(*m*) *Morgan* v. *Davies*, 3 C. P. D. 360; 26 W. R. 816.

(*n*) *Doe* d. *Spicer* v. *Lea*, 11 East, 312; *Mills* v. *Goff*, 14 M. & W. 72; 2 D. & L. 23: *Doe* d. *Cornwall* v. *Matthews*, 11 C. B. 675.

(*o*) *Rogers* v. *Kingston-upon-Hull Dock Co.*, 34 L. J., Ch. 765.

(*p*) *Furley* d. *Mayor, &c. of Canterbury* v. *Wood*, 1 Esp. 198; *Doe* d. *Hinde* v. *Vince*, 2 Camp. 256; *Doe* d. *Willis* v. *Perrin*, 9 C. & P. 467.

(*q*) *Doe* d. *Spicer* v. *Lea*, 11 East, 312; *Smith* v. *Walton*, 8 Bing. 235; *Cadby* v. *Martinez*, 11 A. & E. 720.

a written agreement to demise from the following "Lady-day," a notice to quit on the 6th of April is good, upon parol evidence that by "Lady-day" the parties meant Old Lady-day: such evidence is admissible where the written agreement is not under seal (*r*). A notice to quit on "Lady-day" is good either for the New or Old Lady-day, according to the holding, if served in due time (*s*). A notice to quit "on the 25th day of March *or* the 6th day of April next," if served in sufficient time, is good for New or Old Lady-day, according as the tenancy actually commenced (*t*).

Must expire on the *last day* of some Year of the Tenancy.

Generally speaking, a notice to quit should expire *on the last day* of some year of the tenancy, and not on the same day on which the tenancy commenced (*u*). Thus, upon a tenancy *from* Lady-day, the notice should expire on Lady-day, and not on the 26th of March (*x*).

Expiration on Anniversary. *Sidebotham* v. *Holland.*

But although a yearly tenancy in strictness expires at midnight of the day before the anniversary of its commencement, a notice expiring on the anniversary of commencement is usual and good, though a notice expiring on the day before the anniversary of commencement is good also, as was held by the Court of Appeal in *Sidebotham* v. *Holland* (*y*).

Not "at Noon."

A notice to quit on the proper day at twelve o'clock at noon is bad (*z*).

Need not mention the particular Day.

The notice *need not mention the particular day* on which the tenant is required to quit. Thus a notice to quit "at the expiration of the current year of the tenancy which shall expire next after the end of one half-year from the date hereof" is sufficient (*a*). A notice on 22nd March to quit "at the expiration of the current year" is sufficient for the 29th September, if the tenancy commenced from that day (*b*), but it is better not to use the expression *current year* (*c*). A notice on 27th September to quit "at the expiration of the term for which you hold the same" is sufficient for Lady-day, if the tenancy commenced from that day (*d*). A notice to quit "at the expiration of the present year's tenancy" is sufficient, although it does not appear *on the face of it* that it was given six months before the expiration of the current year of the tenancy (*e*).

(*r*) *Denn* d. *Peters* v. *Hopkinson*, 3 D. & R. 507; *Doe* d. *Hale* v. *Benson*, 4 B. & A. 588.

(*s*) *Denn* d. *Willan* v. *Walker*, Peake, Ad. Cas. 194.

(*t*) *Doe* d. *Matthewson* v. *Wrightman*, 4 Esp. 5; 6 R. R. 834.

(*u*) *Poole* v. *Warren*, 8 A. & E. 587, 588.

(*x*) *Ackland* v. *Lutley*, 9 A. & E. 879.

(*y*) *Sidebotham* v. *Holland*, [1895] 1 Q. B. 378; 64 L. J., Q. B. 200; 72 L. T. 62; 43 W. R. 338; 14 R. 299—C. A., dub. A. L. Smith, L.J.

(*z*) *Page* v. *More*, 15 Q. B. 684.

(*a*) *Doe* d. *Phillips* v. *Butler*, 2 Esp. 589; 5 R. R. 756; *Doe* d. *Williams* v. *Smith*, 5 A. & E. 350.

(*b*) *Doe* d. *Baker* v. *Wombwell*, 2 Camp. 559.

(*c*) *Doe* d. *Mayor of Richmond* v. *Morphett*, 7 Q. B. 577; Smith L. C. T. 323, 326 (2nd ed.).

(*d*) *Doe* d. *Milnes* v. *Lamb*, Ad. Ejec. 272, Holroyd, J.

(*e*) *Doe* d. *Gorst* v. *Timothy*, 2 C. & K. 351.

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When Commencement of Tenancy is unknown and cannot be ascertained.

Where it is unknown and cannot be ascertained or proved at what time of the year the tenancy actually commenced, the notice should be to quit on a specified quarter day, "or at the expiration of the current year of your tenancy which shall expire next after the end of one half-year from the service of this notice" (*f*). If an ejectment founded on such notice be not commenced, nor the claimant alleged in the writ to be entitled to possession, until some day after the third quarter day succeeding that mentioned in the notice, such notice will certainly be sufficient, supposing the rent to be payable on the usual quarter days and no rent to be received which accrued *subsequently* to the quarter day mentioned in the notice. This is the safest course to be pursued under such circumstances (*g*). But sometimes an implied admission may be obtained from the tenant, by serving him personally with a notice to quit on a particular day, and reading it to him, or getting him to read it, if he make an objection to it on the ground that it is to quit at the wrong time (*h*). But the defendant may rebut such primâ facie evidence as to the time when the term commenced by proof that the tenancy actually commenced at a different part of the year (*i*). In the absence of such proof the jury should be directed to infer and find that the tenancy commenced at the time mentioned in the notice (*k*). If the tenant, in answer to an application by the landlord or his agent, state that the tenancy commenced on a particular day, and a notice is thereupon given him to quit on that day, it seems that he will be estopped from afterwards proving that the tenancy commenced on a different day (*l*). It was once ruled that a notice to quit upon a particular day was primâ facie evidence that the tenancy commenced on that day, and threw upon the defendant the onus of proof that it commenced on some other day (*m*). But it is now settled that such a notice (without more) is not even primâ facie evidence that the tenancy commenced on the day therein mentioned (*n*).

When Tenant enters in the Middle of a Quarter.

When a tenant enters in the middle of a quarter, and *pays rent for the broken period* ending with that quarter, and subsequently pays his rent from quarter to quarter, his tenancy will be deemed to have commenced, not when he first entered, but at the quarter day, to which

(*f*) *Doe* d. *Digby* v. *Steel*, 3 Camp. 115; 13 R. R. 768; *Hirst* v. *Horn*, 6 M. & W. 393.

(*g*) Cole Ejec. 51.

(*h*) *Thomas* d. *Jones* v. *Reece*, 2 Camp. 647; *Doe* d. *Clarges, Bart.* v. *Forster*, 13 East, 405; 12 R. R. 383; *Doe* d. *Leicester* v. *Biggs*, 2 Taunt. 109; 11 R. R. 533; *Walker* v. *Godé*, 6 H. & N. 594; 30 L. J., Ex. 172.

(*i*) *Oakapple* d. *Green* v. *Copous*, 4 T. R. 361; *Cadby* v. *Martinez*, 11 A. & E. 720.

(*k*) *Walker* v. *Godé*, 6 H. & N. 594; 30 L. J., Ex. 172.

(*l*) *Doe* d. *Eyre* v. *Lambley*, 2 Esp. 625; 5 R. R. 758; but see *Doe* d. *Murrell* v. *Milward*, 3 M. & W. 331.

(*m*) *Matthewson* v. *Wrightman*, 4 Esp. 7.

(*n*) *Doe* d. *Ash* v. *Calvert*, 2 Camp. 338; 11 R. R. 745.

he paid up, and notice to quit should be given accordingly (*o*). But if he has not paid any rent the tenancy will be deemed to have commenced on the day when he entered, and notice to quit at that time will be good (*p*).

Holding over after 3 years' agreement.

The defendant went into possession under an agreement for three years by which he agreed to pay a yearly rent of 50*l.* to commence as from the 9th May, 1891, to be payable for the first half quarter on the 24th June, and subsequently on the usual quarter days. At the end of the three years he held over but continued to pay rent quarterly. A notice served on the 28th September, 1896, to quit on the 25th March, 1897, was ruled bad (*q*), inasmuch as the tenancy commenced on the 24th June.

When different Parts of the Premises are entered on at different Times.

Where different parts of the demised premises were entered upon at different times the notice should be to quit at corresponding periods, "or at the expiration of the year of the tenancy which will expire next after the expiration of half a year from the delivery of this notice" (*r*). Such notice has been held to be sufficient for the whole of the premises, if served in time for the principal subject of the demise (*s*). But this was in the case of agricultural tenancies, where the entry upon the accessorial part of the premises was at a different time from that upon the substantial part for agricultural reasons, and the court viewed the landlord as having given a licence to enter the accessorial part rather than as having made a demise of it. If any doubt arise as to which is the principal and which the accessorial subject of the demise, that is a question of fact for the jury (*t*); but if the judge assumes the fact either way, and decides accordingly, that the notice to quit is or is not sufficient, the party against whom he so decides should expressly desire him to leave the question of fact to the jury, otherwise it will be taken, upon any application for a new trial, &c., that he acquiesced in the fact assumed by the judge as the ground of his decision (*u*).

Increase of Rent.

No new tenancy is created by a mere agreement for an increase of rent in the middle of the year of a tenancy, and a notice to quit after the receipt of the increased rent must expire at the time when the tenant originally entered (*x*).

(*o*) *Doe* d. *Holcomb* v. *Johnson*, 6 Esp. 10; 9 R. R. 800; *Savage* v. *Stapleton*, 3 C. & P. 275; *Doe* d. *King* v. *Grafton*, 18 Q. B. 496; 21 L. J., Q. B. 276.

(*p*) *Doe* d. *Cornwall* v. *Matthews*, 11 C. B. 675.

(*q*) *Simmons* v. *Underwood*, 76 L. T. 777, per Bruce, J.

(*r*) *Doe* d. *Williams* v. *Smith*, 5 A. & E. 350.

(*s*) *Doe* d. *Dagget* v. *Snowden*, 2 W. Blac. 1224; *Doe* d. *Strickland* v. *Spence*, 6 East, 120; 8 R. R. 422; *Doe* d. *Ld. Bradford* v. *Watkins*, 7 East, 551; 8 R. R. 670; *Doe* d. *Davenport* v. *Rhodes*, 11 M. & W. 602, 603.

(*t*) Smith L. & T. 322 (2nd ed.).

(*u*) *Doe* d. *Heapy* v. *Howard*, 11 East, 498; 11 R. R. 255; *Doe* d. *Kindersley* v. *Hughes*, 7 M. & W. 141.

(*x*) Ad. Ejec. 107 (4th ed.); *Doe* d. *Holcomb* v. *Johnson*, 6 Esp. 10; 9 R. R. 800; *Crowley* v. *Vitty*, 7 Ex. 319; 21 L. J., Ex. 136.

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Where a Tenant holds over.
*Kelly* v. *Patterson.*

Generally speaking, an implied tenancy from year to year, created by the payment and acceptance of rent after the end or determination of a previous term, will be deemed to have commenced at the same time of the year as the original term, and notice to quit should be given accordingly (*y*). And this rule prevails even where the original term did not cease at the same time of the year as it commenced, as where premises were originally demised for five and a half years, and an implied tenancy from year to year was afterwards created (*z*); and where a new landlord allowed the tenant of his predecessor to remain in occupation and receive rent from him (*a*). But this rule applies only to a case where the tenant holds over on a lease made to himself (*b*).

Where a sub-tenant by assignment holds over, and pays rent after the expiration of a lease commencing at Christmas and expiring at Midsummer, a notice requiring him to quit at Midsummer is good (*c*).

Where there is Possession under a void Demise.
*Doe* v. *Bell.*

Where the tenant comes into possession under a void lease, a tenancy from year to year is created, but, generally speaking, the holding must be taken with reference to the period of entry under the lease so far as regards the expiration of the notice to quit: thus where a remainderman creates a new tenancy with a tenant in possession under a void lease granted by a tenant for life, and receives rent on the days of payment mentioned in the lease, a notice to quit must expire on the day of entry under the original demise (*d*). And it was held in the leading case of *Doe* d. *Rigge* v. *Bell*, that if a landlord lease for seven years by parol, and agree that the tenant shall enter at Lady-day and quit at Candlemas, though the lease be void by the Statute of Frauds as to the duration of the term, the tenant holds under the terms of the lease in other respects; and therefore the landlord can only put an end to the tenancy at Candlemas (*e*).

Where Three Months' Notice is sufficient by Agreement.

Where premises are let from year to year upon an agreement that either party may determine the tenancy by a quarter's notice, the notice must expire at the period of the year when the tenancy commenced (*f*): so where premises are taken under an agreement,

(*y*) *Roe* d. *Jordan* v. *Ward*, 1 H. Blac. 96; 2 R. R. 728; *Doe* d. *Martin* v. *Watts*, 7 T. R. 83; 4 R. R. 387; *Doe* d. *Collins* v. *Weller*, 7 T. R. 478; 4 R. R. 496; *Doe* d. *Castleton* v. *Samuel*, 5 Esp. 173; 8 R. R. 845; *Doe* d. *Spicer* v. *Lea*, 11 East, 312; *Doe* d. *Tucker* v. *Morse*, 1 B. & Ad. 365; *Humphreys* v. *Franks*, 18 C. B. 323.

(*z*) *Berrey* v. *Lindley*, 3 M. & G. 498; *Doe* d. *Robinson* v. *Dobell*, 1 Q. B. 806.

(*a*) *Kelly* v. *Patterson*, L. R., 9 C. P. 681; 43 L. J., C. P. 320; 30 L. T. 842, where see the cases reviewed by Brett, J.

(*b*) Per Brett, J., ib.

(*c*) *Doe* d. *Buddle* v. *Lines*, 11 Q. B. 402.

(*d*) *Roe* d. *Jordan* v. *Ward*, 1 H. Blac. 96; 2 R. R. 728; *Doe* d. *Collins* v. *Weller*, 7 T. R. 478; 4 R. R. 496; *Beale* v. *Sanders*, 3 Bing. N. C. 850; *Lee* v. *Smith*, 9 Exch. 662.

(*e*) *Doe* d. *Rigge* v. *Bell*, 5 T. R. 571; 2 Smith, L. C.; 2 R. R. 642; and see *Doe* d. *Thomson* v. *Amey*, 12 A. & E. 476; and other cases, ante, 231 et seq.

(*f*) *Doe* d. *Pitcher* v. *Donovan*, 1 Taunt. 555; 2 Camp. 78.

by which the tenant "is always to quit at three months' notice," the notice must expire either on the same day of the year the tenancy commenced, or on one of the three other corresponding quarter days (*g*).

Weekly Tenancies.

It appears not to have been expressly decided what notice to quit is necessary in the case of a weekly tenancy. The authorities on the point have already been examined (*h*).

Date of Notice.

The day or time mentioned in the notice to quit should always be correct with reference to the date of the notice. Any mistake in this respect is generally fatal to the validity of the notice (*i*). But a notice dated on the 27th, and served on the 28th *September*, requiring a tenant to quit "at *Lady-day* next, or at the end of his current year," was held in one case to mean a six months' and not a two days' notice to quit (*k*); but this decision has been since overruled in a case where a notice was held bad which was served on the 21st of October, to quit "on the 13th of May next, or upon such other day as the *current* year for which you now hold will expire," the holding being one from a day in November (*l*). A notice served on the 17th June to quit "on the 11th October now next ensuing, or such other day and time as your said tenancy may expire on," is not a good notice for the Michaelmas in the following year (*m*). A notice delivered to a tenant at *Michaelmas*, 1795, to quit "at *Lady-day* which will be in the year 1795," was held to be a good notice to quit at *Lady-day*, 1796; for the intention was clear, and 1795 was to be rejected as an impossible year (*n*). So where a yearly tenancy expired in February, and in October, 1833, a notice was given to quit "at the expiration of half a year from the delivery of this notice, or at such other time or times as your *present* year's holding of or in the said messuage, &c. shall expire after the expiration of half a year from the delivery of this notice," it was held a good notice for February, 1835 (*o*).

To whom the Notice should be directed and given.

It is not necessary that a notice to quit should be directed to the tenant in possession, if proved to have been delivered to him as tenant at the proper time (*p*): and if a notice to quit be directed to the tenant by a wrong christian name, and he keeps it without objection, it is a waiver of the misdirection (*q*): and where two tenants hold premises in common, a notice to quit to one of them is sufficient

(*g*) *Kemp* v. *Derrett*, 3 Camp. 510.
(*h*) Ante, 365; see especially *Jones* v. *Mills*, 31 L. J., C. P. 66.
(*i*) Cole Ejec. 52.
(*k*) *Doe* d. *Ld. Huntingtower* v. *Cullifford*, 4 D. & R. 249; *Doe* d. *Earl of Egremont* v. *Forwood*, 3 Q. B. 627.
(*l*) *Doe* d. *Mayor, &c. of Richmond* v. *Morphett*, 7 Q. B. 577.
(*m*) *Mills* v. *Goff*, 14 M. & W. 72.
(*n*) *Doe* d. *Duke of Bedford* v. *Kightley*, 7 T. R. 63; 4 R. R. 375.
(*o*) *Doe* d. *Williams* v. *Smith*, 5 A. & E. 350; *Doe* d. *Kindersley* v. *Hughes*, 7 M. & W. 139.
(*p*) *Doe* d. *Matthewson* v. *Wrightman*, 4 Esp. 5; 6 R. R. 834.
(*q*) *Doe* v. *Spiller*, 6 Esp. 70; 9 R. R. 810.

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to determine the tenancy (*r*): at least it is evidence that the notice reached the other tenant who lived elsewhere (*s*). Where a tenant from year to year sub-let part of the premises, and then gave up to his landlord the part remaining in his own possession, the landlord cannot entitle himself to recover against the sub-lessee, no notice to quit having been given to the lessee, but only a notice to the sub-lessee, and that by the landlord, in his own name, and not in the name of the first lessee (*t*). In ejectment against S. and F., where it is shown that B., not a party to the cause, came into possession of the premises under an unperformed contract of sale, and that S. and F. held under him, notice to quit served upon S. and F. is sufficient (*u*).

Attestation of Notice.

A notice to quit need not be attested. If attested it may be proved without calling the attesting witness (*x*); but this was formerly otherwise (*y*). It may be proved by an examined copy or duplicate, without any notice to produce the original (*z*).

When and how served.

The notice must generally be served *half a year* before the time when the tenant is to quit possession (*a*). But a customary half-year's notice is sufficient where the tenancy is from one of the usual quarter days (*b*). Where a greater or less notice than that usually required by law is provided for by express stipulation or local custom, it will be sufficient to give notice accordingly (*c*). Where a "six months'" notice is agreed for, it seems that a six lunar months' notice is sufficient (*d*). The notice may be served on a Sunday (*e*).

Sunday.

Service of Notice to Quit.

A notice to quit *need not be served personally* on the tenant. It is sufficient to leave it at his dwelling-house with his wife or servant (*f*). Such service is sufficient although the notice does not actually reach the tenant's (*or* landlord's) hands before the half-year has commenced (*g*). But merely leaving the notice at the tenant's house without any explanation, and without proof that the person to whom it was delivered was the tenant's wife or servant, or that it ever came to his hands, is not sufficient (*h*). So service on the tenant's wife, off the demised premises and without proof that it was at her hus-

(*r*) *Doe* d. *Ld. Macartney* v. *Crick*, 5 Esp. 196; 8 R. R. 848.

(*s*) *Doe* d. *Ld. Bradford* v. *Watkins*, 7 East, 551; 8 R. R. 670.

(*t*) *Pleasant* d. *Hayton* v. *Benson*, 14 East, 234; 12 R. R. 507.

(*u*) *Roe* d. *Blair* v. *Street*, 2 A. & E. 329.

(*x*) C. L. P. Act, 1854, s. 26.

(*y*) *Poole* v. *Warren* 8 A. & E. 582.

(*z*) *Doe* d. *Fleming* v. *Somerton*, 7 Q. B. 58; *Reg.* v. *Mortlock*, Id. 459.

(*a*) *Right* d. *Flower* v. *Darby*, 1 T. R. 159; 1 R. R. 169.

(*b*) Ante, 374.

(*c*) Ante, 357, 359; Cole Ejec. 32, 53.

(*d*) *Rogers* v. *Kingston-upon-Hull Dock Co.*, 34 L. J., Ch. 165.

(*e*) *Sangster* v. *Noy*, 16 L. T. 157. The Sunday Observance Act, 1677, 29 Car. 2, c. 7, s. 6, makes only *writs*, &c. void.

(*f*) *Smith* v. *Clark*, 9 Dowl. 209; *Jones* d. *Griffiths* v. *Marsh*, 4 T. R. 464; 2 R. R. 441; *Roe* d. *Blair* v. *Street*, 2 A. & E. 329; *Reg.* v. *Js. of North Riding of Yorkshire*, 7 Q. B. 154; *Appleton* v. *Murray*, 8 W. R. 653; *Mason* v. *Bibby*, 2 H. & C. 886, Pollock, C.B.

(*g*) *Doe* d. *Neville* v. *Dunbar*, Moo. & M. 10; *Papillon* v. *Brunton*, 5 H. & N. 518; 29 L. J., Ex. 265.

(*h*) *Doe* d. *Buross* v. *Lucas*, 5 Esp. 153; 8 R. R. 842.

band's residence, where she was then living with him, appears to be insufficient (*i*). Service of the notice upon a relative of the *sub-tenant* upon the premises is not sufficient, although the notice was properly addressed to the tenant (*k*). Putting the notice under the door of the tenant's house, or any other mode of service, has been said to be sufficient, if it be shown that the notice came to the tenant's hands before the commencement of the six months (*l*); and in *Tanham* v. *Nicholson* (*m*) it was held that it was sufficient to serve the notice upon a person whose duty it was to deliver it to the tenant.

Sending of Notice to Quit by Post.

In *Papillon* v. *Brunton* (*n*), between nine and ten o'clock on the 25th March a tenant put into a post-office in London a letter containing a notice to quit on the following Michaelmas, and addressed to the place of business in London of his landlord's agent. The agent was at his place of business until between six and seven o'clock in the evening and did not receive the letter, but found it on the following morning. This was held a sufficient notice to determine the tenancy, the jury having found that the letter was delivered on the 25th March, after the agent left (*n*). If a notice be posted on one day, and delivered in due course of post on the next, the latter is considered as the day on which it was sent (*o*).

Joint Tenants, Corporations, &c.

Service on one of several joint tenants is primâ facie sufficient for all of them (*p*). Service on a corporation may be on one of its officers (*q*), and in the case of a company "incorporated by act of parliament for the purpose of carrying on any undertaking," the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), prescribes by sect. 135, that "any notice" may be served "by being left at or transmitted through the post, directed to the principal office of the company, or one of their principal offices where there shall be more than one, or being given personally to the secretary, or if there be no secretary, then by being given to any one director of the company."

Agricultural Tenants.

As to whether notice to quit may be served by registered letter under sect. 28 of the Agricultural Holdings Act, see p. 362, ante.

(*i*) *Roe* d. *Blair* v. *Street*, 2 A. & E. 328, 331; Cole Ejec. 54.

(*k*) *Doe* d. *Mitchell* v. *Levi*, Ad. Ejec. 92.

(*l*) *Alford* v. *Vickery*, Car. & M. 280.

(*m*) *Tanham* v. *Nicholson*, L. R., 5 H. L. 561, and p. 369, ante.

(*n*) *Papillon* v. *Brunton*, 5 H. & N. 518; 29 L. J., Ex. 265. This case does not decide that mere posting amounts to a service in law; it seems, however, that a notice to quit, if posted so as to be delivered in due time, will be presumed to have been so delivered, but that the presumption may be rebutted by proof that the notice was not in fact received—the question being for the jury. See Roscoe on Evidence, 16th ed., p. 1012, citing *Gresham House Estate Co.* v. *Rossa Grande Mining Co.*, 5 W. N. 1870.

(*o*) *Reg.* v. *Recorder of Richmond*, E., B. & E. 253 (notice of chargeability of pauper); *Tew* v. *Harris*, 11 Q. B. 7 (notice of appointment of referee).

(*p*) *Doe* d. *Ld. Bradford* v. *Watkins*, 7 East, 551; 8 R. R. 670; *Doe* d. *Ld. Macartney* v. *Crick*, 5 Esp. 196; 8 R. R. 848.

(*q*) *Doe* v. *Woodman*, 8 East, 228; 9 R. R. 422.

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Indorsement of Service.

Proof of Notice.

A proper indorsement of the service should be made in the usual course of business, which will be admissible in evidence after the death of the witness (*r*). It is not necessary to prove the signature to the notice (*s*); nor to produce the attesting witness (if any) (*t*); nor to give notice to produce the original notice served (*u*). The regular service of a notice to quit, held to have been properly inferred from the circumstance of the tenant speaking about "the notice to quit which he had received," and engaging a valuer to value his rights as an outgoing tenant (*x*). But a party who is driven to rely on such evidence should, as a matter of precaution, give a notice to produce the notice to quit, describing its contents fully (*y*).

### (f) *Waiver of Notice.*

Creation of new Tenancy by Waiver, with consent of both Parties.

A notice to quit can be waived, and a new or continual tenancy created, only by the express or implied consent of both parties (*z*). "There is this difference between a determination of a tenancy by a notice to quit and a forfeiture; in the former case the tenancy is put an end to by the agreement of the parties, which determination of the tenancy cannot be waived without the assent of both; but in the case of a forfeiture the lease is voidable only at the election of the lessor: in the one case the estate continues though voidable, in the other the tenancy is at an end" (*a*). By a notice to quit given to a tenant from year to year, his tenancy is determined on the expiration of the current year; and the waiver of the notice creates a new tenancy, taking effect on the expiration of the old one (*b*).

Guarantee for Rent ceases.

A guarantee for the rent will not extend to such new tenancy (*b*).

By Acceptance of Rent, or Distress.

If a landlord receive rent due *after the expiration* of a notice to quit, it may be a waiver of that notice (*c*), though a receipt of rent due before the expiration of the notice cannot be (*d*), and a distress for such rent is in any case a waiver (*e*).

Even after the expiration of the notice, where rent is usually paid at a banker's, if the banker, without any special authority, receive rent accruing after such expiration, the notice is not thereby waived (*f*): so if the money be not paid or received *as rent*, but as

(*r*) *Doe* d. *Patteshall* v. *Turford*, 3 B. & Ad. 890; *Stapylton* v. *Clough*, 2 E. & B. 933; Smith, L. & T. 328 (2nd ed.).

(*s*) *Forman* v. *Dawes*, 1 Car. & M. 127.

(*t*) C. L. P. Act, 1854, s. 26.

(*u*) Ante, 380 (*z*).

(*x*) *Doe* d. *Simpson* v. *Hall*, 5 M. & G. 795.

(*y*) Cole Ejec. 160.

(*z*) Cole Ejec. 55.

(*a*) *Blyth* v. *Dennett*, 13 C. B. 178, 180; 22 L. J., C. P. 79, 80; *Dendy* v. *Nicholl*, 4 C. B., N. S. 381.

(*b*) *Tayleur* v. *Wildin*, L. R., 3 Ex. 303; 37 L. J., Ex. 173.

(*c*) *Goodright* d. *Charter* v. *Cordwent*, 6 T. R. 219; 3 R. R. 161.

(*d*) See *Price* v. *Worwood*, 5 H. & N. 512.

(*e*) *Zouch* v. *Willingale*, 1 H. Bl. 311; 2 R. R. 770.

(*f*) *Doe* d. *Ash* v. *Calvert*, 2 Camp. 387; 11 R. R. 745.

a satisfaction for the injury done by the tenant in continuing on the premises as a trespasser, it will not have such an operation (*g*). A demand of rent accruing subsequently to the expiration of a notice to quit is not necessarily a waiver of the notice, but is a question of intention which ought to be left to the jury (*h*) ; but a demand for one day's more rent than was due has been treated as a waiver in law (*i*).

By giving a second Notice to Quit.

Generally speaking, giving a second notice to quit amounts to a waiver of a notice previously given (*k*) ; but a good parol notice to quit will not be waived by a subsequent insufficient notice in writing (*l*). Where a landlord gave a notice to quit different parts of a farm at different times which the tenant neglected to do in part, in consequence of which the landlord commenced an ejectment ; and before the last period mentioned in the notice was expired, the landlord, apprehending that the witness by whom he was to prove the notice would die, gave another notice to quit at the same respective times in the following year, but continued to proceed with his ejectment, it was held that the second notice was not a waiver of the first (*m*). If, after the expiration of a notice to quit, the landlord give the tenant a fresh notice, that unless he quit in fourteen days, he will be required to pay double value, the second notice is no waiver of the first (*n*) : so if a landlord give notice to his tenant to quit at the expiration of the lease, and the tenant hold over, and a second notice be delivered to the tenant, after the expiration of such notice, "to quit on a subsequent day or to pay double rent : " it is no waiver of the first notice (*o*).

By other Acts.

If the landlord has given a notice to quit, and the tenant holds over, the landlord cannot waive his notice and distrain for rent subsequently accruing (*p*). Where a three months' notice was given, the rent being reserved quarterly, and the landlord expressed neither his assent nor dissent to admit it, and took the rent up to the time when his tenant quitted ; it was construed to be such an acquiescence as amounted to presumptive evidence that the parties intended to dispense with the notice, and was therefore deemed a waiver of it (*q*). If at the end of the year (where there has

(*g*) *Goodright* d. *Charter* v. *Cordwent*, 6 T. R. 220 ; 3 R. R. 161 ; *Zouch* d. *Ward* v. *Willingale*, 1 H. Blac. 311.

(*h*) *Blyth* v. *Dennett*, 13 C. B. 178 ; *Doe* d. *Cheny* v. *Batten*, Cowp. 243.

(*i*) *Keith, Prowse & Co.* v. *National Telephone Co.*, [1894] 2 Ch. 147 ; 63 L. J., Ch. 373 ; 70 L. T. 276 ; 42 W. R. 380 ; 8 R. 776, per Kekewich, J.

(*k*) *Doe* d. *Brierly* v. *Palmer*, 16 East, 53 ; 14 R. R. 284.

(*l*) *Doe* d. *Ld. Macartney* v. *Crick*, 5 Esp. 196 ; 8 R. R. 848.

(*m*) *Doe* d. *Williams* v. *Humphrey*, 2 East, 237.

(*n*) *Doe* d. *Digby* v. *Steel*, 3 Camp. 115 ; 13 R. R. 768 ; *Blyth* v. *Dennett*, 13 C. B. 178.

(*o*) *Messenger* v. *Armstrong*, 1 T. R. 53 ; 1 R. R. 148.

(*p*) *Jenner* v. *Clegg*, 1 Moo. & R. 213 ; *Alford* v. *Vickery*, 1 Car. & M. 280 ; *Williams* v. *Stiven*, 9 Q. B. 14.

(*q*) *Shirley* v. *Newman*, 1 Esp. 266 ; 6 R. R. 737.

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been a tenancy from year to year) the landlord accept another person as his tenant in the room of the former tenant, without any surrender in writing, such acceptance is a dispensation of the notice to quit (*r*). Where a landlord of premises about to sell them, gave his tenant notice to quit on the 11th October, 1806, but promised not to turn him out unless they were sold; and not being sold till February, 1807, the tenant refused, on demand, to deliver up possession; on ejectment brought, it was held that the promise (which was performed) was no waiver of the notice, as it did not operate as a licence to be on the premises, otherwise than subject to the landlord's right of acting on such notice, if necessary; and, therefore, that the tenant not having delivered up possession on demand after a sale, was a trespasser from the expiration of the notice to quit (*s*). Where a landlord gave his tenants a good parol notice to quit at Old Michaelmas, but at the same time said that if it would be any convenience to them he would permit them to occupy till Christmas, and that they should pay no rent; and one of the tenants expressed himself well satisfied and grateful for the indulgence; after which a written notice was served on the tenants to quit at Christmas: it was held, that an ejectment commenced after Christmas might be maintained upon the parol notice to quit at Old Michaelmas (*t*). Where a tenant gave notice of his intention to quit at Michaelmas, but before that time offered to continue tenant at a reduced rent, which the landlord agreed to, provided he could not find another tenant at a better rent before the 12th day of August then next; but before that day the tenant refused to permit a third person, who contemplated taking the farm, to go over it: it was held, that the conditional agreement for a new tenancy was thereby determined, and that the notice to quit at Michaelmas remained in force and would support an ejectment (*u*).

## SECT. 8.—*Exercise of Option to determine Lease.*

Form of Proviso.

A lease is often made for a term of years subject to a proviso or power therein contained, enabling either (or one) of the parties to determine it at an earlier period by notice, &c. For instance, the lease may be for twenty-one years, determinable at the end of the first seven or fourteen years by either party (or by the lessee) upon giving [twelve] calendar months' previous notice, &c. (*x*). Some-

(*r*) *Sparrow* v. *Hawkes*, 2 Esp. 505.
(*s*) *Whiteacre* d. *Boult* v. *Symonds*, 10 East, 13, 16.
(*t*) *Doe* d. *Ld. Macartney* v. *Crick*, 5 Esp. 196; 8 R. R. 848.
(*u*) *Doe* d. *Marquis of Hertford* v. *Hunt*, 1 M. & W. 690.
(*x*) See form of proviso, post, Appendix B., Sect. 13.

times a proviso of this sort is framed very strictly as regards the tenant by making it a *condition precedent* on his part not only to give the notice, but also to pay and perform all rent and his covenants. The consequence of this is, that in case of any breach of covenant the lessee is unable to determine the lease at the end of the first seven or fourteen years, in pursuance of the proviso: his power to do so being conditional only, and the condition not having been performed (*y*). Such conditions should be carefully considered, on behalf of the tenant, before the lease is executed.

Form of Notice.

Where a power is given to a party to determine a lease on giving a notice *in writing*, he cannot determine it by giving a parol notice (*z*). The notice need not refer to the power (*a*), but must end with the first seven or fourteen years, or other specified period, according to the terms of the proviso, and not at any other time (*b*), and must be to quit *all* the demised premises and not part only (*c*). The landlord may however reserve to himself the right to determine the lease by notice as to all or *any part* of the land which he may want for building purposes (*d*); and after the stipulated notice has been given, if possession be refused, the landlord may maintain ejectment (*e*).

Option whether with Lessor or Lessee. *Dann* v. *Spurrier.*

If a lease be granted for "seven, fourteen or twenty-one years," the lessee only has the option of determining it at the end of the first seven or fourteen years (*f*). But a demise for twenty-one years "determinable nevertheless in seven or fourteen years if the said parties hereto shall so think fit," is determinable only by the consent of *both* the parties, although it may have been their intention to give the option to either of them (*g*).

Notice by Executors, &c.

Where the demise was for twenty-one years, and it was stipulated that if either party should die before the end of the said term, then the heirs, executors, &c., *of the person so dying* should give twelve months' notice to quit, &c., it was held, that the lease could only be determined by twelve months' notice given by the representatives of the party dying before the end of the term; and

(*y*) *Friar* v. *Grey* (in error), 5 Exch. 584, 597; 4 H. L. Cas. 565; *Friar* v. *Grey*, 15 Q. B. 891; *Porter* v. *Shephard*, 6 T. R. 665; *Jervis* v. *Tomkinson*, 1 H. & N. 195; and compare post, Chap. IX., Sect. 2.

(*z*) *Legg* d. *Scott* v. *Benion*, Willes, 43.

(*a*) *Giddens* v. *Dodd*, 3 Drew. 485; 25 L. J., Ch. 451.

(*b*) *Cadby* v. *Martinez*, 11 A. & E. 720; 3 P. & D. 386; *Bird* v. *Baker*, 1 E. & E. 12; 28 L. J., Q. B. 7; *Jones* v. *Nixon*, 1 H. & C. 48; 31 L. J., Ex. 505; *Sharp* v. *Milligan*, 22 Beav. 612.

(*c*) *Doe* d. *Rodd* v. *Archer*, 14 East, 245, 248; 12 R. R. 509. See form of notice, post, Appendix C., No. 8.

(*d*) See form of proviso, Appendix B., Sect. 23; also form of notice to take part, Id., Sect. 24.

(*e*) *Doe* d. *Wilson* v. *Abel*, 2 M. & S. 541; 15 R. R. 343.

(*f*) *Dann* v. *Spurrier*, 3 Bos. & P. 399, 442; 7 R. R. 797; *Doe* d. *Webb* v. *Dixon*, 9 East, 15; 9 R. R. 501; *Fallon* v. *Robins*, 16 Ir. Ch. R. 422.

(*g*) *Fowell* v. *Frantz*, 3 H. & C. 458; 34 L. J., Ex. 6.

CH. VIII. s. 8. *Exercise of Option to determine Lease.*

Executors—*contd.*

consequently, that such notice given by the lessor to the representatives of the lessee (who died during the term) did not determine the lease (*h*). A proviso in a lease for twenty-one years, that if either of the parties shall be desirous to determine it in seven or fourteen years it shall be lawful for either of them, *his executors or administrators*, so to do, upon twelve months' notice to the other of them, his heirs, executors or administrators, extends by reasonable intendment to the *devisee* of the lessor, he being entitled to the rent and reversion (*i*). Where a lease for twenty-one years contained a proviso that in case either the landlord or tenant, or their respective heirs, executors or administrators, wished to determine it at the end of the first fourteen years, and should give six months' notice in writing *under his or their respective hands*, the term should cease: it was held, that a notice to quit signed by *two only* of three executors of the lessor, to whom he had bequeathed the freeholds as joint tenants, was not good under the proviso, although such notice purported to be given on behalf of all the executors—the proviso requiring the notice to be given "under the respective hands" of all of them (*k*).

Landlord's option—delivery of notice, when tenant absconds.

Delivery of Notice to Tenant.

*Hogg* v. *Brooks.*

If the option be in the landlord, and the proviso for notice should stipulate, not, as is usual and proper, that it should be left on the demised premises, but that it should be delivered to the tenant, great difficulties may arise. In *Hogg* v. *Brooks* (*l*), the proviso was that the lease might be determined by the landlord or his assigns "delivering to the tenant or his assigns six months' previous notice in writing." The tenant mortgaged the premises by way of sub-lease, and disappeared. A notice was sent to his last known address, and also to the mortgagee, and was also left on the demised premises, which the mortgagee had sub-let. It was ruled by Mathew, J., that these notices were ineffectual to support an action of ejectment by the assignee of the reversion against the tenant of the mortgagee, on the ground that the lease provided for direct service upon the lessee or his assigns, and the mortgagee was only a sub-tenant, and this ruling was confirmed by the Court of Appeal (*l*).

No bail in Ejectment after such Notice.

When a lease has been determined by notice pursuant to a proviso in that behalf, and the landlord brings ejectment, he cannot compel the tenant to find sureties to pay the costs and damages, pursuant to

(*h*) *Legg* d. *Scott* v. *Benion*, Willes, 43.

(*i*) *Roe* d. *Bamford* v. *Hayley*, 12 East, 464; 11 R. R. 455.

(*k*) *Right* d. *Fisher* v. *Cuthell*, 5 East, 491; 2 Smith, 83; recognized and distinguished in *Doe* d. *Aslin* v. *Summersett*, 1 B. & Ad. 135, 141. See also *Turner* v. *Hardy*, 9 M. & W. 770.

(*l*) *Hogg* v. *Brooks*, 15 Q. B. D. 256, C. A., affirming Mathew, J.; 14 Q. B. D. 475. Perhaps this decision may be open to question on the ground that a mortgagee by demise is not only technically an "assign," but also practically an assignee.

15 & 16 Vict. c. 76, s. 213 (*m*); nor can any accruing or subsequent rent be recovered after any such determination (*n*).



*Exercise of Option to determine Lease.*

## Sect. 9.—*Disclaimer.*

Disclaimer by Parol by Lessee *for Years*, insufficient.

It is a general rule that the tenant commits a forfeiture if he disclaim and deny his landlord's title (*o*). But a denial by parol of a landlord's title does not cause a forfeiture of a lease for a *term certain*, whether under seal or not (*p*); nor will payment to a third person of the rent reserved by such lease (*q*). Where a tenant for five years delivered up possession of the demised premises and of the lease *in fraud* of his landlord, to a person claiming under a hostile title, with the intention of enabling him to set up such title and not to hold under the lease: it was held, that the term was thereby forfeited (*r*). But that case turned upon the fraud of the tenant, and can only be sustained on that ground. All the other cases in the books of forfeiture by disclaimer have been by matter of record (*s*). Any person who obtains possession from the tenant or sub-tenant, by an arrangement made with him, whether by collusion or otherwise, but without any deed of assignment or sub-lease, will not be permitted to defend such possession by proof of a title *aliunde*, but will be estopped from denying the landlord's title in like manner as the tenant or sub-tenant would have been had he remained in possession (*t*).

Disclaimer by Tenant from Year to Year. *Vivian* v. *Moat.*

A disclaimer by a tenant from year to year of the title of his landlord, or of the person for the time being entitled to the immediate reversion as assignee, heir, devisee, executor or administrator of the landlord, will *operate as a waiver by the tenant of the usual notice to quit*, and will in effect determine the tenancy at the election of the landlord or other person so entitled (*u*); for "a notice to quit is only requisite where a tenancy is admitted on both sides, and if a defendant denies the tenancy there can be no necessity to end that which he says has no existence" (*x*).

(*m*) *Doe* d. *Cardigan* v. *Roe*, 1 D. & R. 540; *Doe* d. *Cundey* v. *Sharpley*, 15 M. & W. 558. As to the evidence in such action, see Cole Ejec. 399.

(*n*) *Furnivall* v. *Grove*, 8 C. B., N. S. 496; 30 L. J., C. P. 3.

(*o*) Bac. Abr. tit. *Leases and Terms for Years* (T. 2).

(*p*) *Doe* d. *Graves* v. *Wells*, 10 A. & E. 127; *Rees* d. *Powell* v. *King*, Forrest, 19; Cole Ejec. 42.

(*q*) *Doe* d. *Dillon* v. *Parker*, Gow, 180; *Doe* d. *Williams* v. *Pasquali*, Peake, 196; 3 R. R. 688.

(*r*) *Doe* d. *Ellenbrock* v. *Flynn*, 1 C., M. & R. 137.

(*s*) Per Lord Denman, C.J., in *Gregg* v. *Wells*, 10 A. & E. 427.

(*t*) *Doe* d. *Buller* v. *Mills*, 2 A. & E. 17; *Doe* d. *Haden* v. *Burton*, 9 C. & P. 254; *Doe* d. *Thomas* v. *Shadwell*, 7 Dowl. 527; Cole Ejec. 215, 216.

(*u*) *Doe* d. *Bennett* v. *Long*, 9 C. & P. 773; *Doe* d. *Grubb* v. *Grubb*, 10 B. & C. 816; *Doe* d. *Phillips* v. *Rollings*, 4 C. B. 188; *Doe* d. *Davies* v. *Evans*, 9 M. & W. 48; *Doe* d. *Landsell* v. *Gower*, 17 Q. B. 589; *Vivian* v. *Moat*, 16 Ch. D. 730; 50 L. J., Ch. 331; 44 L. T. 210; 29 W. R. 504, per Fry, J.

(*x*) Per Best, C.J., in *Doe* d. *Calvert* v. *Frowd*, 4 Bing. 560; *Doe* d. *Phillips* v.

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What amounts to a Disclaimer.

It is sometimes a nice question whether what has taken place does or does not amount to a disclaimer of the tenancy. It is difficult, if not impossible, to reconcile all the cases on this point. But the result of them seems to be, that if a tenant from year to year use any expressions which, being reasonably construed with reference to the circumstances under which they were uttered or written, amount to a denial of the existence of any tenancy as between him and the claimant, such expressions amount to a disclaimer, and render a notice to quit unnecessary (*y*). On the other hand, if the expressions used cannot under the circumstances be reasonably construed to amount to such a denial, they will not operate as a disclaimer nor render a notice to quit unnecessary (*z*). In order to make either a verbal or written disclaimer sufficient, it must amount to a *direct repudiation of the relation of landlord and tenant*, or to a distinct claim to hold possession of the estate upon a ground wholly inconsistent with that relation, which by necessary implication is a repudiation of it (*a*). A disclaimer, as the word imports, must be a renunciation by the party of his character of tenant, either by setting up a title in another or by claiming title in himself (*b*); and it was held to be a disclaimer where the tenant wrote a letter disputing the landlord's right to raise the rent, but offering to pay a customary rent, as being all that the tenant was liable to pay (*c*). But a very slight matter, not really intended as a repudiation, will sometimes be construed as a repudiation, in order to defeat an objection of a technical nature (*d*).

Refusal to pay Rent.

A refusal to pay rent to a devisee in a will which is contested is not a disavowal of the title of such devisee. But where the defendant held premises under a tenant for life, on whose death possession was claimed and rent demanded by the heir at law of the devisor; whereupon the defendant wrote to the attorney of the heir at law, stating that he held as tenant to J. S. (the husband of the tenant for life) in right of his wife; that he had never considered the claimant as the landlord of the house; and that he should be ready to pay the arrears to any person who should be proved to be heir at law; but that he must decline taking upon himself to decide upon the claim made on

*Rollings*, 4 C. B. 188, 200; *Doe* d. *Jefferies* v. *Whittick*, Gow. 195.

(*y*) *Doe* d. *Calvert* v. *Frowd*, 4 Bing. 560; *Doe* d. *Grubb* v. *Grubb*, 10 B. & C. 816; *Doe* d. *Bennett* v. *Long*, 9 C. & P. 773; *Doe* d. *Hughes* v. *Bucknell*, 8 C. & P. 566; *Doe* d. *Whitehead* v. *Pittman*, 2 N. & M. 673; *Doe* d. *Davies* v. *Evans*, 9 M. & W. 48; *Doe* d. *Phillips* v. *Rollings*, 4 C. B. 188, 200; *Doe* d. *Landsell* v. *Gower*, 17 Q. B. 589.

(*z*) *Doe* d. *Lewis* v. *Earl Cawdor*, 1 C., M. & R. 398; *Doe* d. *Williams* v. *Cooper*, 1 M. & G. 135; 1 Scott, N. R. 36; *Doe* d. *Williams* v. *Pasquali*, Peake, 259; 3 R. R. 688; *Hunt* v. *Allyood*, 10 C. B., N. S. 253; *Jones* v. *Mills*, Id. 788.

(*a*) *Doe* d. *Grey* v. *Stanion*, 1 M. & W. 695, 703; *Doe* d. *Williams* v. *Cooper*, *Hunt* v. *Allgood*, and *Jones* v. *Mills*, supra.

(*b*) Per Tindal, C.J., in *Doe* d. *Williams* v. *Cooper*, 1 M. & G. 135; *Jones* v. *Mills*, 10 C. B., N. S. 788, 796, 801; *Vivian* v. *Moat*, 44 L. T. 210.

(*c*) *Vivian* v. *Moat*, ubi supra.

(*d*) *Doe* d. *Davies* v. *Evans*, 9 M. & W. 48.

him without more satisfactory proof in a legal manner; it was held, that this letter amounted to a disclaimer of the title of the heir at law, and that he might maintain ejectment against the tenant without giving him a previous notice to quit (*e*). A remainderman, after the death of tenant for life who had made a voidable lease, applied for rent to the tenant, who at first did not refuse to pay, but after some negotiation did so, saying that he understood that another person was entitled to the estate; held that the remainderman might maintain ejectment without notice to quit or demand of possession, there being a disclaimer of the remainderman's title (*f*). Where several persons joined in letting land, and it was agreed that the rent should be paid to an agent for them, and afterwards one of the lessors, to whom alone in fact the land belonged, demanded rent of the tenant, who said "you are not my landlord:" it was left to the jury to say whether he intended that the relation of landlord and tenant did not exist between them or merely that the rent was to be paid to the agent (*g*). An attornment by a tenant from year to year to a third person amounts to such a disclaimer of the landlord's title as will enable him to maintain ejectment without any notice to quit (*h*). "I have no rent for you, because A. B. has ordered me to pay none." This is evidence of a disclaimer of the tenancy (*i*). In another case the defendant had for several years occupied a cottage as tenant from week to week to one M., and after the death of M. the defendant continued to pay his rent weekly to certain persons to whom M. had devised the premises. The devise being discovered to be void by reason of the Mortmain Act, the heir at law of M., by his agent, demanded the rent. The defendant said that he had *received notice from the other party and would not pay any more rent until he knew who was the right owner.* It was held, that this did not amount to a disclaimer or repudiation of the title of the heir at law so as to entitle him to eject the defendant without any notice to quit (*k*).

Date of Disclaimer.

Where a disclaimer is relied on, it must appear to have been made *before or on* the day mentioned in the writ of ejectment as the time when the claimant was entitled to possession (*l*). But where the defendant by his agent, on 26th June, answered an application for rent by saying that his "connection as tenant with the late John Grubb, Esq. (through whom the plaintiff derived his title), has *ceased for several years*, and that he now pays his rent to his brother;" this

(*e*) *Doe* d. *Calvert* v. *Frowd*, 4 Bing. 557; 1 Moo. & P. 480.

(*f*) *Doe* d. *Phillips* v. *Rollings*, 4 C. B. 188.

(*g*) *Doe* d. *Bennett* v. *Long*, 9 C. & P. 773.

(*h*) *Throgmorton* v. *Whelpdale*, Bull. N. P. 90; Cole Ejec. 42.

(*i*) *Doe* d. *Whitehead* v. *Pittman*, 2 N. & M. 673.

(*k*) *Jones* v. *Mills*, 10 C. B., N. S. 788.

(*l*) *Doe* d. *Lewis* v. *Earl Cawdor*, 1 C., M. & R. 389; 4 Tyrw. 852; *Doe* d. *Bennett* v. *Long*, 9 C. & P. 773.

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was held to be evidence of a disclaimer of title *before the* 1*st May* (on which day the demise was laid in the ejectment), and rendered any notice to quit unnecessary (*m*). In ejectment against two persons as landlord and tenant, an admission by the tenant, after action brought, of an attornment by him to the landlord having taken place before the day from which possession was claimed in the ejectment, was held sufficient evidence of a disclaimer as against both the defendants (*n*).

Waiver of Disclaimer.

A disclaimer may be waived by any act of the landlord acknowledging the party as his tenant at a later period, as by a distress for subsequent rent (*o*).

## SECT. 10.—*Death.*

Death of Tenant.

Death of Landlord.

A tenancy does not determine by the death of the lessee, but will vest in his legal personal representatives, who are entitled to give or receive the usual notice to quit (*p*). So it will not determine by the death of the lessor (*q*), unless he was only a tenant for his own life, and the demise was not made in pursuance of any power or statute (*r*). And even in such case the tenant, if the holding be agricultural, is entitled (in lieu of emblements (*s*) ) to hold the demised premises until the end of the then current year of the tenancy (*t*).

When the Term is limited conditionally.

Sometimes a lease is granted for a certain term of years, if the lessee shall so long live; in which case it will determine either at the end of the specified term or upon the death of the lessee, which shall first happen (*u*).

Death of cestui que vie.

When a person holds for the term of another's life he is called tenant pur autre vie; leases made by him of course determine on the death of the cestui que vie, or person for whose life he holds, or at the end of the then current year of the tenancy (*x*): but not on his own death; and a lease by him may be made to commence on his own death (*x*). We have already considered how a tenant pur autre vie may be compelled to produce his cestui que vie, if living (*x*).

(*m*) *Doe* d. *Grubb* v. *Grubb*, 10 B. & C. 816.

(*n*) *Doe* d. *Mee* v. *Litherland*, 4 A. & E. 784.

(*o*) *Doe* d. *David* v. *Williams*, 7 C. & P. 322.

(*p*) *Mackay* v. *Mackreth*, 4 Doug. 213; *Doe* d. *Shore* v. *Porter*, 3 T. R. 13; 1 R. R. 626; *Parker* d. *Walker* v. *Constable*, 3 Wils. 25: *James* v. *Dean*, 11 Ves. 391; 8 R. R. 178; *Doe* d. *Hull* v. *Wood*, 14 M. & W. 682.

(*q*) *Maddon* d. *Baker* v. *White*, 2 T. R. 159; 1 R. R. 453.

(*r*) *Doe* d. *Thomas* v. *Roberts*, 16 M. & W. 778: *Doe* d. *Kirby* v. *Carter*, Ry. & Moo. 237.

(*s*) *Kelly* v. *Webber*, 11 Ir. Com. L., Rep. 57.

(*t*) 14 & 15 Vict. c. 25, s. 1; post, Appendix A., Sect. 5.

(*u*) Ante, Chap. IV., Sect. 3.

(*x*) Ante, Chap. I., Sect. 5.

# CHAPTER IX.

## OF THE RENEWAL OF LEASES, AND OF OPTION TO PURCHASE AND THE EXERCISE THEREOF.


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### Sect. 1.—*Covenants to Renew—whether perpetual or not.*

Construction of Covenants for the Renewal of Leases.

Some nice points occur in the books concerning the construction of covenants for the renewal of leases: the question in general being whether the renewed lease is to contain a similar covenant for renewal, so giving a right of renewal for ever. Covenants for renewal of leases are considered as real agreements, and go with the land, and therefore will affect even the legal interest of those who take the estate with notice of such leases and covenants (*a*): but a covenant for perpetual renewal, entered into by a person having a limited interest in lands, does not bind the estate; and therefore, if his assignee acquire the inheritance, it is not bound by the covenant (*b*). A covenant for renewal, which is so framed as to create a perpetuity in the heirs of the body of a particular person, is invalid (*c*).

Running with Land.

It has been already stated that a covenant for renewal runs both with the reversion and the land (*d*).

Ordinarily not held perpetual.

The leaning of the courts is against perpetual renewals (*e*); and therefore, in order to establish this construction, the intention must be unequivocally expressed, and a proviso in general terms, that the lease to be granted shall contain the same covenants and agreements as the lease containing the covenant, has been repeatedly held not to extend to the covenant for renewal (*f*). An agreement in a lease for lives, that upon the renewing or inserting of any life or

(*a*) *Earl of Shelburne* v. *Biddulph*, 6 Bro. P. C. 363.

(*b*) *Brereton* v. *Tuohey*, 8 Ir. Ch. R. 190; *Postlethwaite* v. *Lewthwaite*, 2 J. & H. 237; 31 L. J., Ch. 584; and see *Trumper* v. *Trumper*, L. R., 14 Eq. 295; 41 L. J., Ch. 295.

(*c*) *Hope* v. *Mayor, &c., of Gloucester*, 7 De G., M. & G. 647; 25 L. J., Ch. 145.

(*d*) Ante, p. 172.

(*e*) *Baynham* v. *Guy's Hospital*, 3 Ves. 298; 3 R. R. 96.

(*f*) 4 Jarm. Prec. 394 (3rd ed.); *Trition* v. *Foote*, 2 Bro. C. C. 636; 2 Cox, 174.

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lives, a certain sum shall be paid by the lessee, his heirs and assigns, to the lessor, his heirs and assigns, does not amount to a covenant for perpetual renewal (*g*). A covenant in a lease of land for ninety-eight years, that the lessor will from time to time renew the lease, and perfect such other assurances as the lessee should reasonably require for strengthening, confirming and sure-making the demised premises, at such rents, and under such covenants and conditions, as in the lease were contained, is not a covenant for perpetual renewal (*h*). Where one, in consideration of 5*l.* 8*s.* in nature of a fine, and of a yearly rent of 6*s.* 9*d.*, demised certain ground, with the buildings, &c., for twenty-one years, with a proviso for distress if the rent were in arrear for fourteen days; and the lessor covenanted at the end of eighteen years of the term, or before, on request of the lessee, to grant a new lease of the premises "for the like fine, for the like term of twenty-one years, at the like yearly rent, with all covenants, grants, and articles, as in that indenture were contained:" it was held, that this covenant was satisfied by the tender of a new lease for twenty-one years, containing all the former covenants except the covenant for future renewal (*i*). Where a lessor covenanted to renew the lease at the request of the lessee within the term; and the lessee did not request, but his executors did; Lord Macclesfield, C., ordered the lessor to renew the demise of the premises for twenty-one years, that being the usual term, but said that though the new lease was to be made on the same covenants, yet that that did not take in a covenant for renewing (*k*). In another case, premises were demised for three lives and for twenty-one years after the death of the last survivor. The lessor covenanted with the lessee that if he should lose a life and think proper to have a new life put in, then, within six months after the death of the first life, and so on continuing the term and estate thereby demised, the lessor would put in a new life; it was held, that the lessee had power to introduce one new life only, and that one in the place of the first life dropping, but with a new term of twenty-one years, commencing with the death of the survivor of the two survivors and the new life (*l*).

*Swinburne* v. *Milburn.*

Also in *Swinburne* v. *Milburn* (*m*) a right of renewal was held not to be perpetual, but to be a right of renewal as often as any of three lives should drop, but the covenant in this case was so special, that a reference thereto is considered sufficient.

(*g*) *Smyth* v. *Nangle*, 7 Cl. & Fin. 405; 1 West, 184.
(*h*) *Browne* v. *Tighe*, 2 Cl. & Fin. 396.
(*i*) *Iggulden* v. *May*, 7 East, 237; 2 New R. 449; 9 Ves. 331.
(*k*) *Hide* v. *Skinner*, 2 P. Wms. 197; but see 3 Atk. 448.
(*l*) *Walmesley* v. *Pilkington*, 35 Beav. 362.
(*m*) *Swinburne* v. *Milburn*, 9 App. Cas. 844; 54 L. J., Q. B. 6.

But although primâ facie a lessor is not taken to have intended to enter into a covenant for perpetual renewal, if there are in the lease expressions indicative of such an intention, the High Court will give effect thereto (*n*). Thus, where a lease for lives contained a covenant on the death of either of the cestui que vies to execute a renewed lease at the same rent, and subject to the same covenants, "including this present covenant:" it was held, that this was a covenant for perpetual renewal, and that the lessee was entitled to have inserted in the renewed lease a covenant for renewal *totidem verbis* with that contained in the original lease, but with the name of the new cestui que vie substituted for that of the deceased (*o*). It was once held that a lessor and his ancestors had, by their own acts of successive renewals, construed a covenant in a lease for lives to be for a perpetual renewal, and that he was therefore bound by it (*p*). But in a subsequent case, this method of construing the covenant by the equivocal acts of the parties was repudiated (*q*).

Perpetual Renewal.

One of two lessees has no single right of renewal (*r*).

Renewal to one of two Lessees.

If a lease for ninety-nine years, determinable on three lives, be conveyed in trust for A. for life, and A. covenant to use his utmost endeavours, as often as any of the persons on whose lives the premises are held shall die, to renew the same by purchasing of the lord of the fee a new life in the room of such as shall fail, it is no breach of the covenant, if upon one of the lives failing he procure a renewal upon his own life (*s*). A sum falling short of three years' annual value of premises, calculated on the rack rent, is not an unreasonable fine for the renewal of a lease by the Duchy of Cornwall; and therefore the lessee having covenanted in a sub-lease to do his utmost endeavours to procure a renewal of the letters-patent, on either of three cestui que vies dying, commits a breach of his covenant by not paying such a fine demanded for a renewal (*t*).

Breach of Covenant to "endeavour" to renew.

Under a trust to renew leases out of the rents, issues and profits, followed by a power to mortgage in case, from any cause, the money wanted to pay the fines should not be produced by the ways and means aforesaid, it was held that the rents being sufficient for that purpose, the fines ought to be paid out of the income (*u*). A trust for renewal fails if renewal be impossible (*x*).

Trust for Renewal.

(*n*) *Hare* v. *Burgess*, 4 K. & J. 45; 27 L. J., Ch. 86; *Bridges* v. *Hitchcock*, 1 Bro. P. C. 522; *Furnival* v. *Crewe*, 3 Atk. 83.

(*o*) *Hare* v. *Burgess*, supra.

(*p*) *Cook* v. *Booth*, Cowp. 819.

(*q*) *Baynham* v. *Guy's Hospital*, 3 Ves. 298; 3 R. R. 96; *Eaton* v. *Lyon*, Id. 694; *Iggulden* v. *May*, 9 Ves. 331; 7 East, 237; 2 New R. 449.

(*r*) *Finch* v. *Underwood*, 45 L. J., Ch. 522; infra, p. 395 (*f*).

(*s*) *Scudamore* v. *Stratton*, 1 Bos. & P. 455.

(*t*) *Simpson* v. *Clayton*, 4 Bing. N. C. 758.

(*u*) *Solley* v. *Wood*, 29 Beav. 482.

(*x*) *Maddy* v. *Hale*, 45 L. J., Ch. 791.

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*Renewal (Forfeiture of Right to).*

## SECT. 2.—*Forfeiture of Right to Renew.*

Forfeiture of Right to Renew by not applying in

Where it was covenanted that the lessor would renew whenever any life or lives dropped, provided that if the lessee, his executors or administrators, upon or after the dropping of any life or lives, should refuse or neglect to renew the said lease, or make application therein, or tender such new lease, and pay or tender a certain fine, then the indenture should be void; it was held, that the lessee forfeited his right of renewal by not applying when the first life dropped (*y*). But where a lease, for sixty-one years, of house property contained a covenant that the lessee might renew, on certain terms, at the end of each and every term of fourteen years, on giving ten days' notice of such his desire; and the lessee, or those claiming under him, continued in possession after the two first terms of fourteen years each had expired, and then, before the expiration of the third fourteen years, desired to renew: held, that the lessee was not precluded, by his not having given notice earlier, from claiming his right to have a renewed lease in the terms of the covenant (*z*). A covenant in a corporation lease to renew upon the falling in "of one life for ever," cannot be extended to the case where two are suffered to fall in, although a compensation be offered (*a*). Where A. and B. covenanted in a lease for sixty-one years, that at any time within one year after the expiration of twenty years of that term, upon the request of the lessee and his paying 6*l*. to the lessors, they would execute another lease of the premises for the further term of twenty years, to commence from the expiration of the said term of sixty-one years, &c., and so in like manner at the end of every twenty years during the said term of sixty-one years, for the like consideration and upon the like request, would execute another lease for the further term of twenty years, &c., to commence at the expiration of the term then last before granted, &c.: it was held, that, under this covenant, the lessee could not claim a further term at the end of the last term of twenty years in the lease, where he had omitted to claim a further term at the end of the first and second twenty years in the lease (*b*). Where a lease renewable for ever had expired by the dropping of the lives, so that, in fact, only a tenancy from year to year existed; but the owner in fee of the land, the tenants and their sub-tenants, had all been acting for years on the terms of the lease, which was at length duly renewed: held, that no one of them

(*y*) *Baynham* v. *Guy's Hospital*, 3 Ves. 295; 3 R. R. 96; *Eaton* v. *Lyon*, 3 Ves. 690.

(*z*) *Bogg* v. *Midland R. Co.*, L. R., 4 Eq. 310, 313; 36 L. J., Ch. 440.

(*a*) 3 Bro. C. C. 529.

(*b*) *Rubery* v. *Jervoise*, 1 T. R. 229; 1 R. R. 191.

could subsequently set up in equity claims adverse to the several characters they bore under such lease and the sub-lease (*c*).

Where the lessee has not performed his covenants to repair and insure, the court will not decree a specific performance of a perpetual covenant to renew "provided the rent should have been paid and the covenants kept" (*d*). So where the covenant was to renew at the end of the term "if it should not be sooner determined by the lessee's acts or defaults" (*e*). The covenant to renew in case the lessee's covenants are duly performed is construed strictly against the lessee, and will not be specifically enforced if the lessor have a right of action for the breach of covenant to repair, although the want of repair be but small. If there be any repairs wanted at all, the lessee should have them done before applying to the court. This was held in *Finch* v. *Underwood* (*f*). In *Bastin* v. *Bidwell* (*g*), the same strictness was observed. There the covenants were by the lessee to paint inside and outside at certain fixed periods, and by the lessor that the lessee should be entitled, "on giving six months' notice before the expiration of the term," to have a further lease "upon the lessee paying the rent and performing and observing the covenants of this present lease." Neither when the six months' notice was given nor when it expired had the requisite painting been completed. Kay, J., held that the performance of the covenant to paint was a condition precedent to the right of renewal, but left the point open whether the condition would have been complied with if the painting had been completed at the time that the notice was given.

Forfeiture of Right to Renewal by Non-performance of Covenants.

*Finch* v. *Underwood.*

One of two lessees has no single right of renewal (*h*).

Where there was a lease for twenty-one years at 1*l.* rent, with a covenant to the tenant to renew from twenty-one years to twenty-one years, to make up ninety-nine years; and at the expiration of the first term an arrear of rent being due, and no application being made for a renewal, the lessor brought an ejectment and obtained judgment and possession; on a bill filed in Chancery, a renewal was decreed, on payment of the rent in arrear and interest; the delay being accounted for, and there being no neglect on the part of the lessee, or prejudice to the lessor (*i*).

A. agreed to let premises to B. for three years, and at the expiration of that term to grant him a lease for an extended term. A. died, and three years having expired B. continued to hold on under A.'s

When Option for Renewal not determined.

(*c*) *Archbold* v. *Scully*, 9 H. L. Cas. 360.
(*d*) *Job* v. *Banister*, 2 Kay & J. 374; 26 L. J., Ch. 125.
(*e*) *Thompson* v. *Guyon*, 5 Sim. 65; cited 2 K. & J. 381.
(*f*) *Finch* v. *Underwood*, 2 Ch. D. 310; 45 L. J., Ch. 522; 34 L. T. 779—C. A.
(*g*) *Bastin* v. *Bidwell*, 18 Ch. D. 238; 44 L. T. 742.
(*h*) *Finch* v. *Underwood*, supra.
(*i*) *Rawston* v. *Bentley*, 4 Bro. C. P. 415; *Statham* v. *Liverpool Docks Trustees*, 3 Y. & J. 565; *Hunter* v. *Earl of Hopetoun*, 13 L. T. 130 (H. L.).

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executors for four years without asking for a lease. He then required a lease: held, that B.'s option had not determined, and that he was entitled to the extension of the term (*k*).

## SECT. 3.—*Renewal by Minors, Lunatics and Married Women.*

Renewal in the Case of Minors, &c.

Where guardians and minors, married women and infants are concerned, and a renewal of leases is required, existing leases may be surrendered and new leases granted by direction of the Chancery Division of the High Court (*l*). The Lunacy Regulation Act, 1853 (16 & 17 Vict. c. 70), contained detailed provisions for renewal to the committee of a lunatic tenant (*m*), and by the committee of a lunatic landlord (*n*), which are now replaced by the Lunacy Act, 1890, 53 & 54 Vict. c. 5. By s. 120 of that act the judge in lunacy may "authorize and direct" the committee of a lunatic (*inter alia*) to surrender any lease and accept a new lease or to accept a surrender of any lease and grant a new lease, and by s. 122, sub-s. (3) "fines or other payments on the renewal of leases may be paid out of the lunatic's estate, or charged with interest on the leasehold property." Where a person bound by covenant to renew a lease if required "at the cost and charges in all things" of the lessee, subsequently devised the land in strict settlement, and died pending the arrangements for a renewal, leaving the first person entitled to an estate of inheritance under his will an infant, so that it was necessary to institute a suit in Chancery to obtain a renewal of the lease, it was held, that the cost of the suit must be paid out of the estate of the covenantor, because it had been rendered necessary by his own act done subsequently to entering into the covenant (*o*).

## SECT. 4.—*Renewal by Trustees, Agents, &c.*

Renewal by Trustees in their own Names.

A lease renewed by a trustee or executor in his own name, even in the absence of fraud, and upon the refusal of the lessor to grant a new lease to the cestui que trust, will be ordered to be held in trust for the person entitled to the old lease (*p*). The same rule applies to an executor de son tort renewing a lease in his own name (*q*). Where a trustee obtains a new lease which comprises not only the

(*k*) *Moss* v. *Barton*, 35 Beav. 197; L. R., 1 Eq. 474; and see *Buckland* v. *Papillon*, L. R., 2 Ch. Ap. 67; 36 L. J., Ch. 81.

(*l*) 11 Geo. 4 & 1 Will. 4, c. 65, ss. 16, 17; ante, p. 41.

(*m*) Sect. 113.

(*n*) Sect. 134.

(*o*) *Wortham* v. *Ld. Dacre*, 2 Kay & J. 437.

(*p*) *Keech* v. *Sandford*, Select Cas. Ch. 61; *Fitzgibbon* v. *Scanlan*, 1 Dow. 261 (after twenty years); *Mill* v. *Mill*, 3 H. L. Cas. 828; *Cooper* v. *Phibbs*, L. R., 2 H. L. Cas. 149.

(*q*) *Mulraney* v. *Dillon*, 1 Ball & B. 409; *Griffin* v. *Griffin*, 1 Sch. & Lef. 352.

premises in the original lease, but also additional lands, the trusts will not attach upon the additional lands (*r*). The ground of decreeing renewals by trustees and executors to enure to the benefit of cestui que trusts is public policy, to prevent persons in such situations from acting so as to take a benefit to themselves (*s*).

Renewal by Trustees under Trustee Act, 1893.

Any trustee of any leaseholds for lives or years which are renewable either under covenant or contract or by custom or usual practice, may, if in his discretion he see fit, and must, if so required by any person having any beneficial interest in the leaseholds, use his best endeavours to obtain renewals; and may also out of trust funds in his hands pay any money required for the renewal (*t*).

By Agents.

A person acting as agent, or in any similar capacity for a person having an interest in a lease, cannot renew it for his own benefit (*u*).

By Tenant for Life.

If a person having a limited interest in a renewable lease, as a tenant for life, renews it in his own name, he will be held a trustee for those entitled in remainder to the old lease (*x*).

Renewal at "best rent" under a power.

As to renewal at best rent under a power, the authorities concur that in a lease under a power a covenant to renew at the expiration of the term is a good covenant, even though the first lease was for the full term authorized by the power; but that when the time for carrying the covenant into effect arrives by the expiration of the first lease, then it must be shown that the rent and covenants stipulated for are the best rent and the proper covenants at that time (*y*).

By a Person jointly interested with Others.

If one of several persons jointly interested in a lease renew it in his own name he will hold in trust for the others according to their respective shares (*z*). And if a person jointly interested with an infant renew, and the renewed lease turn out not to be beneficial, the person renewing must sustain the loss; if beneficial, the infant can claim his share of the benefit to be derived from it (*z*).

By a Partner.

A partner renewing a lease of the partnership premises in his own name will be held a trustee of it for the firm (*a*).

By a Mortgagee.

If a mortgagee renew a lease in his own name the renewal is deemed to be for the benefit of the mortgagor, paying the mortgagee his charges (*b*); nor will the case be altered by the expiration of the lease before renewal (*c*). On the other hand, if a lessee mortgage

By a Mortgagor.

(*r*) *Acheson* v. *Fair*, 3 Dru. & W. 512.
(*s*) *Griffin* v. *Griffin*, 1 Sch. & Lef. 352; *Blewett* v. *Millett*, 7 Bro. P. C. 367.
(*t*) Trustee Act, 1893, s. 19; ante, Chap. I., Sect. 15.
(*u*) White & Tudor, L. C. 41 (2nd ed.).
(*x*) *Keech* v. *Sandford*, White & Tudor, L. C. 41. In *Phillips* v. *Phillips*, 54 L. J., Ch. 943, a tenant for life who had twice renewed, and then purchased the reversion, was held to hold the fee thus acquired in trust for the remaindermen.
(*y*) Per Kay, J., in *Gaslight and Coke Co.* v. *Towse*, L. R., 35 Ch. D. at p. 534, citing *Dowell* v. *Dew*, 1 Y. & C. Ch. 345; *Dyas* v. *Cruise*, 1 Sch. & Lef. 549.
(*z*) Id. 39.
(*a*) Id. 40; *Clegg* v. *Edmondson*, 8 De Gex, M. & G. 787.
(*b*) White & Tudor, L. C. 40 (2nd ed.).
(*c*) Id. 40; *Rakestraw* v. *Brewer*, 2 P. Wms. 510; *Nesbitt* v. *Tredennick*, 1 Ball & B. 29.

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leaseholds, and afterwards obtain a new lease in his own name, the new lease will be held a graft on the old one for the benefit of the mortgagee (*d*). Upon the same principle, if a person entitled to a lease subject to debts, legacies or annuities, renews in his own name, the incumbrances will remain a charge upon the renewed lease (*e*).

By Owner of incumbered Lease.

Against Volunteers.

Or Purchasers with Notice.

The same remedies which may be had against trustees, executors, and persons with limited interests renewing leases in their own names, may also be had against volunteers claiming through them (*f*). And against purchasers from them with notice express or implied (*f*). But the cestui que trust may be barred by acquiescence and lapse of time (*f*).

Not against a quasi Tenant in Tail of Leaseholds.

A quasi tenant in tail of leaseholds being the absolute owner of them is not barred by the same equities as persons having merely limited interests (*g*).

Nor against a Stranger.

Where a stranger obtains a renewal of a lease, or a reversionary lease, the old tenant has no equity against him (*h*); nor, it seems, has a lessee any equity against his sub-lessee who obtains a renewal from the head landlord without consulting him (*i*).

Sale of Right of Renewal.

If a person having a right of renewal sells such right, the money produced by the sale will be affected with the same trusts as the leaseholds, if renewed, would have been (*k*).

Nature of Relief in Equity and upon what Terms.

A trustee who has renewed will be directed to assign the lease, free from incumbrances, except, as it seems, any lease made by him bonâ fide at the best rent (*l*); and he must account also for the mesne rents and profits which he may have received (*m*), notwithstanding the lease had expired before the action was brought (*n*). But where a tenant for life has renewed, the account will commence only from his decease (*o*). On the other hand, the person who has renewed the lease will be entitled to be indemnified against the covenants he may have entered into with the lessor (*p*), and he will have a lien upon the estate for the costs and expenses of renewing the lease, with interest (*q*), and for the expenses of lasting improvements (*r*), but not for any improvements adopted as a mere matter of taste, or as matter of personal convenience (*s*); at the same time there may be many charges in the nature of waste, and as to deterioration,

(*d*) *Smith* v. *Chichester*, 1 Conn. & Law. 486.
(*e*) White & Tudor, L. C. 41 (2nd ed.).
(*f*) Id. 42.
(*g*) *Blake* v. *Blake*, 1 Cox, 266; 1 R. R. 35.
(*h*) White & Tudor, L. C. 44 (2nd ed.).
(*i*) *Maunsell* v. *O'Brien*, 1 Jones (Ir. Ex.), 176.
(*k*) White & Tudor, L. C. 41; *Owen* v. *Williams*, Ambler, 734.
(*l*) Id. 41; *Bowles* v. *Stewart*, 1 Sch. & Lef. 230.
(*m*) Id. 41.
(*n*) *Eyre* v. *Dolphin*, 2 Ball & B. 290.
(*o*) *Geddings* v. *Geddings*, 3 Russ. 241.
(*p*) *Keech* v. *Sandford*, Select Cas. Ch. 61; *Mill* v. *Mill*, 3 H. L. Cas. 828; White & Tudor, L. C. 36; *Geddings* v. *Geddings*, 3 Russ. 241.
(*q*) White & Tudor, L. C. 41, 42.
(*r*) Id. 42.
(*s*) *Mill* v. *Mill*, 3 H. L. Cas. 869.

which must be set off against anything found due in respect of improvements. So also will a tenant for life have a lien for such proportion of the fine upon renewal as ought to be borne by the remainderman (*u*).

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### Sect. 5.—*Renewal without Surrender of Sub-leases.*

4 Geo. 2, c. 28.

Renewal in Case of Sub-lease.

By the Landlord and Tenant Act, 1730, 4 Geo. 2, c. 28, s. 6, after reciting "that many persons hold considerable estates by leases for lives or years, and lease out the same in parcels to several under-tenants; and many of those leases cannot by law be renewed without a surrender of all the under-leases derived out of the same, so that it is in the power of any such under-tenants to prevent or delay the renewal of the principal lease by refusing to surrender their under-leases, notwithstanding they have covenanted so to do, to the great prejudice of their immediate landlords the first lessees;" it is enacted, "that in case any lease shall be duly surrendered in order to be renewed, and a new lease made and executed by the chief landlord or landlords, the same new lease shall, without a surrender of all or any the under-leases, be as good and valid to all intents and purposes as if all the under-leases derived thereout had been likewise surrendered at or before the taking of such new lease; and all and every person and persons in whom any estate for life or lives, or for years, shall from time to time be vested by virtue of such new lease, and his, her and their executors and administrators, shall be entitled to the rents, covenants and duties, and have like remedy for recovery thereof; and the under-lessees shall hold and enjoy the messuages, lands and tenements in the respective under-leases comprised as if the original leases, out of which the respective under-leases are derived, had been still kept on foot and continued; and the chief landlord and landlords shall have and be entitled to such and the same remedy by distress or entry in and upon the messuages, &c., for the rents and duties reserved by such new lease, so far as the same exceed not the rents and duties reserved in the lease out of which such under-lease was derived, as they would have had in case such former lease had been still continued, or as they would have had in case the respective under-leases had been renewed under such new principal lease."

New Lease is as good as i Sub-leases surrendered.

The effect of this enactment, while it gives a lessee the right to surrender notwithstanding his contracts with his sub-lessee, leaves untouched the sub-contract, though it is merely an agreement for a sub-lease; and the effect of a new demise after the surrender for the

(*u*) White & Tudor, L. C. 42.

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residue of the original term is to make the new lessee the assignee of the reversion of the terms created by the surrenderor (*r*).

8 & 9 Vict. c. 106, s. 9. Substituted Reversion on Leases.

By the Real Property Act, 1845, 8 & 9 Vict. c. 106, s. 9, "when the reversion expectant on a lease made either before or after the passing of this act, of any tenements or hereditaments of any tenure, shall after the said first day of October, 1845, be surrendered or merge, the estate which shall for the time being confer as against the tenant under the same lease the next vested right to the same tenements or hereditaments, shall, to the extent and for the purpose of preserving such incidents to and obligations on the same reversion as but for the surrender or merger thereof would have subsisted, be deemed the reversion expectant on the same lease." The object of this enactment was to do away with the rule (*x*) that the covenants of and remedies against the lessee, and the obligations on the lessor, being incident to the *immediate* reversion, cease as regards the land on the merger of that reversion in another estate. Such rule (*x*) was altogether technical, and generally productive of injustice.

"Tenant Right of Renewal."

It has long been an established practice to consider those who are in the possession of lands under leases for lives or years, particularly from the crown, colleges, &c., as having an interest beyond the subsisting term: and this interest is usually denominated "the tenant right of renewal," which though not any certain or even contingent estate, there being no means of compelling a renewal, yet is so adverted to in all transactions relative to leasehold property, that it influences the price in sales, and is often an inducement to accept of it in mortgages and settlements.

Purchase of Reversion by Assignee of Mortgagor of Term.

Where a lease from a dean and chapter was mortgaged, and the mortgagor's interest assigned to a person who afterwards bought the reversion, and borrowed money on the security of such reversion, it was held that such person, upon the Ecclesiastical Commissioners refusing to renew, held the fee simple upon the expiration of the lease subject to the mortgage of the lease, so that the lender on the security of the reversion was not entitled to any prior lien in respect of his advance (*y*).

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### SECT. 6.—*Undesirability of Renewable Leases.*

"The experience of the Court," observed Jessel, M.R., in the *Smith Charity Case* (*z*), "is that renewable leases are wasteful, and

(*r*) *Cousins* v. *Phillips*, 3 H. & C. 892; 35 L. J., Ex. 84; *Doe* d. *Palk* v. *Marchetti*, 1 B. & Ad. 715; *Wootley* v. *Gregory*, 2 Y. & J. 536; and see *Ecclesiastical Commissioners* v. *Treemer*, [1893] 1 Ch. 166; 62 L. J., Ch. 119; 68 L. T. 11; 41 W. R. 166, per Chitty, J.

(*x*) *Webb* v. *Russell*, 3 T. R. 393; 1 R. R. 725; *Stokes* v. *Russell*, 3 T. R. 678; 1 R. R. 732.

(*y*) *Leigh* v. *Burrell*, 33 W. R. 578.

(*z*) *In re Smith's Charity* (*Hartlepool*), L. R., 20 Ch. D. 516.

that is so for various reasons. Lessees do not like such leases, because they know that if by accident they do not pay the fine they are in danger of losing the property. Then there is expense on every renewal, not merely the expense of the new lease, but the expense of showing the title of the person who claims the right of renewal. Lessees take all these matters into consideration, and will take better terms if they are relieved from them. It is therefore found by experience to be more beneficial to landlords to grant leases for fixed terms, and it is well known that consequently all the great corporations have given up the granting of renewable leases."

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## Sect. 7.—*Purchase of Reversion.*

### (a) *Generally.*

Suspension of right to distrain.

A lease is not determined at law by a contract by the lessee to purchase the reversion; but in equity the lessor's right to distrain is suspended pending completion of the contract, so long as it is subsisting and enforceable by action for specific performance; but if the contract is released or abandoned, or the right to specific performance lost to the lessee by delay, the lessor may then distrain (*a*).

### (b) *By Exercise of Option to purchase.*

A lease sometimes contains a clause enabling the tenant, upon giving certain notice to the landlord, to purchase the reversion. Such a clause is always for the interest of the tenant, as it binds him to nothing, and allows him the advantage of a trial of the demised premises. A form is given hereafter (*b*).

Building Lease.

Building Leases and Agreements contain options of purchase more often than not.

Where a building agreement gave the tenant the option, not conditioned, as is usual on due performance of the building stipulations, and the tenant having exercised the option whilst in default, the lessor under a power in that behalf determined the agreement and sought to recover possession, it was held that, pending completion of the purchase, the tenant was owner in equity, so that the lessor could not legally determine possession (*c*).

Settled land.

As has been already pointed out (ante, p. 9) the Settled Land Act, 1889, allows the tenant for life of settled land to grant a building lease, with option of purchase, limited as therein mentioned.

(*a*) *Ellis* v. *Wright*, 76 L. T. 522—C. A.

(*b*) See post, Appendix B., Sect. 7, and see also Dav. Prec., Vol. V., p. 157. "Lease to Builder's Nominee of First-Class House in London," Prideaux Prec., Vol. II., p. 44.

(*c*) *Raffety* v. *Scholefield*, [1897] 1 Ch. 937; 66 L. J., Ch. 448; 76 L. T. 648; 45 W. R. 460—per Romer, J.

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Time has been held to be of the essence of a stipulation that the lessee may purchase (*d*).

Time of the Essence of the Contract.

The purchase-money goes to the lessor's personal representatives, if the option be exercised after the lessor's death (*e*); and on the death of the lessee, the option of purchase goes to the personal representative of the lessee (*f*).

Executor receives Purchase-money.

We have already seen that it is ultra vires, and a breach of trust, for an executor or administrator to grant a sub-lease with an option of purchase to be exercised by the sub-lessee at a price fixed at the time of the grant of the sub-lease (*g*).

Sub-lease with Option, not grantable by Executor.

Where the landlord covenanted to insure, and the tenant had the option to purchase, and before the time for exercising the option expired the demised premises were burnt, the landlord receiving the insurance money; it was held that the tenant, upon exercising the option, could not sustain a claim to the insurance money as part of his purchase (*h*).

Insurance Money.

(*d*) *Lord Ranelagh* v. *Melton*, 2 Dr. & Sm. 278. As to reinstating property out of insurance money after exercise of option, see *Reynard* v. *Arnold*, L. R., 10 Ch. 386; 23 W. R. 804.

(*e*) See *Weeding* v. *Weeding*, 1 J. & H. 424; Prideaux, 45.

(*f*) *Adams and Kensington Vestry, in re*, 27 Ch. D. 394; 54 L. J., Ch. 87; 51 L. T. 382; 32 W. R. 883 (C. A.).

(*g*) *Oceanic, &c., Co.* v. *Sutherbury*, 16 Ch. D. 236; and ante, p. 52.

(*h*) *Edwards* v. *West*, 7 Ch. D. 858; 47 L. J., Ch. 463; 38 L. T. 481; 26 W. R. 507, distinguishing *Reynard* v. *Arnold*, L. R., 10 Ch. 386.

# CHAPTER X.

## RENT.


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### SECT. 1.—*Different kinds of Rent.*

RENT (redditus) is a retribution or compensation for the lands demised. It is defined to be a certain profit issuing yearly out of land and tenements corporeal: and may be regarded as of a twofold nature:—first, as something issuing out of the land, as a compensation for the possession during the term; and, secondly, as an acknowledgment made by the tenant to the lord of his fealty or tenure (*a*). Definition of Rent.

Rent must always be a profit; but there is no occasion for it to be, as it usually is, a sum of money: for spurs, capons, horses, corn, and other matters, may be, and occasionally are, rendered by way of rent (*b*): it may also consist in services and manual operations; as to plough so many acres of ground, and the like; which services, in the eye of the law, are profits (*c*). This profit must also be certain, or capable of being reduced to a certainty by either party, and must issue out of the thing granted, and not be part of the land or thing itself, wherein it differs from an exception in the grant, which is always of part of the thing granted (*d*). But a royalty payable to a landlord upon his bricks which are made out of a brickfield is a rent, although it is not paid for the produce of the land, which is periodically Rent need not be in Money, but it must be certain, and must issue out of the Thing demised. Royalty.

(*a*) Bradby, 24; Co. Lit. 142 a; Gilb. Rents, 9; Smith L. & T. 111 (2nd ed.).

(*b*) 1 Inst. 142 a.

As to corn rent, see 409, post.

(*c*) *Doe* d. *Edney* v. *Benham*, 7 Q. B. 976 (cleaning church, and ringing church bell); *Doe* d. *Robinson* v. *Hinde*, 2 Moo. & R. 441 (keeping up a grindstone ruled with doubt *not* to be rent); *Duke of Marlborough* v. *Osborn*, 5 B. & S. 67; 33 L. J., Q. B. 148 (team work).

(*d*) Bac. Abr. Rent (A.).

CH. X. SEC. 1. *Different kinds of Rent.*

renewed, but for portions of the land itself, which is gradually exhausted by the working (*e*).

Incorporeal Hereditaments.

The lessee of tithes, advowsons or any incorporeal hereditaments, is liable to an action for the gross sum or sums agreed upon for the use and enjoyment but not for "rent" (*f*). Where the owner of a factory let "standings" in some of its rooms for lace-machines, he himself supplying the steam power by which they were put in motion; it was held, that there was no demise of the room, and consequently that the weekly payments reserved could not be distrained for, *as rent* (*g*). But where A. let to B. a defined portion of a room in a factory, with steam-power for working lace-machines belonging to B., at a certain sum per annum, payable quarterly, a deduction to be allowed in the event of hindrances in the supply of power beyond seven days in each quarter; this was held a sufficient demise to entitle A. to distrain (*h*), and similarly, where all the room and power in a mill with a warehouse except one room were let to the defendants at a rent (with no exception for destruction by fire), and the mill was afterwards burnt down, it was held that the defendants were liable for rent which fell due after the fire (*i*).

"Standings for Machinery."

Rent-service.

There are at common law three sorts of rents:—rent-service, rent-charge and rent-seck (*k*). Rent-service was so called because it had some corporeal service incident to it, as, at the least, fealty (*l*). Every copyhold rent (*m*), and every rent reserved on a lease, is a rent-service (*n*).

Rent-charge.

A rent-charge is where land is charged with a rent by deed or will *with power to distrain* for the same, but the owner of the rent has no reversion in the land: as where a person conveys to another land in fee-simple, reserving a certain rent payable thereout, with a clause of distress, that if the rent be in arrear or behind for a specified number of days it shall be lawful to distrain for the same. In such case the land is liable to the distress, not of common right, but by virtue of the clause in the deed; and therefore it is called a rent-charge, because in this manner the land is charged with a distress for the payment of it (*o*).

Fee-farm Rent.

A fee-farm rent is a rent-charge reserved on a grant in fee; the name is founded on the perpetuity of the rent or service, and not on the amount (*p*).

(*e*) *Reg.* v. *Westbrook*, 10 Q. B. 178. And see *Daniel* v. *Gracie*, 6 Q. B. 145; post, 407.

(*f*) Co. Lit. 47 a; Gilb. Rents, 24.

(*g*) *Hancock* v. *Austin*, 14 C. B., N. S. 634.

(*h*) *Selby* v. *Greaves*, L. R., 3 C. P. 594; 37 L. J., C. P. 251. And see *Smith* v. *Eggington*, 43 L. J., C. P. 140; L. R., 9 C. P. 145; 30 L. T. 521.

(*i*) *Marshall* v. *Schofield*, 52 L. J., Q. B. 58.

(*k*) Bac. Abr. Rent (A.).

(*l*) Co. Lit. 87 b; Gilb. Rents, 9.

(*m*) *Laugher* v. *Humphrey*, Cro. Eliz. 524.

(*n*) Smith L. & T. 112.

(*o*) Co. Lit. 143 b; Gilb. Rents, 17, 38; *Bradbury* v. *Wright*, 2 Doug. 628.

(*p*) Co. Lit. 143 b, n. (5); *Governors of Christ's Hospital* v. *Harrild*, 2 M. & G. 713, n.; Smith L. & T. 114 (2nd ed.).

Rent-seck (redditus-siccus), or barren rent, is in effect nothing more than a rent reserved by deed or will, but *without any clause of distress;* and differs from a rent-charge only in being reserved without a clause of distress (*q*). A right to distrain for rent-seck, however, "as in the case of rents reserved upon lease," and also for rent of assize and chief rents, is given by the Landlord and Tenant Act, 1730, 4 Geo. 2, c. 28, s. 5, which applies to all rents "duly answered or paid for the space of three years within the space of twenty years" before that session of parliament, "or should be thereafter created." The three years mentioned in this section need not be consecutive (*r*), and a fee-farm rent may be distrained for if brought within the section (*s*).

Rent-seck.

Rents of Assize.

Chief-rents.

Quit-rents.

Rents of assize are the certain established rent of the freeholders and ancient copyholders of a manor, and which cannot be departed from: those of the freeholders are frequently called chief-rents, and both sorts are indifferently denominated quit-rents, because thereby the tenant goes quit and free of all other services (*t*).

Small Rent for long time.

Payment of an unvaried rent for a long series of years to the lord of a manor is evidence only of a title to the rent (which is presumed to be a quit-rent), but not to the land in respect of which the rent is paid (*u*); but in *Weller* v. *Stone* (*x*), the payment of an "encroachment rent" of 4*s*. 10*d*. since 1811, the land having been dealt with as held in fee simple and built upon since 1805, was held to be evidence of a tenancy from year to year only, so that the plaintiff recovered the land in an action brought in 1878 upon a half-year's notice to quit; and it was further held that the defendant was not entitled to equitable relief on the ground of his predecessors having built to the knowledge of the predecessors of the plaintiff. For such relief to be grantable, the tenant must either be in possession under a mistaken belief of title, which the reversioner must have known of and stood by, or the tenant must have laid out money upon the faith of an expectation, created or encouraged by the reversioner, of a lease (*y*).

Building on Land.

Peppercorn Rent.

A peppercorn rent is a nominal rent not intended to be paid, but stipulated for on the view (which is not correct) that the reservation of some rent is necessary to constitute a lease. It is most frequently found in building leases (see s. 8, sub-s. 2 of the Settled Land Act, 1882, which authorizes it in leases of settled land), in which it is usually reserved for the first few years of the term only, during which the houses to be built will be in course of erection only, and therefore not yet profitable to the lessee.

(*q*) Gilb. Rents, 38.

(*r*) *Musgrave* v. *Emerson*, 10 Q. B. 326.

(*s*) Id.; *Bradbury* v. *Wright*, 2 Dougl. 624.

(*t*) Gilb. Rents, 38; Co. Lit. 144, Harg. n. (5).

(*u*) *Doe* d. *Whittick* v. *Johnson*, Gow, 173; here the rents had been 2*s*. and 4*s*. 3*d*. for thirty-nine years.

(*x*) *Weller* v. *Stone*, 54 L. J., Ch. 497; 33 W. R. 42 (C. A.).

(*y*) *Ramsden* v. *Dyson*, L. R., 1 H. L. 129; 12 Jur., N. S. 506; 14 W. R. 926.

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Enlargement into fee-simple of Long Lease at Rent of no Money Value.

The residue, if not less than 200 years, of a term (not liable to be determined by re-entry, or created by sub-demise) originally created for not less than 300 years, without any trust for the freeholder, and without any rent "or with merely a peppercorn rent or other rent having no money value" (*z*) may, under sect. 65 of the Conveyancing Act, 1881, as amended by sect. 11 of the Conveyancing Act, 1882, be enlarged into a fee simple.

Rent barred by Time.

The Statute of Limitations (see Chap. XIII., Sect. 1) does not apply to rent reserved on a lease (*a*); but the provisions of the Conveyancing Acts above mentioned apply also to cases where a rent having money value has become barred by lapse of time.

Rack-rent.

Rack-rent is a rent of the full annual value of the tenement, or near it (*b*).

Fore-hand Rents or Fines.

A fine or premium given by the lessee to the lessor at the time of taking or renewing a lease is in the nature of a fore-hand rent, and has been considered as an improved rent (*c*). In the case of renewal of a lease by an ecclesiastical corporation, if an accident, which has not happened from their fault or that of the tenant, delay the lease, a new member coming in has his proportion of the fine (*c*).

Rent payable in Advance.

Sometimes rent is made payable from quarter to quarter or otherwise *in advance*. Such rent could not of course be recovered in advance in an action for use and occupation (*d*), but a distress may be made, or an action maintained for such rent, as soon as it becomes payable according to the terms of the demise (*e*). The reservation should be clearly expressed so as to make the rent payable from time to time in advance: otherwise it may perhaps be construed as applicable to the first quarter only (*f*). Thus where premises were let, "the yearly rent to be 110*l*., and to be payable in advance if the landlord required the same," nothing being said as to the days of payment: and after a quarter had expired the landlord demanded a quarter's rent only: it was held, that he was not entitled to distrain for the whole 110*l*. (*g*). But where it was a condition in the lease of a farm that the tenant should pay the last half-year's rent in advance, which last half-year's rent should be considered as reserved and due on the 29th September preceding, if the landlord should see cause for such demand; it was held, that the landlord was entitled to demand the last half-year's rent, and to distrain for it at any time between

(*z*) A rent so small as to be unsaleable, as a rent of 3*s*., has been held not to be within these words (*re Smith and Stott*, 31 W. R. 411); but a rent of "one silver penny if demanded" is clearly within them (*re Chapman and Hobbs*, 33 W. R. 703).

(*a*) *Grant* v. *Ellis*, 9 M. & W. 113.

(*b*) 2 Blac. Com. 42.

(*c*) *Irish Society* v. *Needham*, 1 T. R. 486; *Southall* v. *Leadbetter*, 3 T. R. 461; *Wynne* v. *Bampton*, 3 Atk. 473.

(*d*) *Angell* v. *Randall*, 16 L. T. 489.

(*e*) *Jenner* v. *Clegg*, 1 Moo. & R. 213; *Lee* v. *Smith*, 9 Exch. 662; *Morton* v. *Woods*, L. R., 3 Q. B. 658; 37 L. J., Q. B. 242; Smith L. & T. 218 (2nd ed.).

(*f*) *Holland* v. *Palser*, 2 Stark. R. 161; *Hopkins* v. *Helmore*, 8 A. & E. 463.

(*g*) *Clarke* v. *Holford*, 2 C. & K. 540.

the 29th September and the expiration of the tenancy, without demand previous to the 29th September (*h*). Where the words were that the rent was to be paid quarterly on the usual quarter days "and always, if required, a quarter in advance," it was held that a quarter's rent was due after reasonable notice given on demand at any time of a quarter (*i*).

## Sect. 2.—*Reservations of Rent.*

### (a) *Mode of Reservation.*

Reservation ought to be sufficiently certain. *Daniel* v. *Gracie.*

The usual formal reddendum in a lease is not essential. Any expressions showing the intention of the parties that a rent shall be payable will be a sufficient reservation (*k*). The reservation of rent, however, ought to be certain as to the amount and the time when payable (*l*); although if there be anything in the reservation by which the amount of the rent may be ascertained, this will be as good as if the sum itself were clearly specified, in accordance with the maxim *Id certum est quod certum reddi potest* (*m*). Thus in *Daniel* v. *Gracie*, the proprietor of a house, and of a marl pit and brick mine, demised the house by unwritten agreement to D. from a day named, and it was at the same time agreed between them, without writing, that D. should take the marl pit and the brick mine, and should pay quarterly, at the usual quarter days, 8*d*. *per solid yard* for all the marl that he got, and 1*s*. 8*d*. *per thousand* for all the bricks that he made. D. took the marl and made bricks accordingly, and paid the stipulated sums for a time; but they afterwards fell into arrear. It was held, that the agreement for the marl pit and brick mine was a demise of the land from year to year, at a rent capable of being ascertained with certainty, for which, consequently, the lessor might distrain (*n*).

Rent may commence before Enjoyment.

Rent may be reserved to commence before the lessee is to enter upon the enjoyment of the land. Thus where a man made a lease of Blackacre to commence in futuro, and of Whiteacre to begin in præsenti, rendering rent payable at Michaelmas before the commencement of the term in Blackacre; it was held to be a reservation immediately; for it was but one entire rent, and as such was payable

(*h*) *Witty* v. *Williams*, 12 W. R. 755.

(*i*) *London and Westminster Loan Co.* v. *London and North Western R. Co.*, [1893] 2 Q. B. 49; 62 L. J., Q. B. 370; 69 L. T. 320; 41 W. R. 670; 5 R. 425.

(*k*) Gilb. Rents, 30, 33; *Doe* d. *Rains* v. *Kneller*, 4 C. & P. 3; *Attoe* v. *Hemmings*, 2 Bulstr. 281; cited 2 H. & C. 427.

(*l*) *Parker* v. *Harris*, 1 Salk. 262; 4 Mod. 79; Lit. s. 213; Gilb. Rents, 9.

(*m*) *Orby* v. *Mohun*, 2 Vern. 531, 542; 2 Freem. 291; 3 Bro. P. C. 248; Gilb. Rents, 9, 10; Co. Lit. 96 a, 142 a.

(*n*) *Daniel* v. *Gracie*, 6 Q. B. 145; and see *Pollitt* v. *Forrest*, 11 Q. B. 949; *Bowers* v. *Nixon*, 12 Q. B. 546; *Edmonds* v. *Eastwood*, 2 H. & N. 811, 826.

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according to the reservation (*o*). A subsequent agreement may by relation operate to make a reservation of rent from the beginning (*p*).

From what Rent must issue.

Properly speaking, a rent can be reserved out of no inheritance but such as is manurable, as it is called, or upon which the lessor may enter to distrain (*q*); a lease of the vesture or herbage of the land reserving rent is good, because the lessor may come upon the land to distrain the lessee's beasts feeding thereon; but a reservation of grass, herbage, or other vesture of the land, would be bad, because they are part of the thing demised (*r*). There is this difference between a reservation, which is always of a thing not in being, but newly created or reserved out of the land or tenement demised; and an exception, which is ever a part of the thing granted, and of a thing in being (*s*).

Where Reservations are entire or several.

There is a difference between a rent reserved entire, upon a demise of several things in the same lease, and where the rent is not originally reserved entire, but the reservation is several and apportioned to the several things demised: for instance, if a lease be made of several houses, rendering the annual rent of 5*l.* at the two usual feasts—viz. for one house 3*l.*, for another 10*s.*, and for the rest of the houses the residue of the said rent of 5*l.*—with a clause of re-entry into all the houses for non-payment of any parcel of the rent: this is but one reservation of one entire rent; because all the houses were leased, and the 5*l.* was reserved as one entire rent for them all, and the "viz." afterwards does not alter the nature of the reservation, but only declares the value of each house (*t*). But if the lease had been of three houses, rendering for one house 3*l.*, for another 20*s.*, and for the third 10*s.*, with a condition to re-enter into all for the non-payment of any parcel; these are three several reservations and in the nature of three distinct demises; and each house in this case is only chargeable with its own rent (*u*).

Whole Demise void if Part cannot be legally demised.

Where there is a demise of premises, and an entire rent reserved, if any part of the premises could not be legally demised, the whole demise is void (*x*). But in an action for rent upon an indenture of demise, a plea of the defendant that prior to the making of the demise the plaintiff had demised two roods, part of the demised premises, to A., which demise to A. was still in force, whereby the defendant was kept out of possession of that part of the demised premises, was held no answer to the claim for the entire rent reserved. This was because the demise to the defendant, which

(*o*) Gilb. Rents, 25.
(*p*) *M'Leish* v. *Tate*, Cowp. 781.
(*q*) Gilb. Rents, 20.
(*r*) Co. Lit. 47, 142 a; Gilb. Rents, 26.
(*s*) Ante, Chap. V., Sect. 10.
(*t*) Gilb. Rents, 34.
(*u*) Gilb. Rents, 35; *Tanfield* v. *Rogers*, Cro. Eliz. 341.
(*x*) *Doe* d. *Griffith* v. *Lloyd*, 3 Esp. 78; 6 R. R. 813.

was under seal, operated as a lease in possession of all that part of the lands of which the lessor had the possession at the time of the demise, and as a lease of the reversion, with the rent incident thereto, of that part of the lands of which the lessor had not the possession, and thereby conveyed to the defendant the whole interest in respect of which the entire rent was reserved (*y*).

Reservation on specified Days.

In early times it was much the practice to reserve the rent payable on two alternate days, as on the usual feasts or days of payment, or within a certain number of days afterwards (*z*). But this being found to be attended with serious inconveniences (*a*), rent is now generally reserved on a day certain, with a proviso for re-entry on non-payment within a specified number of days after the day appointed.

Rent in Advance.

If rent is intended to be paid in advance (*b*), the reservation should be clearly expressed.

Corn-rent under College Leases.

A restriction with regard to leases made by colleges in the universities of Oxford and Cambridge, and by the colleges of Winchester and Eton, is created by statute 18 Eliz. c. 6 (*c*), by which it is directed that one-third of the old rent then paid should for the future be reserved in wheat or malt, reserving a quarter of wheat for each 6*s.* 8*d.*, or a quarter of malt for every 5*s.*, or that the lessees should pay the same according to the price that wheat and malt should be sold for in the market next adjoining to the respective colleges, on the market day before the rent becomes due, it being added that "all leases otherwise made and all collateral bonds or assurances to the contrary, by any of the said corporations, shall be void in law to all intents and purposes." Until quite recent times many college leases were framed more or less in accordance with this Act, but the practice of so framing them has now been almost entirely abandoned (*d*). If the reservation be of corn—as in the case of a hospital renewed lease, where the reddendum was "so many quarters of corn"—it will be understood to mean legal quarters, reckoning the bushel at eight gallons (*e*). A reservation of eight bushels of grain in lieu of one quarter is good, because it is all one in quality, value and nature (*f*).

Computation of Rent by average Price of Corn.

*Kendall* v. *Baker.*

In a lease of land for twenty-one years from the 25th of March, 1848, it was covenanted that the lessee should pay 620*l.* for the first

(*y*) *Eccl. Commrs. of Ireland* v. *O'Connor*, 9 Ir. Com. L. R. 242.

(*z*) *Anon.*, 2 Show. 77.

(*a*) Gilb. Rents, 52, 53; *Clun's case*. 10 Co. R. 127; *Biggin* v. *Bridge*, 3 Keb. 534.

(*b*) See the cases ante, 406.

(*c*) See this statute and 39 & 40 Geo. 3, c. 41, sect. 7 of which specially saves it. Chitty's Statutes, Vol. IV., tit. "Landlord and Tenant (Ecclesiastical, &c. Leases)."

(*d*) The editor is indebted to Mr. G. E. Baker, Estates Bursar of Magdalen College, Oxford, for the information on which this statement is founded.

(*e*) *Master, &c. of St. Cross* v. *Ld. Howard de Walden*, 6 T. R. 338.

(*f*) *Mountjoy's case*, 5 Co. R. 3 b; Sug. Pow. 797.

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year, to be reduced or increased in each subsequent year of the term of twenty-one years according to the "average price of wheat in any one year of the said term," such average "to be taken and ascertained from the then current year's averages, which were taken in the month of January in every year under and by virtue of the Tithe Commutation Act (6 & 7 Will. 4, c. 71), s. 56," which is the result of the sales "during seven years ending on the Thursday next before Christmas-day then next preceding." It was held, that the rent might be computed according to such septennial average so published in each year (*g*).

Sliding-scale Rents, in Mining Leases by statute;

A legislative attempt, in manner as above, to provide for the partial division of profit and loss between landlord and tenant by a rent rising or falling with the price of the produce of the demised premises, has been made in the case of mining leases by s. 8 of the Settled Land Act, 1890, which provides that:—

"The rent may be made to vary according to the price of the minerals or substances gotten, or any of them:" and that "Such price may be the saleable value, or the price or value appearing in any trade or market or other price list or return from time to time, or may be the marketable value as ascertained in any manner prescribed by the lease (including a reference to arbitration) or may be an average of any such prices or values taken during a specified period."

in Agricultural Leases, by agreement.

The late Lord Tollemache of Helmingham set on foot a sliding scale of rent, rising or falling with the average price of wheat, barley, and oats. This scale appears to have been in force on Lord Tollemache's Suffolk estates with satisfaction to the tenants and himself (*h*).

(b) *Construction of Reservations.*

Construction of Reservations generally.

Where there are special days of payment mentioned in the reddendum, the rent ought to be computed according to the reddendum and not according to the habendum (*i*); but where the reservation is general, as half-yearly or quarterly, and no special days are mentioned, there the half-year or quarter must be computed according to the habendum (*k*). If a man make a lease the first day of May, reserving rent payable quarterly, this means quarterly from the making of the lease: for if the beginning of the quarter should be construed to be any other day than the date of the lease, the

(*g*) *Kendall* v. *Baker*, 11 C. B. 842.

(*h*) See a form of reddendum according to this scale in Lely & Peck's Precedents of Leases, Part XII., Form 23.

(*i*) As to discrepancy between the habendum and reddendum with respect to the length of the term, see *Burchell* v. *Clark*, 46 L. J. 115 (C. A.), and 154, ante.

(*k*) *Tomkins* v. *Pinsent*, 2 Ld. Raym. 819; 1 Salk. 141; 7 Mod. 96.

lessor would lose the profits of his land for some time, and consequently not have quarterly payment made during the continuance of the lease (*l*). Where rent was to be payable by a parol demise from the Lady-day following, evidence of the custom of the country was admitted to show that by "Lady-day," "Old Lady-day" was intended (*m*).

"Net Rent."

A *net* rent is a sum to be paid to the landlord clear of all deductions, so as to include, for instance, land tax and sewers rate (*n*).

Mining Leases.

Where a lessee of a colliery covenanted to pay as rent "one-third part of the money that should arise, be made, received or produced from the sale of the coals:" and also covenanted to keep "true accounts of all coal daily raised, and to make and deliver true copies thereof;" it was held, that the rent was to be calculated on the amount of coals sold, not on the amount of money actually received for them (*o*).

Dead Rent.

Mining leases frequently stipulate for two rents: first, a dead rent, i.e. a rent payable whether the mines be worked or not; and secondly, a royalty upon the minerals raised. In one case the demise was of all right and interest in coals and other minerals in a certain estate, yielding and paying yearly for every ton of coal that should be worked, not exceeding 13,000 tons in any year, the sum of 8*d.* per ton, or yielding that amount of money, viz. 433*l.* 6*s.* 8*d.*, as fixed rent, whether the coals should be worked or not, and for every ton above 13,000 tons 9*d.* per ton. The lessee covenanted to raise 13,000 tons of coal in each year, and to pay in the same terms as the reddendum. This was held to be an absolute covenant to pay that fixed rent, although the mine became exhausted (*p*). In another case the covenant was, that the lessee would deliver quarterly to the lessor a certain proportion of all coal raised, or pay him quarterly the value in money; provided, that in case at the end of the first quarter of any year the quarterly delivery or payment should not be equal to 37*l.* 10*s.*, then the lessee should pay such additional sum as would make up 37*l.* 10*s.*; and in case at the end of the second quarter such deliveries or payments for that and the preceding quarter should not be equal to 75*l.*, then the lessee should pay such additional sum as would make up 75*l.*, with a similar provision for the third and fourth quarters, it being the intent and meaning of the parties that the royalties

(*l*) Gilb. Rents, 50; 2 Roll. Abr. 449, 450.

(*m*) *Doe* d. *Hall* v. *Benson*, 4 B. & A. 588; *Denn* v. *Hopkinson*, 3 D. & R. 507; *Smith* v. *Walton*, 8 Bing. 235; but see *Hogg* v. *Norris*, 2 F. & F. 246.

(*n*) *Bennett* v. *Womack*, 7 B. & C. 627; 3 C. & P. 96; 31 R. R. 270.

(*o*) *Edwards* v. *Rees*, 7 C. & P. 340.

(*p*) *Marquis of Bute* v. *Thompson*, 13 M. & W. 487; *Jervis* v. *Tomkinson*, 1 H. & N. 195, 208.

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thereby named should always amount to the sum of 150*l.* per annum at the least. This was held to be a *quarterly* minimum rent, and it was decided that an excess of this royalty in one quarter could not be set off against a deficiency in a previous quarter (*q*). But where A. demised to B. certain pits of clay on his land for twelve years, B. to pay 2*s.* 6*d.* per ton on all clay raised half-yearly, and to raise not less than 1,000 tons, nor more than 2,000 tons yearly; it was held, that this was not an absolute covenant by B. to raise 1,000 tons yearly or else pay the rent, but that there was an implied condition that there existed clay to the amount of 1,000 tons yearly capable of being raised (*r*).

Supply of Words in the Construction.

If rent be made payable *yearly*, without saying "during the said term," the payment must nevertheless be made every year during the continuance of the lease (*s*). If a lease be made for years, provided that the lessee shall pay at Michaelmas and Lady-day 10*l.* by equal portions "during the term," though this rent is not made payable *yearly*, yet the law construes it to be so, because it is payable at the two feasts during the term (*t*): so, if a man demise for five years, rendering 100*l.* to be paid by equal portions during the term, it must be paid *yearly*, though that word was omitted (*u*). If a lease be made rendering rent at the two usual feasts of the year, without specifying what feasts, the law construes such payments to be made at Michaelmas and Lady-day, because those are the usual days appointed in contracts of this nature for payments (*x*): so if a man grant a rent payable at the two usual feasts of the year, this means by equal portions, though not so mentioned in the deed, because where there are two several days appointed for payment, it is the most reasonable construction that a moiety of the rent shall be paid at each day (*y*). If a man make a lease to another on the 6th day of August, rendering yearly rent at two terms of the year, viz. at Lady-day and Michaelmas, by equal portions; though in this case, by the appointment of the parties, Lady-day be the first term mentioned, yet the first payment shall be made at Michaelmas ensuing the date of the lease, for without such transposition of the words of the deed, the intention of the parties could never be fulfilled, because the rent is reserved annually, and the lessor would lose the profits of one half-year if the first rent was not payable at Michaelmas; and the lessee would enjoy the land from the date of the lease to the first Michaelmas, and likewise from the last Lady-day of the term to the expiration

(*q*) *Bishop* v. *Goodwin*, 14 M. & W. 260.
(*r*) *Clifford* v. *Watts*, L. R., 5 C. P. 577; 40 L. J., C. P. 36; 22 L. T. 717; 18 W. R. 925.
(*s*) Gilb. Rents, 51; *Harrington* v. *Wise*, Cro. Eliz. 486; Moore, 459; Noy, 57.
(*t*) Gilb. Rents, 50.
(*u*) Com. Dig. tit. *Rent* (B. 8).
(*x*) Gilb. Rents, 51; 2 Roll. Abr. 450.
(*y*) Id.

of it, without paying anything: because, though the rent ended in August, yet the payment was not to be made till the Michaelmas following, before which time the lease would have expired (*z*). By indenture dated 21st March, a messuage was demised from 25th March then instant, for seven years wanting seven days, paying therefor yearly and every year during the term the yearly rent of 285*l.* by four equal quarterly payments on the 25th of March, 24th June, 29th September, and 25th December, in every year commencing from the said 25th March then instant; it was held, that this was either a covenant to pay a beforehand rent, whereby all the payments would become due within the term, or else that, by virtue of the words yearly and every year, the lessee would be liable for the last quarter's rent on a day after the expiration of the term (*a*). Where, by agreement, dated 8th September, a house was let for seven years at an annual rent payable quarterly, the *first payment* to be made on the 25th March following, it was held that only a quarter's rent became due on the 25th March, and that in effect the payment for the first quarter was postponed until after the end of the term (*b*).

"Gale."

Each periodical payment of rent is termed a "gale," from "*gaval*," a rent or duty, and each "gale" is a distinct debt (*c*).

"Team Work."

In a lease of a farm, the clause "the tenant to perform each year for the landlord at the rate of one day's team work with two horses and one proper person for every 50*l.* of rent when required (except at hay and corn harvest), without being paid for the same," extends to other than agricultural work, such as hauling coals; but it does not oblige the tenant to find a cart, plough or other vehicle or machine necessary for the performance of the work (*d*).

### (c) *To whom Rent reserved.*

Rent must be reserved to Lessor himself.

Rent must be reserved to the lessor himself, and not to a stranger, for it is something paid by way of retribution or compensation for the land, and ought to be made to him from whom the land passes; only the crown can make a reservation of rent to a stranger (*e*). If A., and B., his son, by lease reciting that B. is the heir apparent of A., let for years to commence after the death of A., rendering rent to B., it will be void; for a reservation to him by his proper name, and not to him as heir, is the same as if it were to a stranger (*f*). Where by a lease rent was reserved to a person *not a*

(*z*) Gilb. Rents, 49, 51; *Hill* v. *Grange*, Plow. 171.
(*a*) *Hopkins* v. *Helmore*, 8 A. & E. 463.
(*b*) *Hutchins* v. *Scott*, 2 M. & W. 809.
(*c*) *Welby* v. *Phillips*, 2 Vern. 129.
(*d*) *Duke of Marlborough* v. *Osborn*, 5 B. & S. 67; 33 L. J., Q. B. 148.
(*e*) Lit. s. 346; Co. Lit. 47 b; Id. 143 b; Gilb. Rents, 54.
(*f*) Com. Dig. tit. *Rent* (B. 5); *Oates* v. *Frith*, Hob. 130; Co. Lit. 47, 143 b; *Sacheverell* v. *Froggat*, 1 Ventr. 161; 2 Saund. 370; Gilb. Rents, 59.

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*party* to the lease, and the lessees covenanted with him and the lessors to pay rent, &c., it was held, that he could not join with the lessors in an action of covenant for non-payment of the rent (*g*). Where there is any doubt as to the person to whom the reservation should be made, the clearest and safest way is to reserve the rent *generally, during the term* (*without saying to whom*), and leave it to be distributed by the law in the mode pointed out in *Whitlock's case* (*h*): for if the reservation of rent be general, the law directs it to be paid according to the intent and the nature of the thing demised. In such case the rent goes to the person who would have succeeded in the estate if the lease had not been made (*i*).

Effect of Inaccuracies of Expression as to Parties in the Reservation.

As rent is intended by law to follow the reversion, inaccuracies of expression, by which the reservation is made to other persons than the reversioner, have not the effect of severing it from the reversion; thus, if the reservation be made to the owner in fee, "his heirs, executors or assigns," the word "executors" will be rejected, and the rent will go with the reversion and belong to the heirs (*k*). In any case (except under a power) it is safe to make the reservation to the lessor, "his heirs, executors, administrators, and assigns" (*l*). If a lessee for a term of years make a lease for a less term of years, rendering rent to him "and his heirs during the term," it will go to his executors (*m*); but it seems to be otherwise when the words "during the term" are omitted (*n*). If a tenant in tail demise for years, rendering rent to himself and his heirs, this goes to the heir in tail (*o*), and not to the general heir. So if a tenant in tail to him and the heirs male of the body of his father, lets the land, rendering rent to him, "his heirs and assigns," the rent will go to the heir male of the body of his father, though he be not heir to the lessor (*p*).

If a tenant for life, having a power, demise, rendering rent to himself, his heirs and assigns, "it shall be adjudged to him in remainder" (*q*).

Reservation by Tenant for Life.

*Whitlock's case.*

It appears that a simple reservation of rent to the lessor only, not mentioning his heirs, is good for the life of the lessor only (*r*); but that a reservation to the lessor or his heirs *during the term* is good for the whole of the term (*s*). Where the words "during the term" are

(*g*) *Ld. Southampton* v. *Brown*, 6 B. & C. 718.
(*h*) *Whitlock's case*, 8 Co. R. 70, 141.
(*i*) Gilb. Rents, 64, 71.
(*k*) Id. 61; Cro. Car. 207; Co. Lit. 47 a.
(*l*) *Dollen* v. *Batt*, 4 C. B., N. S. 768; *Whittome* v. *Lamb*, 12 M. & W. 813.
(*m*) Gilb. Rents, 66; 1 Ventr. 162; 2 Wms. Saund. 371, n. (7).
(*n*) Gilb. Rents, 66; 1 Ventr. 161.
(*o*) Com. Dig. tit. *Rent* (B. 5); *Sacheverell* v. *Froggat*, 1 Ventr. 161; 2 Wms. Saund. 371, n. (7); Sir T. Raym. 213.
(*p*) *Cother* v. *Merrick*, Hardr. 91, 95: Gilb. Rents, 70.
(*q*) *Whitlock's case*, 8 Co. R. 70 b; Gilb. Rents. 70: 2 Wms. Saund. 371, n. (7); *Greenaway* v. *Hart*, 14 C. B. 340.
(*r*) Co. Lit. 47 a.
(*s*) *Sacheverell* v. *Froggat*, 1 Ventr. 161.

omitted, and the reservation be either to the lessor *or* his executors or assigns (*t*), or to the lessor *or* his assigns (*u*), the reservation is good for the life of the lessor only.

### (d) *Sums in Gross, quasi Rent.*

Where a Sum reserved may enure by way of Contract, though not as Rent.

A reservation of an annual sum of money to a third person in consideration of a demise, may be good by way of contract, though it is not a sufficient reservation of rent, but the grantee cannot distrain for it, because he has not the reversion (*x*). If a lessee simply covenant to pay such a sum yearly, without mentioning it as a consideration of the demise of the premises, it is not a rent, properly so called, but a sum in gross (*y*). So under a contract for a building lease, where sums in the nature of rent are from time to time to be paid before the lease is granted, such payments are sums in gross, and not rent (*z*). Where a landlord who had demised premises for a term of years at a certain rent, afterwards agreed to enlarge the buildings, the lessees agreeing to pay 10*l.* per cent. additional on the outlay; it was held, that this was a collateral agreement, and not a contract running with the land (*a*). So where a sum of money is made payable for goodwill, over and above the rent, this additional sum, though payable annually, is not to be considered as rent, but only as a sum in gross (*y*). Where a lease reserved a rent of 40*l.* per annum, and at the end of it, the words "the allowance of the road to the Six Bells' Yard to be made as usual" were added, and it appeared that it had been usual for the landlord to allow a payment of 5*l.* annually, which the lessee paid to a third person for the use of a road, it was held, that the clause in question was a mere covenant, and not an alteration of the rent, so as to support a plea of non tenuit in replevin (*b*).

### (e) *In Lease of Settled Land.*

"Best Rent."

The power of leasing commonly introduced into settlements of estates in England requires the best rent to be reserved, and expressly prohibits the taking of a fine (*c*). Formerly these powers required the ancient or usual rent (*d*) to be reserved, but at the present day this practice is very properly exploded (*e*), and the Settled Land Act, to which reference at length has already been

(*t*) Gilb. Rents, 62.
(*u*) Id. 65.
(*x*) *Oates* v. *Frith*, Hob. 130.
(*y*) *Smith* v. *Mapleback*, 1 T. R. 441; 1 R. R. 247.
(*z*) *Howlett* v. *Tarte*, 10 C. B., N. S. 813; 31 L. J., C. P. 146; *Marquis of Camden* v. *Batterbury*, 7 C. B., N. S. 864.
(*a*) *Lambert* v. *Norris*, 2 M. & W. 333; *Hoby* v. *Roebuck*, 7 Taunt. 157; 17 R. R. 777; *Donellan* v. *Read*, 3 B. & Ad. 899.
(*b*) *Davies* v. *Stacey*, 12 A. & E. 506.
(*c*) Sug. Pow. 779 (8th ed.).
(*d*) For construction of these terms see Sug. Pow. 790, citing *Right* v. *Thomas*, 1 W. Blac. 446, and other cases.
(*e*) Id. 790.

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made (*f*), expressly requires the best rent to be reserved that can reasonably be obtained.

Power to allow for Agricultural Improvements.

Less than Best Rent for Working Men's Dwellings.

In two cases, however, the best rent need not of necessity be reserved. Where the holding is agricultural, and the tenant has made or paid for improvements thereon, the 43rd section of the Agricultural Holdings Act, 1883, provides that it shall not be necessary, in estimating the rent, to take into account against the tenant the increase in value arising from the improvements. Where a lease is made of land for the purpose of erecting thereon dwellings for the working classes, the 74th section of the Housing of the Working Classes Act, 1890, 53 & 54 Vict. c. 70, re-enacting the 11th section of the Housing of the Working Classes Act, 1885, 48 & 49 Vict. c. 72, and substituted for that section within the meaning of s. 18 of the Settled Land Act, 1890, 53 & 54 Vict. c. 69, so that the expression "working classes" includes all classes of persons who earn their livelihood by wages or salaries in buildings of a rateable value not exceeding 100*l.* per annum, provides that the lease may be "for such rent as having regard to the said purpose, and to all the circumstances of the case, is the best that can reasonably be obtained, notwithstanding that a higher rent might have been obtained if the land were leased for another purpose."

Construction of "Best Rent."

Whether the "best rent" is reserved is a question of fact to be decided by a jury (*g*), or a Judge if the action in which the question arises is tried by a Judge without a jury. Improvements by the tenant, however valuable, will not authorize a lease at an undervalue (*h*), unless the holding be agricultural (*i*). Where a testator gave lands to trustees upon certain trusts, with a power to lease for the best yearly rent without fine or foregift; it was held that a lease for a fixed rent, with a proviso that the first five years' rent should be paid in advance, was not warranted by the power (*k*). A lease from 11th October, making the rent payable by half-yearly payments on the 6th of April and the 11th of October, except the last half-year's rent, which was made payable on the 1st of August before the end of the term, was held good, as being more likely to benefit than to prejudice the remainderman (*l*). Under a power to grant leases for twenty-one years, "so as upon every such lease there shall be reserved the best improved rent that can reasonably be had for the same," a lease by a tenant for life, reserving a larger rent than had been paid to the devisor, but not the best rent which could have been fairly obtained though there was no fraud or collusion, was

(*f*) Ante, Chap. I., Sect. 4.
(*g*) *Doe* d. *Sutton* v. *Harvey*, 1 B. & C. 426; 25 R. R. 444.
(*h*) *Roe* v. *Archbp. of York*, 6 East, 86; 8 R. R. 413.
(*i*) See Agricultural Holdings Act, supra.
(*k*) *Booth* v. *A'Beckett*, 1 Moo. P. C. C. (N. S.) 201; 9 L. T., N. S. 68.
(*l*) *Rutland* d. *Doe* v. *Wythe*, 2 M. & W. 661; 12 Id. 355; 10 Cl. & F. 419.

determined to be void (*m*). It would seem that the best rent means the best rack-rent that can reasonably be required by the landlord, taking all the requisites of a good tenant for the permanent benefit of the estate into the account (*n*). A lease at 43*l*. a year, granted under a power directing the best rent to be reserved, cannot be impeached merely by showing that the lessor rejected at the time two specific offers, one at 50*l*. and another of from 50*l*. to 60*l*. from other tenants, though the responsibility of such other tenants could not be disproved; for in the exercise of such a power, where fairly intended, and no fine or other collateral consideration is received, or injurious partiality plainly manifested by the lessor, all other requisites of a good tenant are to be regarded as well as the mere amount of the rent offered, unless something extravagantly wrong in the bargain for rent be shown (*n*). In *Doe* v. *Harvey* a power was reserved to grant leases for a term not exceeding seven years, "so as there was reserved in such leases the best rent that could be gotten for the same, without taking any premium for the making thereof." The donee of the power granted a lease for seven years at a specified rent, which lease contained a covenant by the lessee to find board, lodging and wearing apparel, during the term, for three children of the donee (if they wished it) at 7*l*. a year each, and for the donee's son gratis. It was held by Parke and Patteson, JJ., that (assuming a power to require two conditions, first, that the rent reserved should be the best rent, and secondly, that there should be no fine or premium) it did not clearly appear on the face of the lease that either of those conditions had been broken, because the covenant to maintain the children was not necessarily beneficial to the lessor, and, therefore, parol evidence was admissible to show that the rent reserved was the best that could be obtained (*o*). The best rent must be reserved during the whole term, so as not to prejudice any remainderman or reversioner (*p*); nor even the tenant for life who demises (*q*).

As to Fines or Premiums. *Isherwood* v. *Oldknow.*

A tenant for life under a settlement with power to lease at the "usual rent," may demise upon reserving the usual fines and rent, where the usual profit had previously been made by fines (*r*). Where there was a devise to the use of H. I. for life without impeachment of waste, &c., remainder to the use of plaintiff for life, with power to

(*m*) *Wright* v. *Smith*, 5 Esp. 203; 5 Dow. 344.

(*n*) *Doe* d. *Lawton* v. *Radcliffe*, 10 East, 278; 10 R. R. 295; *Dyas* v. *Cruise*, 2 Jon. & Lat. 460.

(*o*) *Doe* d. *Rogers* v. *Rogers*, 5 B. & Ad. 755 (diss. Taunton, J.).

(*p*) *Doe* d. *Sutton* v. *Harvey*, 1 B. & C. 426; 25 R. R. 444.

(*q*) *Mountjoy's case*, 5 Co. R. 6 a, b; Sug. Pow. 792. Where the rent is reserved at a future day by mistake, see *Marquis of Donegal* v. *Grey*, 13 Ir. Eq. R. 12, 52, 53.

(*r*) *Right* d. *Bassett* v. *Thomas*, 3 Burr. 1446; *Doe* d. *Newnham* v. *Creed*, 4 M. & S. 371.

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make leases for two or three lives, &c., or for the term of twenty-one years, so as there be reserved the best rent, without taking any sum or sums of money or other thing, for or in lieu of a fine; and H. I., by indenture of 15th October, leased for fourteen years, to be computed as to the meadow land from 13th February, the pasture from 25th March, and the messuage from 12th May previously, under a yearly rent, payable to the lessor and such other person as should be entitled to the freehold and inheritance, half-yearly on the 11th November and 25th March, the first payment to be made on 11th November next ensuing; and the lessee covenanted with the lessor, his heirs and assigns, for payment to the lessor and such other person, &c., of the rent at the days and times, &c.: it was held, that the reservation of the first half-year's rent, payable at the end of twenty-seven days, was not taking a sum of money for a fine, being in consideration of a preceding occupation (*s*). Where a power was given to a tenant for life to make leases, with or without a fine, at such rent as he thought proper: it was held, that a lease, without any reservation of rent whatever, was good (*t*).

Effect of Improvement of the Estate.

Where a tenant for life entered and built a new house upon the land, and then made a lease for twenty-one years, reserving only the ancient rent, &c., the court would not suffer an objection to it to be argued (*u*).

## SECT. 3.—*Penalty or Liquidated Damages.*

Penalty in Leases, &c.

Sometimes the payment of rent and performance of covenants in a lease or agreement for a lease are secured by a bond or penalty, with or without sureties (*x*). The right to such penalty will pass with the reversion as an incident thereto, and may be enforced against an assignee of the term (*y*). If there be a penalty to secure the payment of rent, the lessor must demand the rent at the day fixed for the payment of it (*z*). It seems that such penalty, like any other forfeiture, may be waived by acceptance of the rent (*a*). Whenever a breach first occurs, for which an action is necessary, the lessor may sue either for the penalty or for general damages (*b*).

Action for the Penalty.

Where the lessor elects to sue for the penalty he must allege (inter alia) that the penalty has not been paid: otherwise there will be no

(*s*) *Isherwood* v. *Oldknow*, 3 M. & S. 382; 16 R. R. 305.

(*t*) *Talbot* v. *Tipper*, Skin. 427; Sug. Pow. 433; *In re Molton*, 2 Ir. Com. L. R. 64; *Clarke* v. *Smith*, 9 Cl. & F. 126.

(*u*) *Read and Nash's case*, 1 Leon. 147; Sug. Pow. 799.

(*x*) See *Stancliffe*, app., *Clarke*, resp., 7 Exch. 439; 21 L. J., Ex. 129.

(*y*) Co. Lit. 61 b, 126; *Budloss* v. *Phillips*, Cro. Eliz. 895; *Thynn* v. *Cholmley*, Cro. Eliz. 383; *Egerton* v. *Sheafe*, Lutw. 1151; Gilb. Rents, 143.

(*z*) Bac. Abr. tit. *Condition* (O. 2); Id. tit. *Rent* (I.); *Grantham* v. *Thornborough*, Hob. 82, 133; Gilb. Rents, 74, 141: but see *Thynn* v. *Cholmley*, Cro. Eliz. 383.

(*a*) *Doe* d. *Cheeny* v. *Batten*, Cowp. 247; 9 R. R. 570.

(*b*) *Iceley* v. *Grew*, 6 N. & M. 467.

sufficient breach, and only general damages can be recovered (*c*). Such judgment will afterwards stand as a security for further breaches, which may be suggested from time to time when necessary (*d*). After obtaining judgment for the penalty the plaintiff cannot bring a fresh action for damages in respect of subsequent breaches, but must suggest them as above mentioned.

Action for Damages.

On the other hand, if the lessor (or his assigns) elect to sue for damages for any breach, he cannot afterwards maintain an action for the penalty, but he may recover damages *toties quoties* to a greater amount than the penalty (*e*). Only such damages as the jury shall find that the plaintiff has actually sustained by the alleged breaches can be recovered (*f*).

Liquidated Damages.

"Liquidated damages" are sums agreed to be paid, and *intended to be actually paid* (*g*), for the breach of any particular covenant or stipulation. Thus, where a tenant covenants or agrees not to plough up any of the ancient meadow or pasture ground, and that if he does so, he will pay an additional yearly rent of 5*l.* per acre; or that he will pay an additional specified rent per acre, and so in proportion, for every acre had in tillage beyond a certain quantity (*h*); or that he will not sow more than seventy acres with clover in one year, or if he does so, will pay an additional rent of 10*l.* for every acre above seventy for the residue of the term (*i*); or if the lease contain a stipulation that for every acre, and so in proportion for a less quantity, which the lessee should suffer to be occupied by any other person, without the consent of the landlord, an additional rent shall be paid (*k*); in these and similar cases the additional sums reserved become recoverable, when once the particular stipulation is broken, for the remainder of the term. Where a tenant held under a demise upon the terms not to sell any hay produced on the demised premises, off the said premises, "under the penalty of 2*s.* 6*d.* for each yard of the said hay so sold as aforesaid, to be recovered by distress as for rent in arrear:" it was held, that although this was not strictly a rent, it was not a penalty, but an agreed sum recoverable by distress as for rent (*l*).

Injunction.

Where an increased rent is reserved by way of liquidated damages, an injunction will not be granted to restrain the lessee from com-

(*c*) *Hurst* v. *Hurst*, 4 Exch. 571; 5 Exch. 203; *Reindell* v. *Schell*, 4 C. B., N. S. 97.

(*d*) *Astley* v. *Weldon*, 3 Bos. & P. 353; 5 R. R. 618; *Lowe* v. *Peers*, 4 Burr. 2228.

(*e*) *Lowe* v. *Peers*, 4 Burr. 2228; *Winter* v. *Trimmer*, 1 W. Blac. 395; *Harrison* v. *Wright*, 13 East, 343; 12 R. R. 369; *Mercer* v. *Irving*, E., B. & E. 563; 6 W. R. 661.

(*f*) See *Kemble* v. *Farren*, 6 Bing. 141.

(*g*) *Dimich* v. *Corlett*, 12 Moore, P. C. C. 199.

(*h*) *Rolfe* v. *Peterson*, 2 Bro. P. C. 436; *Bowers* v. *Nixon*, 12 Q. B. 546, 558; *Denton* v. *Richmond*, 1 Cr. & M. 734; *Birch* v. *Stephenson*, 3 Taunt. 469; 12 R. R. 679; *Howell* v. *Richards*, 11 East, 633; 11 R. R. 287; *Farrant* v. *Olmius*, 3 B. & A. 692.

(*i*) *Jones* v. *Green*, 3 Y. & J. 298.

(*k*) *Greenslade* v. *Tapscott*, 1 C., M. & R. 55 (user of small portions of land for raising potato crop).

(*l*) *Pollitt* v. *Forrest*, 11 Q. B. 949; 1 C. & K. 560.

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mitting the breach of covenant in respect of which the increased rent becomes payable (*m*), but where there was a covenant by a lessor not to carry on the business of a saddler within ten miles of the demised premises, and to pay 100*l.* by way of liquidated damages if he did, an injunction was granted (*n*).

Difference between a Penalty and Liquidated Damages.

The difference between a penalty and liquidated damages is very great. Although judgment may be obtained, execution cannot issue to levy the amount of a penalty, but only the damages assessed by the jury, with costs; and the judgment will stand as a security for any subsequent breaches (*o*). But liquidated damages constitute a debt of fixed amount, which may be recovered upon proof of the contract and breach, without any evidence as to the amount of damages actually sustained (*p*). In such case the jury is bound to give their verdict for the whole sum stipulated to be paid (however disproportionably large), and not for what they find to be the actual amount of damage sustained: otherwise the court will set aside the verdict, and grant a new trial (*q*). But the court will not set aside the award of an arbitrator on this ground, unless the mistake appear on the face of his award (*r*). Increased rent, being in the nature of liquidated damages, may be distrained for (*s*), but a penalty cannot.

How distinguished.

Notwithstanding the important differences between a penalty and liquidated damages, it is sometimes difficult to distinguish them: the numerous cases on this point are as to the ground of decision at any rate (*t*) somewhat conflicting. If expressly called a "penalty" in the contract, that is not conclusive (*u*); but if *pleaded* as a penalty, that is conclusive against the party so pleading (*x*). On the other hand, if expressly declared in the contract to be "liquidated and ascertained damages, and not a penalty or penal sum or in the nature thereof," it may be held to be a mere penalty (*y*).

*Kemble* v. *Farren.*

The leading case is *Kemble* v. *Farren* (*z*), in which it was laid down that where stipulations to do or not to do a series of things are followed by a stipulation for payment of one sum for the breach of any of such stipulations, such one sum must be considered as a penalty, but that where there is a stipulation to do or not to do any

(*m*) *Woodward* v. *Gyles*, 2 Vern. 119.
(*n*) *Jones* v. *Heavans*, L. R., 4 Ch. D. 636; 25 W. R. 355.
(*o*) Ante, note (*k*).
(*p*) *Astley* v. *Weldon*, 2 Bos. & P. 351; 5 R. R. 618; *Rolfe* v. *Peterson*, 2 Bro. P. C. 436; *Green* v. *Price*, 13 M. & W. 695; 16 Id. 346; *Galsworthy* v. *Strutt*, 1 Exch. 659; *Atkyns* v. *Kinnier*, 4 Exch. 776; *Sainter* v. *Ferguson*, 7 C. B. 716; *Reynolds* v. *Bridge*, 6 E. & B. 528; *Mercer* v. *Irving*, E., B. & E. 563.
(*q*) *Farrant* v. *Olmius*, 3 B. & A. 692; *Mercer* v. *Irving*, E., B. & E. 563; *Fletcher* v. *Dyche*, 2 T. R. 37; 1 R. R. 414.
(*r*) *Fuller* v. *Fenwick*, 3 C. B. 705.
(*s*) *Pollitt* v. *Forrest*, 11 Q. B. 949; *Bowers* v. *Nixon*, 12 Q. B. 546, 558.
(*t*) See per Bramwell, B., in *Newman's case*, L. R., 4 Ch. D. at p. 734.
(*u*) *Sainter* v. *Ferguson*, 7 C. B. 716; *Hurst* v. *Hurst*, 4 Exch. 571; 5 Id. 203; *Legge* v. *Horloch*, 12 Q. B. 1015; *Crux* v. *Aldred*, 14 W. R. 656, C. P.
(*x*) *Pollitt* v. *Forrest*, 11 Q. B. 949, 966.
(*y*) *Kemble* v. *Farren*, 6 Bing. 141.
(*z*) Id.

particular thing followed by a stipulation for the payment of a sum on breach, such sum must be considered as liquidated. Therefore, where lessees had covenanted to pay 100*l.* an acre for all land, on which they were allowed to place slag, not restored by them, the House of Lords held this to be liquidated damages, although the sum was described in one part of the lease as "the penalty therein stipulated" (*a*). The law on the question of penalty or liquidated damages may now be considered, after a great number of decisions, not, perhaps, all of them strictly reconcilable with each other, to be at length satisfactorily settled: and the hinge on which the decision in every particular case turns is *the intention of the parties*, to be collected from the language they have used. The mere use of the term "penalty," or the term "liquidated damages," does not determine that intention; but, like any other question of construction, it is to be determined by the nature of the provisions and the language of the whole instrument. One circumstance, however, is of great importance towards arriving at a conclusion; if the instrument contains many stipulations of varying importance, or relating to objects of small value *calculable in money*, there is the strongest ground for supposing that a stipulation, applying generally to a breach of all or any of them, was intended to be a penalty, and not in the way of liquidated damages (*b*).

Additional rent for hay or straw sold.

Where there was an agreement to pay an additional rent of 3*l.* per ton by way of penalty for every ton of hay or straw which should be sold off the premises during the last twelve months of a tenancy, and it appeared that the manurial value of hay was substantially (*i.e.*, about 5*s.* a ton) less than that of straw, and hay had been sold, it was held that the 3*l.* per ton was a penalty and not liquidated damages, so that the manurial value only (from 15*s.* to 1*l.* per ton) of the hay sold was recoverable (*c*).

Forfeiture of a Deposit.

Where a deposit is made to secure the due performance of a written contract, and it is to be *forfeited* in case of any breach, such forfeiture may be enforced, and is not considered as a penalty (*d*); or, instead thereof, the amount of damage actually sustained may be recovered (*e*).

Increased Rent for Tillage.

Where there is a reservation of 5*l.* per acre during the last twenty years of a term, for every acre of meadow which the tenant shall plough, or convert into tillage during the said last twenty years of the term, and so after that rate for any greater or less quantity than

(*a*) *Ld. Elphinstone*, app., *Monkland, Iron, &c., Co.*, resps., L. R., 11 App. Cas. 332. The appeal was a Scotch one, but there is no difference between English and Scotch law on the point.

(*b*) *Kemble* v. *Farren*, supra, 420.

(*c*) *Willson* v. *Love*, [1896] 1 Q. B. 626; 65 L. J., Q. B. 474; 74 L. T. 580; 44 W. R. 450—C. A.

(*d*) *Hinton* v. *Sparkes*, L. R., 3 C. P. 161; 37 L. J., C. P. 81.

(*e*) *Icely* v. *Grew*, 6 N. & M. 467.

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an acre, or less time than a year, it is considered that the rent is due in the last twenty years, if the land is then ploughed, whether it was first ploughed within the last twenty years, or before; and the rent continues payable during the twenty years, though the land be again laid down to permanent grass (*f*). The right to additional rent for over tillage is not waived by the acceptance of the reserved rent with a knowledge of the breach (*g*).

Increased Rent in Publican's Lease for not taking Lessor's Beer.

The provision inserted in a publican's lease of what is called a "tied house," that the lessee shall take all his beer from the lessor, or else pay an advanced rent, has been much censured by the courts; and, at all events, such a covenant is subject to an implied condition, and cannot be enforced unless the lessee be supplied with good beer (*h*).

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### SECT. 4.—*When Rent is due.*

Rent is due in the Morning, must be demanded at Sunset, and is in Arrear after Midnight.

The rules of the common law with respect to the time when rent is due, and when it must be demanded, are very curious and precise. It seems that rent is *due* in the morning of the day appointed for payment, but it is not *in arrear* until after midnight (*i*).

*Duppa* v. *Mayo.*

Time for Demand, in order to support a Re-entry at Common Law.

Just before and at sunset is the time appointed by law to make a proper demand of it (*k*), to take advantage of a condition of re-entry; the demand should be made such time before sunset as to allow sufficient light to count the money (*l*); the person making the demand must remain on the land till the sun has set; and the demand must be actually or constructively continued till that time (*m*). The court will not take judicial notice of the time of sunset on a particular day, that must be proved by evidence (*n*). A demand made on the proper day at one o'clock is clearly bad (*o*), although a tender by the tenant or his agent at any time before or after sunset would be sufficient to save the forfeiture (*p*). But these niceties are usually dispensed with by express words in the lease, as has been already (ante, p. 337) explained.

Death of Landlord on Rent-day.
*Clun's case.*

Where a lessor, tenant in fee, died after sunset and before midnight, it was held that the heir and not the executor was entitled to

(*f*) *Birch* v. *Stephenson*, 3 Taunt. 469; 12 R. R. 679; *Howell* v. *Richards*, 11 East, 633; 11 R. R. 287; Bac. Abr. tit. *Rent* (F.).

(*g*) *Denton* v. *Richmond*, 1 C. & M. 734.

(*h*) *Cooper* v. *Twibill*, 3 Camp. 286; 13 R. R. 803; *Holcombe* v. *Hewson*, 2 Camp. 391; 11 R. R. 746; *Stancliffe*, app., *Clarke*, resp., 7 Exch. 439; 21 L. J., Ex. 129.

(*i*) *Dibble* v. *Bowater*, 2 E. & B. 564; *Cutting* v. *Derby*, 2 W. Blac. 1077.

(*k*) *Duppa* v. *Mayo*, 1 Saund. 287; 2 Salk. 578; Cole Ejec. 413.

(*l*) Co. Lit. 202 a; *Maund's case*, 7 Co. R. 28 b; *Tinckler* v. *Prentice*, 4 Taunt. 549; 13 R. R. 684.

(*m*) *Wood and Chiver's case*, 4 Leon. 179; *Acocks* v. *Phillips*, 5 H. & N. 183.

(*n*) *Collier* v. *Nokes*, 2 C. & K. 1012.

(*o*) *Doe* d. *Wheeldon* v. *Paul*, 3 C. & P. 613.

(*p*) Plow. 172 a; Co. Lit. 202 a; *Cropp* v. *Humberton*, Cro. Eliz. 48.

the rent (*q*); but payment to the lessor or his agent on the morning of the rent-day, the lessor dying before noon, is valid as against the heir, though not against the crown (*r*). Where the rent was reserved payable on Michaelmas-day, and the lessor died on that day between three and four o'clock in the afternoon before sunset, and a question was raised whether the executor or the heir, or, which is the same, the jointress of the lessor, should have the rent, it was held that the rent should go to the heir or jointress (*s*).

Payment of Rent in Advance.

Payment before the day is voluntary and a payment of a sum in gross, and no satisfaction at law of the rent (*t*); but it seems it will be otherwise in equity, for payment of rent to the tenant in tail or for life, *on* or even *before* the day, where the tenant in tail lived to the rent-day (*u*), will discharge the lessee, though if the tenant in tail die on the same day, the remainderman is entitled to recover the rent so paid from his representatives. If a tenant make a payment in advance, and the landlord dies before the rent-day, the payment may be pleaded by way of an equitable defence, to an action by the landlord's executors for the rent (*x*). But a payment of rent in advance is not within 4 Ann. c. 16, s. 10, so as to discharge the tenant from his obligation to pay rent to the assignee of the reversion, in case he received notice of the assignment before the rent is due (*y*).

At what Days in the Year Rent is due.

Where rent is reserved generally, and no mention is made, as is usual, of half-yearly or quarterly payments, nothing is due until the end of the year (*z*): and where, after signing a written agreement which made no mention of the time when the rent was to be paid, the landlord asked the tenant how he would like to pay the rent, and the tenant replied quarterly, and the rent was accordingly paid quarterly, it was held that the rent was still due annually, and not quarterly (*a*). Where there is a general reservation of a yearly rent, a clause to put an end to the term, by notice expiring on any quarter day, will not make the rent payable quarterly (*b*). In a case where an agreement was dated the 21st January, and a person thereby agreed to become tenant, "at the customary time of entry," at a certain rent to be "paid at the usual time," "as agreed upon;" and he entered at

(*q*) *Duppa* v. *Mayo*, 2 Salk. 578; 1 Wms. Saund. 287; *Clun's case*, 10 Co. R. 127 b; *Ld. Rockingham* v. *Penrice*, 1 P. Wms. 177; 1 Salk. 578; 1 Swanst. 345, note; *Re Cludow*, 3 Kay & J. 689; 26 L. J., Ch. 513.

(*r*) *Clun's case*, 10 Co. R. 127 b.

(*s*) *Ld. Rockingham* v. *Penrice*, 1 P. Wms. 177; 1 Salk. 578; 1 Swanst. 345, note; Bac. Abr. tit. *Rent* (H.).

(*t*) *Clun's case*, 10 Co. R. 127 b; *Ld. Cromwell* v. *Andrews*, Cro. Eliz. 15.

(*u*) *Ld. Rockingham* v. *Penrice*, supra; Bac. Abr. tit. *Rent* (H.).

(*x*) See *Nash* v. *Gray*, 2 F. & F. 391.

(*y*) *De Nicolls* v. *Saunders*, L. R., 5 C. P. 58; 39 L. J., C. P. 297; 22 L. T. 661; 18 W. R. 1106; *Cook* v. *Guerra*, L. R., 7 C. P. 132; 41 L. J., C. P. 89; 26 L. T. 97; 20 W. R. 367.

(*z*) *Cole* v. *Sury*, Latch. 264; Com. Dig. *Rent* (B.), 8; *Gray* v. *Chamberlain*, 4 C. & P. 260; *Coomber* v. *Howard*, 1 C. B. 440.

(*a*) *Turner* v. *Allnay*, Tyr. & G. 819.

(*b*) *Collett* v. *Curling*, 10 Q. B. 785; 5 D. & L. 605.

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Lady-day, the usual time of entry being the 12th of May, the usual time of rent becoming payable, being once a year, at Michaelmas, and the rent-day, when it was paid, being the 8th January: it was held, that there was evidence that the rent was payable at Michaelmas, and that it was not necessarily payable at the end of the year, from the time of entry (*c*). When the rent is made payable on certain days in the year, it is due on the first of the days occurring in point of time, without regard to the local order of the words (*d*). If rent is intended to be made payable in advance, such intention should be clearly expressed (*e*). A covenant that a half-year's rent shall remain in the hands of the tenant till the last year, means the "current half-year" (*f*). Where rent was reserved quarterly, or *half-quarterly if required*, and the landlord received the rent quarterly for the first twelve months, it was held, that he could not, without notice, distrain for a half-quarter's rent (*g*).

## SECT. 5.—*Payment of Rent.*

Rent a Debt of high Nature.

Rent is considered as of a higher nature than even a debt due on an instrument under seal, as between the parties themselves. In the case of the death of the tenant, it was, prior to the act 32 & 33 Vict. c. 46, of equal degree with specialty debts, so as, in the distribution of the deceased's estate, to be payable with debts of that degree (*h*); but now, by virtue of that statute, all the creditors of a deceased person are treated as standing in equal degree. Rent in arrear is no part of the reversion; and therefore when rent becomes due after delivery to the sheriff of a writ of elegit against the lessor, but before inquisition taken thereon, it is not payable to the execution creditor (*i*).

Attachment of Rent.

Rent due and owing to a judgment debtor may be ordered by a divisional court, a judge, or a master, to be attached in the hands of his tenant, as a debt, under the Rules of the Supreme Court (Order XLV., Rule 2) (*k*). But accruing rent not due cannot be so attached (*l*). Rent which is overdue cannot be attached under a foreign attachment in London (*m*).

Payments by mistake to the wrong Person.

A payment of rent, by mistake or misrepresentation, to a person not entitled to demand it, does not preclude the tenant from showing that the person to whom it was paid was not entitled to it (*n*), but the

(*c*) *Gore* v. *Lloyd*, 12 M. & W. 463.
(*d*) *Hill* v. *Grange*, Plowd. 171.
(*e*) Ante, Sect. 1.
(*f*) —— v. *Nicholls*, Lofft. 393.
(*g*) *Mallam* v. *Arden*, 10 Bing. 299.
(*h*) *Thompson* v. *Thompson*, 9 Price, 471.
(*i*) *Sharp* v. *Key*, 8 M. & W. 379; 9 Dowl. 770.
(*k*) *Mitchell* v. *Lee*, 8 B. & S. 92; L. R., 2 Q. B. 259; decided on s. 62 of the Common Law Procedure Act, 1854, from which Order XLV., Rule 2, differs only in enlarging the discretion of the court.
(*l*) *Jones* v. *Thompson*, 27 L. J., Q. B. 234; and see for the general principle, *Tapp* v. *Jones*, L. R., 10 Q. B. 591.
(*m*) Com. Dig. *Attachment* (D.), cited 8 B. & S. 95.
(*n*) *Rogers* v. *Pitcher*, 6 Taunt. 202.

onus of proof is shifted. Therefore, if A., who is a tenant for life subject to forfeiture, with remainder over to B., lease to C. for a term, and afterwards, apprehending that he has forfeited, acquiesce in B.'s claiming and receiving the rent from C.; his executor may, on showing that he acquiesced under a false apprehension, recover from C. the amount of the rent erroneously paid to B. (*o*). Where an old corporation, before the Municipal Reform Act, were trustees of a charity, and a tenant of the charity paid rent after the new corporation came into office to the secretary of the old corporation, who still continued as charity trustees, it was held that this was a good payment as against the new corporation (*p*).

Allowances by mistake of Deductions from Rent.

An allowance by way of deduction from the rent, even though made by mistake, operates as payment of the rent, pro tanto: thus where a tenant paid rent regularly to the landlord's agent, deducting a sewers rate, which by the terms of the agreement under which the tenant held he ought himself to have paid, it was held, that, in an action to recover the sums so deducted as arrears of rent, a plea of payment was supported by the facts (*q*).

Rent is payable on the Land, except in the Case of a Covenant. *Haldane* v. *Johnson.*

Rent reserved, payable yearly, or otherwise, is to be paid *on the land*, because the land is the debtor, and that is the place of demand appointed by law: so if a man lease, rendering rent, and the lessee binds himself in a sum to perform the covenants, this does not alter the place of payment of the rent, for it may be tendered on the land without seeking the obligee, except where the condition is for the performance of homage or other corporeal service to the person of the lord (*r*). This, however, which is a rule of the common law, applies only to re-entry for non-payment of rent, and not to an action on the covenant to pay it. Such a covenant (if no particular place of payment be mentioned) is analogous to a covenant to pay a sum of money in gross on a day certain, in which case it is incumbent on the covenantor to seek out the person to be paid, and pay or tender him the money, for the simple reason that he has contracted so to do. So it was held in the considered case of *Haldane* v. *Johnson* (*s*), where the authorities for this somewhat harsh doctrine (which applies, if only the landlord be intra quatuor maria) will be found carefully examined.

Lessee of Crown.

The lessee of the crown must pay his rent, without demand, at the Exchequer, wherever it may be; but if the crown grant the

(*o*) *Williams* v. *Bartholomew*, 1 Bos. & P. 326; 4 R. R. 81; *Gregory* v. *Doidge*, 3 Bing. 474; *Claridge* v. *Mackenzie*, 4 M. & G. 143.

(*p*) *Mayor, &c., of Ludlow* v. *Charlton*, 9 C. & P. 242.

(*q*) *Waller* v. *Andrews*, 3 M. & W. 312; *Bramston* v. *Robins*, 4 Bing. 11.

(*r*) Co. Lit. 201 b; *Rowe* v. *Young*, 2 Brod. & B. 234; 2 Bligh, 391; 21 R. R. 91; Shep. Touch. 378; *Crouch* v. *Falstolfe*, Sir T. Raym. 418; Com. Dig. *Pleader*, (2 W. 49).

(*s*) *Haldane* v. *Johnson*, 8 Exch. 689; 17 Jur. 937; 22 L. J., Ex. 264.

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reversion, the rent must be demanded on the land before the grantee can enter as for a forfeiture on non-payment (*t*).

Remittance of Rent through Post.

Like any other species of debt, rent is often paid by a remittance by the post. But remitting through the post is departing from the mode of payment marked out by law, and in the absence of a recognition by the landlord of the use of the post, the loss by post would fall on the tenant. It has been held that if a tenant be directed by his landlord to remit money by the post, and it be lost, the latter must bear the loss (*u*) ; but even in this case, it is said, the tenant must show due caution (*x*), such as, in the present day, using a registered letter. It is probable that slight evidence of an implied recognition by the landlord of the use of the post would be held sufficient ; but in every case it would be desirable to obtain an express recognition by the landlord, once for all, of the mode of payment. Where a creditor in the country directed his debtor to pay money into a London banking-house to his account, and had no account with the house but through a country banker ; it was held, that a payment there to the credit of his account with the country banker was a discharge to the debtor (*y*). Generally, a creditor may insist upon payment being made either to himself or his agent ; but having authorized payment to his agent, he cannot revoke that authority, if the debtor have given such a pledge to pay pursuant to the authority as would bind him in a court of law (*z*).

Payment by Bills or Notes. *Davis* v. *Gyde.*

If the landlord take *a security* for rent in arrear—as if he take a bond, bill of exchange, or promissory note—his so doing will not of itself amount to a payment of the rent, nor bar him of his remedies peculiar to the recovery of rent. So it was held in *Davis* v. *Gyde* (*a*), it having been previously ruled at nisi prius, that where the tenant gave a note of hand for rent in arrear, and took a receipt, he could not sue the landlord in trespass for a distress, but that, notwithstanding the note, the landlord might distrain, as the note was no alteration of the debt till payment (*b*). In another case, a tenant being indebted for rent, his landlord's agent received from the tenant a bill of exchange for the amount, which he indorsed over, and paid the rent to the landlord, crediting it in his accounts as if the tenant had paid the money. The landlord having distrained for rent, it was held to be a question for the jury whether the transaction amounted to a discount of the bill by the agent for the tenant, or a mere advance of rent by the agent to the landlord, in which latter

(*t*) Bac. Abr. tit. *Rent* (I.).
(*u*) *Warwick* v. *Noakes*, Peake, 67 ; 3 R. R. 653.
(*x*) *Hawkins* v. *Rutt*, Peake, 186.
(*y*) *Breed* v. *Green*, Holt, 204.
(*z*) *Hodgson* v. *Anderson*, 3 B. & C. 842.
(*a*) *Davis* v. *Gyde*, 2 A. & E. 624, on demurrer.
(*b*) *Harris* v. *Shipway* and *Ever* v. *Lady Clifton*. Bull. N. P. 182 ; *Seven* v. *Mihil*, 1 Ld. Ken. 370.

case he was entitled to distrain (*c*). Where to covenant for rent against three defendants, it was pleaded that 41*l.* of the rent was paid; that of the residue two of the defendants had paid their shares, and that the other had given the plaintiff a promissory note for his share payable at a banker's; that such note was dishonoured, whereupon the plaintiff sued him and had judgment by default on the note, which judgment was still unsatisfied; it was held, that the judgment was no merger, being obtained on a collateral security, and not having produced actual satisfaction (*d*). In *Davis* v. *Gyde*, however, which was decided on demurrer, more than one member of the court pointed out that a special agreement, made at the time of the note, for suspending the distress, might have suspended the right to distrain, and in *Palmer* v. *Bramley* (*e*) it was pointed out that *Davis* v. *Gyde* is no authority that the giving of a bill is no evidence of an agreement to suspend the landlord's right of distress, no such agreement having been averred in the pleadings in that case; and it was expressly held that the fact of a landlord taking a bill of exchange from his tenant for rent due is some evidence of an agreement by the landlord to suspend his remedy by distress during the currency of the bill. *Davis* v. *Gyde* seems to bear very hardly on the tenant, and, although it is not likely to be overruled, it is submitted that it is incorrect, on the ground that the acceptance of a negotiable security constitutes an implied suspension of the right to distrain, and that the substitution of the simple remedy upon a note for the more cumbrous remedy otherwise open to the landlord is a good legal consideration. A similar remark will apply to *Skerry* v. *Preston* (*f*), in which it was held that an agreement to take interest did not postpone the right of distress.

Stamp-duty on Receipts for Rent.

Receipts for rent require to be stamped with a penny stamp, which, if adhesive, as it generally is, must be cancelled by the person giving the receipt before he delivers it out of his hands, if the sum received amounts to 2*l.* or upwards. The fine for giving a receipt liable to duty and not duly stamped, or refusing "in any case where a receipt would be liable to duty," to give a receipt duly stamped, is 10*l.* recoverable by information in the High Court, in the name of the Attorney-General (*g*).

Fraudulent Reduction of Rents.

Where a landlord fraudulently reduced various sums of money payable by his tenants, and the evidence of payments by them consisted of memoranda of accounts delivered to the tenants in which

(*c*) *Parrott* v. *Anderson*, 7 Exch. 93; *Griffiths* v. *Chichester*, Id. 95.

(*d*) *Drake* v. *Mitchell*, 3 East, 251; 7 R. R. 449.

(*e*) *Bramley* v. *Palmer*, [1895] 2 Q. B. 405; 65 L. J., Q. B. 42; 73 L. T. 329; 14 R. 692—C. A.

(*f*) *Skerry* v. *Preston*, 2 Chit. R. 245.

(*g*) Stamp Act, 1891, 54 & 55 Vict. c. 39, ss. 101—103, 121, and Schedule, tit. *Receipt*.

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Receipt and Stamp—*contd.*

the items in question were set down, and to each of which the landlord wrote the word "paid;" it was held, that such memoranda were admissible in evidence without a stamp, when coupled with entries in the steward's books to the same effect (*h*). A paper signed by the lessor in this form—"Mr. J. (the lessee) having written off the sum of 72*l.* from his mortgage debt, being five quarters' rent of his house, I hereby discharge the same rent to the 24th day of July last"—requires a receipt stamp (*i*). A paper in form of a receipt, if it is not given in evidence *as* a receipt, does not require a stamp (*k*); and an unstamped receipt may be used by a witness who can prove the fact, independently, to refresh his memory (*l*).

When Payment of Ground-rent operates as payment pro tanto of the Rent.

A payment of ground-rent by the tenant, in default of payment by his mesne landlord, may operate as payment pro tanto of the rent claimed by the latter (*m*); and growing rent may be discharged by such payments as well as rent actually due (*n*). Such payments are not the less compulsory because the ground landlord, on demanding the ground-rent, allows the occupier time to pay (*n*). Where a stranger received rent due to the testator in his lifetime, and afterwards, by desire of the tenant in possession, paid the demand of ground-rent due at the same time for the said premises; it was held, that he might deduct such payment in an action by the executor for the rent, but not a payment of ground-rent arising after the death of the testator (*o*).

Payment of Taxes, Rates, &c.

A payment of property-tax operates as a payment pro tanto of the rent, notwithstanding any stipulation in the lease to the contrary (*p*). So a payment of land-tax, sewers-rate, rent-charge in lieu of tithes, and other charges of the like nature, may, in the absence of any express stipulation for their payment by the tenant, operate as a payment pro tanto of the rent, and be deducted accordingly on the next payment of rent (*q*).

When other Payments may be deducted from the Rent.

It has been said that wherever a tenant may be ousted from his occupation on default made of a payment by his landlord, he may pay in his discharge and for the redemption of the premises, and deduct such payment from his rent (*r*). Such payments, in event of the tenant being sued for the whole rent, would seem to fall within the scope of the Rules of the Supreme Court, 1883 (Order XIX. Rule 3), by which "a defendant in an action may set off or set up by way of counter-claim against the claims of the plaintiff, any right

(*h*) *Clarke* v. *Hougham*, 3 D. & R. 325.
(*i*) *Lucas* v. *Jones*, 5 Q. B. 949.
(*k*) *Brookes* v. *Davies*, 2 C. & P. 186; *Matheson* v. *Ross*, 2 H. L. Cas. 286.
(*l*) *Rambert* v. *Cohen*, 4 Esp. 213; 6 R. R. 854.
(*m*) *Doe* v. *Hare*, 2 C. & M. 145.
(*n*) *Carter* v. *Carter*, 6 Bing. 406; *Sapsford* v. *Fletcher*, 4 T. R. 511.
(*o*) *Wilkinson* v. *Cawood*, 3 Anst. 905.
(*p*) Post, Chap. XV.
(*q*) Post, Chap. XV.
(*r*) *Smith* v. *Pearce*, MS., sittings at Guildhall, after M. T. 43 Geo. 3, Lord Ellenborough, C.J.

or claim, whether such set-off or counter-claim sound in damages or not, and such set-off or counter-claim shall have the same effect as a cross action." Even before the Judicature Acts, it was held that in an action for rent the tenant might avail himself of a part payment obtained from him under a distress or a judgment of the County Court for the same rent (*s*), and that where a landlord was bound to repair, and the tenant was obliged by sudden accident to make repairs, in order to prevent further mischief, the tenant might set off the money laid out in repairs (*t*). It was, however, held that there could be no set-off where the tenant paid as rent a sum to prevent a person ejecting him from a portion of the land to which he claimed title from the lessor prior to the lease (*u*).

## Sect. 6.—*Proof for Rent against Liquidators of Company.*

Distress for rent upon premises demised to a company in liquidation is dealt with hereafter (Chap. XI., Sect. 7).

The landlord of a limited company being wound up or applying for leave to reduce its capital has been more than once held entitled to enter a claim for rent and royalties which may become due to him in future, and to an injunction to restrain the company from distributing its assets and dissolving without making proper provision for his payment (*v*). That these decisions require re-consideration since *Hardy* v. *Fothergill* (ante, p. 271) was intimated by the Court of Appeal in *Midland Coal, Coke and Iron Co., In re, Craig's Claim* (*x*), where it was held that a lessee raising such a claim was bound by a scheme under the Joint Stock Companies Arrangement Act, 1870. And although it has been pointed out that the rule of *Hardy* v. *Fothergill* does not apply to a subsisting lease to a company, and lessors refusing to accept a surrender and prove for loss can enter a claim for the whole of a future rent (*y*), and have the assets of the company impounded to meet such claim (*z*), but not its dividends to creditors (*a*) ; still in a case where a lessor is desirous of proving at once for his loss on the footing of the lease being determined or treated as determined, it is the duty of the court to assist him in proving. Great injustice would ensue if a liquidator were at liberty

(*s*) *Harmer* v. *Bean*, 3 C. & K. 307.
(*t*) *Waters* v. *Weigall*, 2 Anst. 575.
(*u*) *Boodle* v. *Cambell*, 7 M. & G. 386 ; 2 D. & L. 66.
(*v*) *Telegraph Construction Co., In re*, L. R., 10 Eq. 384 ; *Oppenheimer* v. *British, &c., Bank*, L. R., 6 Ch. D. 744 ; *Gooch* v. *London Banking Association*, 32 Ch. D. 41 ; *Elphinstone* v. *Monkland, &c., Co.*, 11 App. Cas. 332; all cited in the judgment in *Craig's Claim*, [1895] 1 Ch. at p. 276—C. A.
(*x*) *Midland Coal, Coke and Iron Co., In re, Craig's Claim*, [1895] 1 Ch. 267 ; 64 L. J. Ch. 279 ; 71 L. T. 705 ; 43 W. R. 680 ; 12 R. 62 ; 2 Manson, 75—C. A.
(*y*) *New Oriental Bank Corporation* (No. 2), [1895] 1 Ch. 753, per Vaughan Williams, J.
(*z*) *Haytor Granite Co., In re*, L. R., 1 Ch. 77.
(*a*) *Horsey's Claim*, L. R., 5 Eq. 361.

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to refuse to allow any proof except for rent actually accrued due; for he might apply all the assets in paying other creditors large dividends and leave the lessor with a mere claim for his future rent and in the position of there being no assets available for payment of any part of the rent as and when it accrued due and became available (*b*).

## SECT. 7.—*Apportionment of Rent.*

### (a) *Apportionment in respect of Estate.*

Apportionment by Act of Law.

Apportionment of rent in respect of estate takes place by act of law where lands demised at an entire rent become divided among different persons; thus, if freehold and leasehold premises are let together at one rent, an apportionment takes place, at the death of the lessor, among the real and personal representatives.

By Alienation of the Lessor.

Apportionment at common law may also be by act of the parties: thus, if the lessor dispose of the reversion in part of the lands, either by deed or will, the rent is apportionable (*c*); but the lessee's concurrence to the apportionment is necessary, unless it be settled by a jury (*d*). When the lessee aliens part of the land, the alienee is liable for a proportional part of the rent if the landlord choose to proceed against him (*e*). Although the landlord has received rent from the assignee, the personal contract of the lessee still subsists, and renders him liable for the whole arrears in an action of covenant (*f*). When the lessee surrenders part of the land to the lessor, the rent for the remainder is apportioned. It would seem that the rent should be apportioned, not according to the quantity, but according to the value of each part as improved by buildings, &c. (*g*).

By Alienation of the Lessee.

By a Surrender.

Eviction of Lessee.

Where the lessee is evicted from part of the lands *by title paramount*, he will have to pay a rateable proportion for the remainder (*h*); but if he be evicted from part of the lands *by his landlord* (or his assigns), no apportionment, but a suspension of the whole rent, takes place (*i*). There is no suspension, however, if the eviction has followed upon some wrongful act of the lessee, such as a forfeiture or recovery of part of the lands in an action of waste (*k*).

(*b*) *Panther Lead Co., In re*, [1896] 1 Ch. 978, per Romer, J.

(*c*) *West* v. *Lascelles*, Cro. Eliz. 851; *Collins and Harding's case*, 13 Co. R. 57 a; Cro. Eliz. 609, 622.

(*d*) *Bliss* v. *Collins*, 5 B. & A. 876.

(*e*) *Stevenson* v. *Lambard*, 2 East, 575; 6 R. R. 511.

(*f*) *Bachelour and Gage's case*, Cro. Car. 188; *Ipswich (Bailiff)* v. *Martin*, 1 Roll. Abr. 235, pl. 17; *Orgill* v. *Kemshead*, 4 Taunt. 642; 13 R. R. 712.

(*g*) *Smith* v. *Malings*, Cro. Jac. 160; *Anon.*, Moor, 114.

(*h*) Gilb. Rents, 147; *Smith* v. *Malings*, Cro. Jac. 160; 1 Roll. Abr. 235; *Stevenson* v. *Lambard*, 2 East, 575; 6 R. R. 511; *Boodle* v. *Cambell*, 7 M. & G. 386; 2 D. & L. 66; *McLoughlin* v. *Craig*, 7 Ir. Com. L. R. 117.

(*i*) Smith L. & T. 287 (2nd ed.); but the tenant must perform all his covenants as to repair, &c., *Norton* v. *Allin*, 1 Q. B. 517; *Morrison* v. *Chadwick*, 7 C. B. 283.

(*k*) *Walker's case*, 3 Co. R. 22; 1 Roll. Rep. 331; Moor, 203.

Where a person demised, at one entire rent, lands of which he was seised in fee, and lands of which he was tenant for life with power of leasing; and the lease was void as to the latter lands for want of conformity to the power; the court held, that though the lease as to lands comprised in the power was void, the rent might be apportioned for the remainder (*l*). Similarly, where a lessor professes to grant an exclusive right of sporting, and it turns out that he has no such privilege, an apportionment of rent will be made on that account (*m*).

Demise of more than Lessor entitled to.

In *Neale* v. *Mackenzie*, a lessee of 100 acres of land accepted the lease (which was *not under seal*) and entered upon the land; upon his entry he found eight acres in the possession of a person entitled under a prior lease from the lessor, and that person kept possession of the eight acres until half-a-year's rent became due, the lessee continuing in possession of the remainder; the prior lease was for a term extending beyond the duration of the latter lease: it was held, that the latter demise was wholly void as to the eight acres, and that the rent was not apportionable, the impediment to the lessee taking possession not being analogous to an eviction by title paramount (*n*). But where the second demise was under seal, it was held to operate as a grant of the reversion as to the part previously demised (*o*). Where the tenant cannot obtain possession of all the premises demised, an action of *covenant* by the lessor against the lessee for the rent cannot be maintained, as in such action the rent cannot be apportioned (*p*).

*Neale* v. *Mackenzie.*

When Realty and Personalty are let together.

Where lands and goods are let at an entire rent, and the tenant is evicted from the lands, no apportionment can be made for the goods as the rent is held to issue from the land alone (*q*). Although the rent of furnished lodgings issues out of the realty only (*r*): yet where the mortgagor of a house let it furnished, and the tenant, after notice, paid the whole rent to the mortgagee, it was held, that the mortgagor might still recover for the use of the furniture (*s*). Where A. demised to B. certain mines for thirty years, with licence to use an adjoining railway in common with A., and during the term A. prevented B. from using the railway, it was held, that this created no suspension of the rent, because the rent issued out of the thing demised, *i.e.*, the mines and minerals, and not out of the easement to use the railway (*t*).

(*l*) *Doe* d. *Vaughan* v. *Meyler*, 2 M. & S. 276; 15 R. R. 244.

(*m*) *Tomlinson* v. *Day*, 2 Brod. & B. 680.

(*n*) *Neale* v. *Mackenzie* (in error), 1 M. & W. 747.

(*o*) *Ecc. Commrs. of Ireland* v. *O'Connor*, 9 Ir. Com L. R. 242.

(*p*) *Holgate* v. *Kay*, 1 C. & K. 341; but see *Ecc. Commrs. of Ireland* v. *O'Connor*, supra.

(*q*) *Ernot* v. *Cole*, Dyer, 212 b, in marg.; *Collins* v. *Harding*, Cro. Eliz. 606; 13 Co. R. 57; Moor, 544; *Cadogan* v. *Kennett*, Cowp. 432; Gilb. Rents, 175.

(*r*) *Newman* v. *Anderton*, 2 Bos. & P. New R. 224.

(*s*) *Salmon* v. *Matthews*, 8 M. & W. 827.

(*t*) *Williams* v. *Hayward*, 1 E. & E. 1040; 28 L. J., Q. B. 374.

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The loss of land to the lessee by the overflowing of the sea appears to be another case in which the tenant may claim apportionment: but the loss must be total pro tanto, for if there be merely a partial irruption of water, the exclusive right of fishing, which the lessee would thereupon have, would be such a perception of the profits of the land as to annul his claim (*u*).

Where Land lost by overflowing of Sea.

Where part of land on lease is taken for a railway or other public purposes, under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), the 119th section of that act provides that—

Apportionment under Lands Clauses Act.

> If any lands shall be comprised in a lease for a term of years unexpired, part only of which lands shall be required for the purposes of the special act, the rent payable in respect of the lands comprised in such lease shall be apportioned between the lands so required and the residue of such lands: and such apportionment may be settled by agreement between the lessor and lessee of such lands on the one part, and the promoters of the undertaking on the other part, and if such apportionment be not so settled by agreement between the parties, such apportionment shall be settled by two justices; and after such apportionment the lessee of such lands shall, as to all future accruing rent, be liable only to so much of the rent as shall be so apportioned in respect of the lands not required for the purposes of the special act; and, as to the lands not so required, and as against the lessee, the lessor shall have all the same rights and remedies for the recovery of such portion of rent as previously to such apportionment he had for the recovery of the whole rent reserved by such lease, and all the covenants, conditions, and agreements of such lease, except as to the amount of rent to be paid, shall remain in force with regard to that part of the land which shall not be required for the purposes of the special act, in the same manner as they would have done in case such part only of the land had been included in the lease.

By justices.

Covenants.

Apportionment under other Statutes.

Where part only of lands comprised in a lease for an unexpired term is conveyed, or agreed to be conveyed, for sites for schools for the education of the poor under the School Sites Act, 1841, 4 & 5 Vict. c. 38, the rent and the fine upon renewal may, by the School Sites Act, 1849, 12 & 13 Vict. c. 49, s. 1, be apportioned between the parties interested. By the Church Building Act, 1854, 17 & 18 Vict. c. 32, where parts of lands in lease are taken for the purposes of the Church Building Acts, rents and fines on leases and renewals may be apportioned. Under the Inclosure Act, 1854, 17 & 18 Vict. c. 97, for amending and extending the acts for the inclosure, exchange and improvement of land, rents and other certain payments may be apportioned. By 17 & 18 Vict. c. 116, to facilitate the management and improvement of episcopal and capitular estates in England, on the sale or exchange of part of lands comprised in any lease or copy of court roll, the rent must be apportioned.

(*u*) 1 Roll. Abr. 236, l. 40.

(b) *Apportionment in respect of Time.*

No Apportionment at Common Law.

At common law rent could not be apportioned in respect of time, and therefore when a tenant for life granted a lease for years, and died on any day not being rent day, the whole rent from the last rent day became lost, and the lessee retained the land without paying anything for it until the next rent day (*x*). This injustice has been remedied by a series of statutes culminating in the Apportionment Act, 1870, and as that act does not repeal the preceding statutes, it will be well to consider their effect shortly before setting out at length the provisions of the act which practically supersedes them.

11 Geo. 2, c. 19, s. 15. Distress for Rent Act, 1737.

The first statute, 11 Geo. 2, c. 19 (the Distress for Rent Act, 1737), s. 15, enacted that where any tenant for life should die before or on the day on which any rent was payable upon any demise, *which determined on the death of such tenant for life*, his executors or administrators might recover from the sub-tenant, "if such tenant for life die on the day on which the same was made payable, the whole, or if before such day, then a proportion of such rent, according to the time such tenant for life lived, of the last year or quarter of a year, or other time in which the said rent was growing due, making all just allowances, or a proportionable part thereof respectively." It was held, under this statute, that no apportionment of rent took place as between the heir and personal representative of a tenant in fee (*y*). The courts, however, considered it as a beneficial statute, and put a liberal construction upon it, holding, for instance, that the representatives of a tenant in tail, who had demised the entailed estate by a lease which was void against the remainderman, were entitled to an apportionment of the rent, even when the entire amount had been previously paid to the remainderman (*z*).

4 & 5 Will. 4, c. 22, s. 1. Apportionment Act, 1834.

By the Apportionment Act, 1834, 4 & 5 Will. 4, c. 22, s. 1, rents payable on any demise which determined on the death of the person making the same (although such person was not strictly tenant for life thereof), or on the death of the life or lives for which such person was entitled to such hereditaments, were brought within the operation of 11 Geo. 2, c. 19, s. 15.

By sect. 2 of the same act, it was enacted that all rents-service reserved on lease coming due at fixed periods, should be apportioned so that on the death of any person interested in any such rents, &c., or on the determination by any other means of the interest of any

(*x*) *Clun's case*, 10 Rep. 127 b; and see id. Tudor's Real Property Cases, at p. 249, where the whole law of apportionment before the act of 1870 is learnedly discussed. From the preamble to 11 Geo. 2, c. 19, s. 15, it seems that although the executor of the tenant for life could recover nothing, the reversioner could recover in respect of use and occupation.

(*y*) *Re Cludow*, 3 Kay & J. 689; 26 L. J., Ch. 513.

(*z*) *Whitfield* v. *Pindar*, C. P., *Hil.*, A.D. 1781, cited in *Hawkins* v. *Kelly*, 8 Ves. 311. See also *Ex parte Smyth*, 1 Swanst. 337; *Vernon* v. *Vernon*, 2 Bro. C. C. 659.

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such person he, or his executors, &c., should be entitled to a proportion of such rents, &c., according to the time which should have elapsed from the commencement or last period of payment thereof respectively, including the day of the death of such person, or of the determination of his interest; and that every such person, his executors, &c., should have the same remedies for recovering the apportioned parts of the said rents, &c., when the entire portion shall become due, as he would have had for recovering the entire rents, &c.

Apportionment Act, 1834.

It was held that this act applied to rents and royalties payable periodically and reserved by leases granted after the passing of the act, in pursuance of a power created before or since the act (*a*); but not to rents reserved under *oral* demises (*b*); nor as between the heir-at-law and personal representatives of a tenant in fee (*c*); nor as between a mortgagee tenant for life, who had not entered, and remaindermen, so as to give the mortgagee a right to rents which he would not have had until entry if the tenant for life had lived (*d*), and it was said not to apply where the party entitled to the rent himself determined the lease during a current quarter (*e*). But it was held to apply where a lessee of mines, having power to determine the demise by a six months' notice expiring at any time, gave such notice to the lessor (*f*).

Apportionment Act, 1870.

The Apportionment Act, 1870 (33 & 34 Vict. c. 35), which is retrospective (*g*), after reciting that rents are not at common law apportionable, "and for remedy of *some* of the inconveniences divers statutes have been passed" (being 11 Geo. 2, c. 19; 4 & 5 Will. 4, c. 22; 6 & 7 Will. 4, c. 71; 14 & 15 Vict. c. 25, and 23 & 24 Vict. c. 154), and that "it is expedient to make provision for the remedy of *all* such mischiefs and inconveniences," it is enacted (sect. 1) that—

All Rents accrue from Day to Day.

All rents (*h*), annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly.

Apportioned Part payable when whole due.

By sect. 2, "the apportioned part of any such rent," &c., "shall be payable or recoverable in the case of a continuing rent," &c.,

(*a*) *Plummer* v. *Whiteley*, 1 Johns. 585; 29 L. J., Ch. 247; *Knight* v. *Broughton*, 12 Beav. 312; *Wardroper* v. *Cutfield*, 33 L. J., Ch. 605; *Llewellyn* v. *Rous*, L. R., 2 Eq. 27; 35 Beav. 591.

(*b*) *Mills* v. *Trumper*, L. R., 4 Ch. 320.

(*c*) *Re Rogers' Trusts*, 30 L. J., Ch. 153.

(*d*) *Paget* v. *Marquis of Anglesea*, L. R., 17 Eq 283; 43 L. J., Ch. 437.

(*e*) *Oldershaw* v. *Holt*, 12 A. & E. 590; 4 P. & D. 307.

(*f*) *Bridges* v. *Potts*, 17 C. B., N. S. 314; 33 L. J., C. P. 338.

(*g*) *Capron* v. *Capron*, L. R., 17 Eq. 588; and see note (*o*), post.

(*h*) By sect. 5 the word "rents" includes "rent-service, rent-charge and rent-seck, and also tithes and all periodical payments or renderings in lieu of or in the nature of rent or tithe."

"when the entire portion of which such apportioned part shall form part shall become due and payable, and not before; and in the case of a rent," &c., "determined by re-entry, death, or otherwise, when the next entire portion of the same would have been payable if the same had not been so determined, and not before."

By sect. 4—

Remedies for recovering apportioned Part.

All persons and their respective heirs, executors, administrators and assigns, and also the executors, administrators and assigns respectively of persons whose interests determine with their own deaths, shall have such or the same remedies at law and in equity for recovering such apportioned parts as aforesaid when payable (allowing proportionate parts of all just allowances) as they respectively would have had for recovering such entire portions as aforesaid if entitled thereto respectively: provided (*i*) that such persons liable to pay rents reserved out of or charged on lands or other hereditaments of any tenure, and the same lands or other hereditaments, shall not be resorted to for any such apportioned part forming part of an entire or continuing rent as aforesaid specifically; but the entire or continuing rent, including such apportioned part, shall be recovered and received by the heir or other person who, if the rent had not been apportionable under this act, or otherwise, would have been entitled to such entire or continuing rent; and such apportioned part shall be recoverable from such heir or other person by the executors or other parties entitled under this act to the same.

Tenant not to be resorted to.

By sect. 7, "the provisions of this act shall not extend to any case in which it is or shall be expressly stipulated that no apportionment shall take place" (*k*).

Application of Apportionment Act, 1870.

It has been held that this act applies to a specific devise of real estate (*l*), and, *as between landlord and tenant*, to rent under a lease assigned over by a trustee in bankruptcy (*m*); and it is indeed hard to see what is not included in its very comprehensive terms. It has been intimated that the act is not retrospective (*n*), but the preponderance of authority (*o*) points to an opposite conclusion, and to the application of the act to a will made before, but coming into operation after it.

As between Landlord and Tenant.

The wide terms of the act seem to allow the recovery of rent pro ratâ in the ordinary case where rent is payable at fixed periods, and the tenancy is determined in the middle of a period. It is clear that such rent is not recoverable at common law (*p*), and it was said

(*i*) This proviso substantially follows the corresponding proviso of 4 & 5 Will. 4, c. 22, s. 2.

(*k*) The words "it is" are new; otherwise the section corresponds with 4 & 5 Will. 4, c. 22, s. 3.

(*l*) *Hasluck* v. *Pedley*, L. R., 19 Eq. 271; 44 L. J., Ch. 143; 23 W. R. 155.

(*m*) *Swansea Bank* v. *Thomas*, 4 Ex. D. 94; 48 L. J., Ex. 344; 40 L. T. 558; 27 W. R. 491.

(*n*) In *Jones* v. *Ogle*, L. R., 8 Ch. 192; 42 L. J., Ch. 334, per Lord Selborne, C.

(*o*) *Capron* v. *Capron*, L. R., 17 Eq. 288; 43 L. J., Ch. 677; 29 L. T. 826; *Re Cline's Estate*, L. R., 18 Eq. 213; 30 L. T. 249, per Malins, V.-C.; *Hasluck* v. *Pedley*, L. R., 19 Eq. 271; 44 L. J., Ch. 143; 23 W. R. 155, per Jessel, M.R.; *Constable* v. *Constable*, L. R., 11 Ch. D. 681; *Rosemgrave* v. *Burke*, 1 Ir. R. Eq. 186.

(*p*) See *Slack* v. *Sharpe*, 8 A. & E. 366; *Grimman* v. *Legge*, 8 B. & C. 324.

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not to be recoverable under s. 2 of the Apportionment Act, 1834 (*q*). But the Act of 1870, in sect. 3, speaks of a rent "determined by re-entry," which seems intended to apply to a forfeiture, and the case is clearly within the words of sect. 2. And although it might be argued that it is not within the purview of the act generally (*r*), this argument appears to be disposed of by *Swansea Bank* v. *Thomas* (*s*), in which case the trustee in liquidation of the lessee, having assigned over during a current quarter, was held liable under the act to pay to the lessor a proportionate part of the quarter's rent up to the time of the assignment over; by *Re South Kensington Stores* (*t*), in which case the landlord of a liquidating company, whose business was carried on by the liquidator, was allowed proof for part of a quarter's rent up to date of petition, and distress for the remainder; and by *Hastings (Lord), ex parte, Wilson, in re* (*u*) in which *Swansea Bank* v. *Thomas* was followed as an established authority.

Direction by Testator to forgive Arrears of Rent.

Where a testator directed his executors "to forgive to his tenant all rent or arrears of rent due at the time of his decease," and rent was due at Michaelmas and the testator died in February, it was held that an apportioned part between Michaelmas and February could not be forgiven: but this was not upon any construction of the Apportionment Act, but upon the interpretation of the intention of the testator (*v*).

## SECT. 8.—*Continuance of Lessee's Liability.*

After assigning the Premises.

The lessee has both a privity of contract and of estate; and though he assign, and thereby destroy the privity of estate, the privity of contract continues, and he is liable, in an action of covenant, for the rent, notwithstanding the assignment (*y*).

After quitting Possession.

A tenant remains liable for rent, unless he deliver up complete possession of the premises, or the landlord accept of another in his room (*z*). But where a lessee quitted, in the middle of his term, apartments which he had taken for a year, and the lessor let them to another tenant, it was held, that she could not recover in an action for use and occupation against the lessee for a subsequent portion of the year, during which the apartments had been

(*q*) *Oldershaw* v. *Holt*, 12 A. & E. 590.

(*r*) See the doubts of Bowen, L.J., in *Lucas, In re*, 55 L. J., Ch. 101.

(*s*) *Swansea Bank* v. *Thomas*, 4 Ex. D. 94. See a form providing for payment pro ratâ in case of re-entry, Dav. Prec. vol. 5, pt. 1, p. 109, and note; post, Appendix B., Sect. 12.

(*t*) *South Kensington Stores, In re*, 17 Ch. D. 161; 44 L. T. 471.

(*u*) *Hastings (Lord), Ex parte, Wilson, In re*, 62 L. J., Q. B. 628; 5 R. 455; 10 M. B. R. 219, per Vaughan Williams, J.

(*v*) *Lucas, In re, Parish* v. *Hudson*, 55 L. J., Ch. 101; 54 L. T. 30—C. A.; diss. Fry, L.J.

(*y*) *Eaton* v. *Jacques*, 2 Doug. 455; *Auriol* v. *Mills*, 4 T. R. 94; 2 R. R. 341.

(*z*) *Harding* v. *Crethorne*, 1 Esp. 57; 5 R. R. 719; *Ibbs* v. *Richardson*, 9 A. & E. 849; and see *Henderson* v. *Squire*, L. R. 4 Q. B. 170; and Chap. XX., post.

*Continuance of Liability for Rent.*

unoccupied (*a*): though if a tenant abandon premises without notice, the landlord may recover subsequent rent, notwithstanding he has put up a bill in the window, and otherwise endeavoured to obtain another tenant (*b*). Where a tenant from year to year, at a rent payable half-yearly, without giving any notice to the landlord, quitted the premises at the expiration of the current year; and before the next half-year expired the landlord let the premises to another tenant, who occupied the same; it was held, that the landlord was not entitled to recover rent from the first tenant from the expiration of the current year, when he quitted the premises, to the time when the landlord re-let the same to the second tenant (*c*). If the landlord of lodgings enter into and use the apartments whilst the tenant is in possession, he is deprived of his right to rent; but if the tenant have abandoned the possession during his tenancy, the landlord's lighting fires in the rooms, or even using the rooms, will not deprive him of his right to rent (*d*). Where the landlord forcibly turned out a man left in possession by the tenant, and who was personally offensive to the landlord, it was left to the jury to say whether such expulsion was a mere personal trespass, or done for the purpose of turning the tenant out of possession (*e*). Where, during a current quarter, some dispute arose between the lessor and lessee of a first and second floor of a house demised for a year, at a rent payable quarterly; and the lessee having told the lessor that she would quit immediately, the latter answered that she might go when she pleased; upon which the lessee did quit, and the lessor accepted possession of the apartments; it was held, that he could neither recover the rent which by virtue of the original contract would have become due at the expiration of the current quarter, nor rent pro ratâ for the actual occupation of the premises for any period short of the quarter (*f*).

Where the Premises are destroyed by Fire.

*Belfour* v. *Weston.*

Where the lessee covenants to pay rent at stated periods (without any exception in case of fire), he is bound to pay it, though the house be burnt down; for the land remains, and he might have provided to the contrary by express stipulation, if both parties had so intended. And this rule applies, although the lessee's covenant to *repair* contain an exception (*g*) in case of fire (*h*). Where premises were destroyed by fire during a tenancy under a written

(*a*) *Walls* v. *Atcheson*, 3 Bing. 462; 2 C. & P. 268.
(*b*) *Redpath* v. *Roberts*, 3 Esp. 225.
(*c*) *Hall* v. *Burgess*, 5 B. & C. 332.
(*d*) *Griffith* v. *Hodges*, 1 C. & P. 419.
(*e*) *Henderson* v. *Mears*, 1 F. & F. 636.
(*f*) *Grimman* v. *Legge*, 8 B. & C. 324.
(*g*) This exception has been held not "usual." *Sharp* v. *Milligan*, 23 Beav. 419. As to the construction of the exception in relation to *rent*, see *Bennet* v. *Ireland*, E., B. & E. 326; 28 L. J., Q. B. 48.
(*h*) *Monk* v. *Cooper*, 2 Stra. 763; 1 Ld. Raym. 1477; *Belfour* v. *Weston*, 1 T. R. 310; 1 R. R. 210. And see *Weigall* v. *Waters*, 6 T. R. 488; *Hare* v. *Groves*, 3 Anst. 687, and the cases infra.

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agreement, and rendered no longer habitable, the landlord was held to be still entitled to recover rent, accruing due after the fire, in an action for use and occupation (*i*). So also a tenant from year to year of a second floor, under a parol agreement, has been held liable in the same form of action (*k*): and where the rent for similar lodgings was payable quarterly, he was held liable for rent up to the time of the fire at least (*l*). The tenant in such latter case, to get rid of his liability, should give a regular notice to quit. The reason is, that when *the law* creates a duty, and the party is disabled to perform it without any default in him, and he has no remedy over, the law will excuse him: but when the party, *by his own contract*, creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident by inevitable necessity, because he might have provided against it when making the contract. In some old cases the Court of Chancery relieved the lessee, and granted an injunction to restrain the landlord from bringing an action on the covenant for rent (*m*); but the modern practice was clearly otherwise (*n*), so that no equitable defence could be raised by virtue of the Judicature Act. It has even been held that a tenant who has covenanted to rebuild, has no equity to compel his landlord to expend money received by the landlord from an insurance office, on the demised premises being burnt down (*o*). But it is submitted that the Act 14 Geo. 3, c. 78, s. 83, which requires the governors of an insurance office, "upon the request of any person interested" (*p*), to cause insurance money to be laid out towards rebuilding, may be taken advantage of by tenants as well as by landlords. It is, however, always desirable to provide for the case of fire by special covenants, and this is frequently done (*q*).

Expenditure of Insurance Money on rebuilding.

After Eviction by Lessor, Rent is suspended.

By an entry of the lessor, or any one claiming through him, into any part of the demised premises to take possession thereof, the rent is suspended (*r*): and therefore, as to subsequently (*s*) accruing rent the eviction will be a bar; but if the lessor enter by virtue of a power reserved, or even as a mere trespasser, if the lessee be not evicted, it will be no suspension of the rent (*t*). Where the lessor caused two messuages, let separately, which had been destroyed by fire during the term, to be rebuilt in such a manner as to destroy their identity; it was held that such alterations in the subject-matter of the demises

(*i*) *Baker* v. *Holtpzaffell*, 4 Taunt. 45; 13 R. R. 556.
(*k*) *Izon* v. *Gorton*, 5 Bing. N. C. 501.
(*l*) *Packer* v. *Gibbons*, 1 Q. B. 421.
(*m*) *Brown* v. *Quitter*, Amb. 919; 2 Eden, 210; *Camden* v. *Morton*, Id. 219; cited 18 Ves. 118.
(*n*) *Holtzapffel* v. *Baker*, 18 Ves. 115.
(*o*) *Leeds* v. *Cheetham*, 1 Sim. 146; followed with approval in *Lofft* v. *Dennis*, 1 E. & E. 474; 28 L. J., Q. B. 168.
(*p*) Post, Chap. XVII.
(*q*) Infra, Sect. 9.
(*r*) *Morrison* v. *Chadwick*, 7 C. B. 266; 6 D. & L. 567.
(*s*) *Boodle* v. *Cambell*, 7 M. & G. 386.
(*t*) Bull. N. P. 165, 177; *Hunt* v. *Cope*, Cowp. 243; *Newton* v. *Allin*, 1 Q. B. 518.

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amounted to evictions, and that the tenants were not liable for subsequent rent (*u*). If a lessor serve a writ in ejectment under a clause that for any breach of covenant the lease shall determine and be void, he cannot maintain an action for rent subsequently accruing or for breaches of covenant (*x*). If a lessor has no title, and the lessee is evicted by title paramount, he may plead that as a defence to an action by the lessor for subsequent rent (*y*). If a party having a paramount legal right to evict a tenant, goes to him and claims his right, on which the tenant attorns to him, it seems to be equivalent to an expulsion (*z*). Where lands were demised by parol, and the lessee only entered on and had possession of part, in consequence of the lessor having previously demised the residue to a third person; it was held, that the want of possession was equivalent to an eviction by the tortious act of the lessor, and was not in the nature of an eviction by an elder title, and that therefore the rent was not apportionable, and could not be distrained for (*a*). But where the demise is by indenture it will operate as a grant of the reversion as to such of the lands as are in the possession of a previous tenant, and a demise of the residue of the lands (*b*).

Eviction by mere Trespass does not suspend Rent.

*Paradine* v. *Jane.*

It is essentially necessary, in order to effect a suspension of rent, that an eviction be not the effect of a mere trespass, for in such case the lessee is not excused from the payment of his rent: thus, where in an action of debt for rent the lessee pleaded, that Prince Rupert, an alien born, with a hostile army, had entered upon the lessee, and expelled him out of possession, the Court of King's Bench held, that he was still bound to pay his rent (*c*).

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### Sect. 9.—*Stipulation for Abatement of Rent, in case of Fire, &c.*

It has long been common, though it is not in the legal sense "usual" (ante, p. 127), to insert a proviso that the rent shall be suspended or extinguished in case of damage by fire. If the term used be "suspended" only, that does not mean postponement of payment, but postponement of liability. Where the proviso was that in case the demised premises or any part thereof "should be destroyed or damaged by fire, flood, storm, tempest, or other inevitable accident,"

(*u*) *Upton* v. *Townend* and *Upton* v. *Greenlees*, 17 C. B. 30.

(*x*) *Jones* v. *Carter*, 15 M. & W. 718.

(*y*) *Cuthbertson* v. *Irving*, 4 H. & N. 742; 6 Id. 135; 28 L. J., Ex. 306.

(*z*) *Mayor, &c. of Poole* v. *Whitt*, 15 M. & W. 571; *Emery* v. *Barnett*, 4 C. B., N. S. 423; but see *Delaney* v. *Fox*, 2 C. B., N. S. 768.

(*a*) *Neale* v. *Mackenzie* (in error), 1 M. & W. 747; *Watson* v. *Waud*, 8 Exch. 335.

(*b*) *Eccl. Commrs. of Ireland* v. *O'Connor*, 9 Ir. Com. L. R. 242.

(*c*) *Paradine* v. *Jane*, Aleyn, 26; Style, 47; and see *Tasker* v. *Bullman*, 3 Exch. 351.

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the rent should cease or abate, &c., it was held that an exclusion of the tenant from the premises by the landlord executing repairs in pursuance of a covenant in the lease did not fall within the proviso (*d*).

## SECT. 10.—*Effect of Non-payment of Rent on the Landlord's Title, by the Statute of Limitations.*

Tenancy at Will.

A tenant at will paying no rent gains after thirteen years' tenancy a title to the freehold by virtue of sect. 2 of the Real Property Limitation Act, 1874, 37 & 38 Vict. c. 57, and of sect. 7 of the Real Property Limitation Act, 1833, 3 & 4 W. 4, c. 27 (*e*), and a similar title is gained by a tenant from year to year, without any lease in writing, after paying no rent for twelve years, by virtue of the same section of the Act of 1874, and of sect. 8 of the Act of 1833 (*f*).

Tenancy from Year to Year without Lease in Writing.

Tenancy with Lease in Writing.

The effect of the non-payment of rent with a lease in writing is very different. If the rent amount to 20*s.* a year or upwards, and it be paid to a third person for twelve years, such third person acquires a title to the reversion as against the lessor, the case being within sect. 9 of 3 & 4 W. 4, c. 27. But if the rent do not amount to the 20*s.*, or so amounting, be not so paid, the title remains in the lessor during the whole continuance of a lease however long, and for however long a time the payment of rent may be discontinued, the statute beginning to run in favour of the lessee only, from the date of the expiration of the lease, the case being within sect. 3 of 3 & 4 W. 4, c. 27, by which, when the estate claimed shall have been an estate in reversion, and no person shall have obtained the possession or receipt of the profits, the right to make an entry or bring an action to recover the land first accrued at the time when the estate became an estate in possession (*g*)—so that the lessor has, by sect. 2 of the Real Property Limitation Act, 1874, twelve years after the termination of the lease within which to recover from the property.

Title in Lessor for whole of Lease.

Tenancy with Lease in Writing at Rent of 20*s.* a Year or upwards—effect of Payment to person other than Lessor.

The 9th section of the Real Property Limitation Act, 1833, 3 & 4 W. 4, c. 27, by which payment of rent to a person other than the lessor of a rent at 20*s.* a year or more transfers the reversion from the lessor to such third person, is as follows:—

"When any person shall be in the possession or in receipt of the profits of any land, or in receipt of any rent (*h*), by virtue of a lease in writing, by which a rent amounting to the yearly sum of twenty shillings or upwards shall be reserved, and the rent reserved by such

(*d*) *Saner* v. *Bilton*, 7 Ch. D. 815; 47 L. J., Ch. 267; 38 L. T. 281; 26 W. R. 394.

(*e*) See these sections and the cases thereon, ante, Chap. VI., Sect. 4.

(*f*) See ante, Chap. VI., Sect. 2.

(*g*) *Doe* d. *Davy* v. *Oxenham*, 7 M. & W. 131.

(*h*) The word "rent" *here* means rent-charge, *Doe* d. *Angell* v. *Angell*, 9 Q. B. 356.

*Effect of Non-payment of Rent on the Landlord's Title.*

lease shall have been received by some person wrongfully (*i*) claiming to be entitled to such land or rent (*k*) in reversion immediately expectant on the determination of such lease, and no payment in respect of the rent reserved by such lease shall afterwards have been made to the person rightfully entitled thereto, the right of the person entitled to such land or rent (*k*) subject to such lease, or of the person through whom he claims, to make an entry or distress, or bring an action after the determination of such lease, shall be deemed to have first accrued at the time at which the rent reserved by such lease was first so received by the person wrongfully claiming as aforesaid; and no such right shall be deemed to have first accrued upon the determination of such lease to the person rightfully entitled" (*l*).

Receipt of Rent is Receipt of Profits.

By sect. 35 "the receipt of the rent payable by any tenant from year to year or other lessee, shall as against such lessee or any person claiming under him (but subject to the lease) be deemed to be the receipt of the profits of the land for the purposes of this act."

Extinction of right barred.

By former Statutes of Limitation, the right was not barred but merely the remedy (*m*); but by sect. 34 of the Real Property Limitation Act, 1833, 3 & 4 W. 4, c. 27, as amended by the Act of 1874, at the determination of the period limited by the acts to any person for making an entry, or bringing an action, the right and title of such person to the land for the recovery of which such entry or action might have been made or brought, are extinguished; so that such right and title are in effect transferred to the person whose possession is a bar (*n*).

Acknowledgment.

As to the effect of acknowledgment under sect. 14 of 3 & 4 W. 4, c. 27, see Chap. IV., Sect. 2, ante.

(*i*) Or, merely by mistake; *Williams* v. *Pott*, L. R., 12 Eq. 149.

(*k*) See note (*h*) on p. 440.

(*l*) This last paragraph states the law before the act. See Report of Real Property Commissioners, p. 77.

(*m*) *Higgins* v. *Scott*, 2 B. & Ad. 413.

(*n*) See *Incorporated Society* v. *Richards*, 1 D. & W. 289.

# CHAPTER XI.

## DISTRESS FOR RENT.


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## Sect. 1.—*Definition and Scope of Distress.*

Definition of Distress.

A DISTRESS is one of the most ancient and effectual remedies for the recovery of rent. It is the taking, without legal process, cattle or goods *as a pledge*, to compel the satisfaction of a demand, the performance of a duty, or the redress of an injury. The act of taking, the thing taken, and the remedy generally, having been called a distress; an inaccuracy which the older text-writers usually avoided (*a*).

(*a*) See Bullen on the Law of Distress, 1842; Oldham & Foster's Law of Distress (2nd ed.), 1889. The remedies for wrongful distress are considered post, Chap. XII.

The power of distress appears to have been derived from the ancient feudal law, and to have been substituted for a forfeiture of the tenant's estate (*b*). Originally, and until the passing of 2 & 3 W. & M. sess. 1, c. 5, it was not so much a remedy as the means of obtaining one; for the chattels distrained remained only as a pledge in the hands of the distrainer, but could not be sold (*c*); and, as Blackstone observes, "although such a distress put the owner to inconvenience, and was therefore a punishment to him, yet if he continued obstinate, and would make no satisfaction, it was no remedy at all to the distrainer" (*d*). This power, however, became the means of great oppression in the hands of the barons (*e*), and continual enactments were passed up to 1 & 2 Philip & Mary, c. 12, for the protection of tenants (*f*); but the current of legislation afterwards took a turn, and was for a very long time wholly for the benefit of landlords rather than of tenants (*g*); a step in the favour of tenants, however, was taken, in 1871, by the act which protects the goods of lodgers from distress, another step, in 1872, by the act which protects railway rolling stock, a further and very considerable step—in relation to agricultural holdings only—by the Agricultural Holdings Act, 1883 (Sect. 10 (b), post), and a still further step by the Law of Distress Amendment Act, 1888, which extends to all holdings some of, but not all, the enactments of the Agricultural Holdings Act, 1883.

Distress originally could not be sold.

History of Law of Distress.

Distress is incident of common right to every *rent-service*, properly so called (*h*), and the rent due from a tenant to a landlord is properly called a "rent-service," though this description of it has long passed out of common use. It is also necessarily incident, by special reservation, to every *rent-charge* (*h*). But it was not incident to *rent-seek* (*h*) until the Landlord and Tenant Act, 1730, 4 Geo. 2, c. 28, s. 5 (*i*), extended the remedy of distress to rent-seck, rents of assize, and chief rents, and thereby in effect abolished nearly all material distinction between them (*k*).

Distress for Rent-service;

for Rent-charge.

May distress for rent by agreement be made upon other lands of the lessee than those out of which the rent issues? This was decided in the negative in the Court of Exchequer in *Daniel* v. *Stepney* (*m*), in a considered judgment, very shortly reversed by the Exchequer

Distress on other lands than those demised.

(*b*) Gilb. Rents, 5, 92.

(*c*) Preamble to 2 W. & M., sess. 1, c. 5.

(*d*) 3 Blac. Com. 14.

(*e*) Barrington on Ancient Statutes, 14.

(*f*) 51 Hen. 3, c. 4; 52 Hen. 3 (Statute of Marlebridge), cc. 1, 2, 4, 15, 21; 3 Edw. 1 (Stat. of Westminster), cc. 16, 17, 23; 13 Edw. 1 (Stat. of Westminster II.), cc. 36, 37; 1 & 2 Ph. & M. c. 12.

(*g*) 17 Car. 2, c. 7 (second distress); 2 W. & M. sess. 1, c. 5 (power to sell distress); 8 Ann. c. 14 (satisfaction of rent by execution creditor); 11 Geo. 2, c. 19 (distress on growing crops); 56 Geo. 3, c. 50; 3 & 4 Will. 4, c. 42, s. 38.

(*h*) Ante, 404.

(*i*) Ante, 404; *Johnson* v. *Faulkner*, 2 Q. B. 925.

(*k*) Com. Dig. tit. *Distress* (A. 1).

(*m*) *Daniel* v. *Stepney*, L. R., 7 Ex. 327; 41 L. J., Ex. 208; 27 L. T. 380; 21 W. R. 17, per Kelly, C.B., Martin, Bramwell, and Channell, BB. The lease was a mining one, with a power of distress over any lands in which there should be for the time being any pits by which the coal by the lease demised should be in course of working by the lessees, their executors, administrators or assigns.

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Chamber (*n*), on the ground that such an agreement bound assignees having notice of it.

Distress on other premises than those demised to the tenant—*contd.*

In *Roundwood Colliery Company, in re* (*o*), the company were lessees, from separate lessors, of two adjoining coal mines A. and B. There was no shaft on mine B., and the company worked both mines by means of a shaft on mine A. In each of the leases the lessor had power to distrain on chattels belonging to the lessees "in or about any adjoining or neighbouring collieries." The lessors of mine B. having distrained on chattels of the lessees on mine A., it was held by the Court of Appeal that the power to distrain did not constitute the mining lease a bill of sale so as to require registration, and that the distress, having been levied before the winding-up of the company, and before a receiver had been effectively appointed, was valid against the debenture holders of the company. So far as authority goes, the case appears to legalize a distress (1) on outside premises not expressly defined, (2) a distress on premises held on lease from another than the demising and distraining landlord, so as to deprive such other landlord of a distress which he might himself have taken, but (3) not to legalize a distress upon goods not belonging to the tenant of the distraining landlord.

Distress on other goods than those of tenant.

As we shall see presently (post, Sect. 8), all goods found on the demised premises, whether they belong to the tenant or not, were at common law liable to distress for the tenant's rent (*p*), and goods not belonging to the tenant are still so liable in addition to goods belonging to him, unless they come within certain exemptions (post, Sect. 9), from the original harsh (*r*) rule of the common law, which is applicable to debts for rent alone amongst debts.

Right to distrain may be postponed.

The right of distress is not so inseparable an incident to rent-service that it cannot be postponed. Therefore a landlord may for good consideration undertake not to distrain for six months (*s*), a mesne landlord may contract not to distrain until after he has produced to his tenant a receipt for the rent for the time being due to the superior landlord (*t*), and a superior landlord may undertake not to distrain on the goods of an intended lodger of his tenant (*u*). From an agreement, to which the landlord of a firm is privy, for a sale by the tenant of some eatage of pasture to a third person, the amount produced by the sale to be paid to the landlord, a contract

(*n*) *Daniel* v. *Stepney*, L. R., 9 Ex. 185; 22 W. R. 662—Ex. Ch., per Cockburn, C.J., Blackburn, Mellor, Lush, and Denman, JJ.

(*o*) *Roundwood Colliery Co., In re, Lee* v. *Roundwood Colliery Co.*, [1897] 1 Ch. 373; 66 L. J., Ch. 186; 75 L. T. 641; 45 W. R. 324—C. A., reversing Stirling, J.

(*p*) See p. 469, post.

(*r*) See per Blackburn, J., in *Lyons* v. *Elliott*, 1 Q. B. D. at p. 213 and p. 469 (*s*), post.

(*s*) *Oxenham* v. *Collins*, 2 F. & F. 172.

(*t*) *Giles* v. *Spencer*, 3 C. B., N. S. 244; 26 L. J., C. P. 237.

(*u*) *Horsford* v. *Webster*, 1 C., M. & R. 696. The Lodgers' Goods Protection Act (see post, Sect. 9 (f)) renders such undertaking now generally unnecessary.

by him may be inferred not to distrain cattle put on the demised land to consume the eatage (*x*).

Tenancy at Will, or Agreement for Lease.

Although a distress may be taken for any rent, including that due from tenants at will (*y*), it cannot at common law be made for the rent mentioned in a mere agreement for a lease, not amounting to an actual demise, where no tenancy at an agreed rent has been created expressly or impliedly by the payment of rent or otherwise (*z*); but the effect of the Judicature Acts is, as was laid down in *Walsh* v. *Lonsdale*, to confer a right of distress on agreement for lease executed (*a*). Where a tenant holds over on sufferance only, as there is then no "agreed rent," a distress cannot lawfully be made, but the remedy is by an action for use and occupation (*b*). If a mere termor affect to grant a lease for a term exceeding his own in duration, and to reserve an annual rent, that would operate as an assignment of his term (*c*), and the Landlord and Tenant Act, 1730, 4 Geo. 2, c. 28, s. 5 (*d*), does not give power to distrain for such a rent (*e*). With respect to fee farm rents, it has been held that a distress is not incident to them, unless the case be brought within the Landlord and Tenant Act, 1730 (*f*).

Tenancy on Sufferance.

Rent reserved in an Assignment of a Term.

Fee Farm Rents.

If in an action for rent judgment has been signed, the debt for the rent is merged in the judgment, and the rent for which judgment has been signed cannot be distrained for (*g*), and if it be distrained for and the goods distrained upon be sold, double the value of such goods (see p. 557, post) is recoverable by the tenant from the landlord (*h*).

Rent for which judgment signed —Merger.

A distress cannot generally be made for a rent reserved upon a letting of incorporeal hereditaments, as tithes, commons or tolls (*i*); but a power of distress may be expressly reserved in such lease in like manner as in the grant of a rent-charge.

Rent of Incorporeal Hereditaments.

(*x*) *Horsford* v. *Webster*, supra.

(*y*) Lit. s. 72; *Doe* d. *Davies* v. *Thomas*, 6 Exch. 858; *Doe* d. *Dixie* v *Davies*, 7 Exch. 91; *Turner* v. *Barnes*, 2 B. & S. 435; 31 L. J., Q. B. 170.

(*z*) *Duke* v. *Hunter*, 5 B. & A. 322.

(*a*) *Walsh* v. *Lonsdale*, 21 Ch. D. 9, and Chap. IV., Sect. 1, ante.

Where, however, in an action for specific performance of an agreement for lease to defendants, the plaintiffs having under an interim order entered into possession, claimed the right to distrain on the goods of strangers for past arrears of rent, it was held that the order had suspended the relationship of landlord and tenant, that there being no tenancy there could be no right to distrain, and that the doctrine of *Walsh* v. *Lonsdale* had no application, inasmuch as there was no tenant holding under the agreement. *Murgatroyd* v. *Silkstone and Dodsworth Coal and Iron Co.*, 65 L. J., Ch. 111; 44 W. R. 198—per Chitty J.

(*b*) *Alford* v. *Vickery*, Car. & M. 280; *Jenner* v. *Clegg*, 1 Moo. & R. 213; *Williams* v. *Stiven*, 9 Q. B. 14.

(*c*) Ante, Chap. VII.

(*d*) Ante, 405.

(*e*) *Langford* v. *Selmes*, 3 K. & J. 220; 3 Jur., N. S. 859.

(*f*) *Bradbury* v. *Wright*, 2 Doug. 624; *Musgrave* v. *Emmerson*, 10 Q. B. 326.

(*g*) *Chancellor* v. *Webster*, 9 T. L. R. 568, per Bruce, J., followed with approval by Cave, J., in *Potter* v. *Bradley*, 10 T. L. R. 445, infra.

(*h*) *Potter* v. *Bradley*, supra.

See these cases doubted in Foa on Landlord and Tenant, 2nd ed. at p. 436, citing *Drake* v. *Mitchell*, 251 and 427, ante; *Wegg Prosser* v. *Evans*, [1895] 1 Q. B. 108, and *Phillips* v. *Shervill*, 6 Q. B. 944; but it is conceived that the two first of these cases turn upon the law of guarantee and the third on the Insolvent Debtors Act; and that the principle "nemo debet bis vexari pro eadem causa would be infringed by distress for rent for which judgment had been given."

(*i*) Co. Lit. 47 a.

CH. XI. SEC. 1. *Scope of Distress.*

A distress may be made for the whole rent reserved on a letting of furnished apartments, because in contemplation of law the rent issues out of the realty only, and not out of the furniture (*k*). But where the owner of a factory lets standings therein for looms, and supplies the power of working them at so much per week (there being no demise of the room), he cannot distrain for the weekly payments as for rent (*l*). It is otherwise where a definite part of the room is demised, with the use of steam power for working machines, &c. (*m*).

Furnished Apartments.

Liquidated Damages.

Liquidated damages or forfeitures for breaking up pasture or meadow land, or for carrying hay, straw, &c., off the demised premises, at certain fixed sums in proportion to the extent of the breach, "to be recovered by distress as for rent in arrear," may be distrained for, though the lease is not under seal (*n*).

Double Rent.

Double rent payable under the Distress for Rent Act, 1737, 11 Geo. 2, c. 19, s. 18, may be distrained for (*o*); and the exception, once said to obtain in the case of a weekly tenant (*p*), appears to have been founded on a mistake (*q*).

Manual Services.

A distress may be made where the tenant holds by the service of cleaning the parish church, or of ringing the church bell at stated times, or by other manual service (*r*); but in such case the distress cannot be sold.

No Distress for Debt for Goods supplied by Landlord to Tenant.

It has long been a common practice in brewers' leases of "tied houses" to insert a clause allowing the landlord to distrain on the tenant's goods for any sum of money due from the tenant to the landlord in respect of any malt liquors supplied by the landlord to the tenant; but it was ruled by Denman, J. (*s*), and afterwards held by the Court of Appeal (*t*), that such a clause constitutes a bill of sale requiring registration, so that a tenant may recover damages from a landlord putting it in force.

Priority of the Crown.

If the crown be lessor, it has priority, although no writ of extent may have been issued. This was held in a case where the crown as lessors put in a distress upon goods already distrained (but not sold) by assignees of a rent-charge created by the lessees (*u*).

(*k*) *Newman* v. *Anderton*, 2 Bos. & P. New R. 224.

(*l*) *Hancock* v. *Austin*, 14 C. B., N. S. 634; 32 L. J., C. P. 252; and see *Edmondson* v. *Nuttall*, 17 C. B., N. S. 280.

(*m*) *Selby* v. *Greaves*, L. R., 3 C. P. 594; 37 L. J., C. P. 251.

(*n*) *Pollitt* v. *Forrest*, 1 C. & K. 560; 11 Q. B. 949.

(*o*) *Johnstone* v. *Hudlestone*, 4 B. & C. 922; 4 L. J., K. B. 71; 28 R. R. 505. As to "double rent," see post, Chap. XX., Sect. 2 (e).

(*p*) *Sullivan* v. *Bishop*, 2 C. & P. 359.

(*q*) Bullen on Distress, 116, note; 2 Chit. Pl. 344, note (*v*), (7th ed.).

(*r*) *Doe* d. *Edney* v. *Benham*, 7 Q. B. 976.

(*s*) In *Pulbrook* v. *Ashby*, 56 L. J., Q. B. 376; 35 W. R. 779; approved by C. A. in the *Roundwood Colliery case*, supra, p. 444.

(*t*) In *Stevens* v. *Marston*, 60 L. J., Q. B. 192; 64 L. T. 274; 39 W. R. 129—C. A.

(*u*) *Attorney-General* v. *Leonard*, 38 Ch. D. 622; 57 L. J., Ch. 860; 59 L. T. 624; 37 W. R. 24.

## Sect. 2.—*Conditions precedent to Distress.*



Right to distrain until Payment.

Where the right to distrain exists, nothing but payment, or something equivalent to payment, such as a tender of the arrears, or a release under seal, will be sufficient to take it away: even attending upon the land on the proper day to pay the rent will not destroy the right to distrain unless a tender be actually made (*x*). But where a landlord's receiver allowed the tenant to make a deduction of payments for land tax every year for seventeen years, greater than the landlord was liable to pay, the landlord knowing or having the means of knowing all the facts; it was held, that he could not distrain for the amount erroneously allowed, for such allowance *operated as payments*, though the receipt given every year showed the amount paid and the amount deducted (*y*).

Allowance of Deductions operates as Payment.

Tender before Distress.

A distress cannot lawfully be made after the full amount of rent really due has been tendered to the landlord, or to his agent having authority to receive the rent (*z*). If the landlord or his agent sign a distress warrant and deliver it to the broker, but before he can effect an entrance to distrain, the tenant or his agent tenders the rent *without expenses* to the landlord or his agent, it will be illegal afterwards to execute the distress warrant, and all parties concerned therein will be liable to an action of trespass (*a*) or trover (*b*). After the distress has been made, but *before it is impounded*, the tenant may tender to the landlord or his agent the amount of the rent, together with a sufficient sum for the costs of the distress (*c*); after which it will be illegal to proceed further with the distress (*d*). But a tender of the rent with expenses *after the impounding* is too late to enable the tenant to maintain an action of trespass, trover, detinue or replevin; because the cattle or goods are then in the custody of the law, and not of the landlord or his agent (*e*). The subsequent detention is considered as the act of the law, and not of the distrainer, who has neither any property nor even a constructive possession of the cattle or goods distrained (*f*); and although they might be released with his consent, he is not legally bound to give

Tender before Impounding.

Tender after Impounding.

(*x*) *Horne* v. *Lewin*, 1 Ld. Raym. 637; 1 Salk. 583; 12 Mod. 352.

(*y*) *Bramston* v. *Robins*, 4 Bing. 11; 5 L. J., C. P. 13; 29 R. R. 493; *Waller* v. *Andrews*, 3 M. & W. 312.

(*z*) *Branscomb* v. *Bridges*, 1 B. & C. 145; 3 Stark. R. 171; 1 L. J., K. B. 64; 2 D. & R. 256; 25 R. R. 335; *Holland* v. *Bird*, 10 Bing. 15; *Bennett* v. *Bayes*, 5 H. & N. 391; 29 L. J., Ex. 391.

(*a*) *Bennett* v. *Bayes*, 5 H. & N. 391; 29 L. J., Ex. 391.

(*b*) *Hatch* v. *Hale*, 15 Q. B. 10.

(*c*) Post, Sect. 8 (e).

(*d*) *Vertue* v. *Beasley*, 1 Moo. & R. 21; *Evans* v. *Elliott*, 5 A. & E. 142; *Ladd* v. *Thomas*, 12 A. & E. 117.

(*e*) *Six Carpenters' case*, 8 Co. R. 432; 1 Smith, L. C.; *Firth* v. *Purvis*, 5 T. R. 432; 2 R. R. 637; *Thomas* v. *Harries*, 1 M. & G. 695; *Ladd* v. *Thomas*, 12 A. & E. 117; *Ellis* v. *Taylor*, 8 M. & W. 415; *Tennant* v. *Field*, 8 E. & B. 336.

(*f*) *Rex* v. *Cotton*, Parker, 121; *Turner* v. *Ford*, 15 M. & W. 212; *Wilbraham* v. *Snow*, 2 Wms. Saund. 47 a.

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such consent. However, if such tender be made within the five days allowed to the tenant to replevy (although after the impounding), a special action on the case, founded on the equity of the stat. 2 W. & M. sess. 1, c. 5, s. 2, may be maintained if the landlord afterwards proceed to sell the distress (*g*). To avoid this the landlord should, after such a tender, abstain from selling (which he may lawfully do) and merely keep the distress impounded as a pledge, according to the common law, until the arrears of rent, with expenses, are actually satisfied, or the tenant incurs the trouble and expense of a replevin, the costs of which will fall upon him.

What amounts to an Impounding.

Whether the distress was "impounded" before the tender was made is sometimes a question of considerable nicety and importance. In one case the landlord's agent had delivered to the tenant a notice of distress, wherein it was stated that the cattle distrained, of which an inventory had been given, were *impounded on the premises;* it was held, that the impounding was complete so as to make a subsequent tender unavailing (*h*). In another case, a landlord's agent went upon the tenant's premises, and walked round them, and gave a written notice that he had distrained certain goods lying there for an arrear of rent, *all which goods he had left on the said demised premises*, and that unless the rent was paid, or the goods replevied within five days, they would be appraised and sold according to law, and then went away without leaving any person in possession. It was held, that there was a sufficient distress and impounding on the premises pursuant to the Distress for Rent Act, 1737, 11 Geo. 2, c. 19, s. 10 (*i*). In a third case, a landlord entered upon a dwelling-house to distrain, but, to prevent inconvenience to the tenant, the landlord, with the tenant's assent, instead of removing the articles of furniture upon which he proposed to distrain, made up from a list given to him by the tenant an inventory of the furniture in the house, put a man into possession, and handed to the tenant a notice of distress referring to the inventory, which was also then handed to the tenant. The landlord did not go into the several rooms in which the articles were, and the notice of distress did not state that the articles were impounded. It was held, that this constituted a distraining of the articles mentioned in the inventory, and an impounding them upon the premises, and that a tender subsequently was too late (*k*).

(*g*) *Johnson* v. *Upham*, 2 E. & E. 250; 28 L. J., Q. B. 252; overruling *Ellis* v. *Taylor*, 8 M. & W. 415.

(*h*) *Thomas* v. *Harries*, 1 M. & G. 695.

(*i*) *Swann* v. *Earl of Falmouth*, 8 B. & C. 456.

(*k*) *Tennant* v. *Field*, 8 E. & B. 336. Where sheep are distrained for damage feasant, a tender of amends after the sheep have been put into a private pound, but before they have been sent (as intended) to the public pound, is not too late, *Browne* v. *Powell*, 4 Bing. 230; 12 Moore, 454; 5 L. J., C. P. 121; 29 R. R. 538.

A tender may be made to the landlord himself, notwithstanding he has instructed a broker to distrain and left the matter in his hands (*l*). So it may be made to any agent of the landlord who has express or implied authority to receive rent on his behalf (*m*). Where a landlord gives a warrant to distrain for rent in the usual form, he thereby in effect authorizes the bailiff to receive the rent, if tendered: and it seems that in such case he could not prohibit the bailiff from accepting such tender, so as to render a tender to him invalid: at all events, the bailiff cannot refuse a tender on the ground that he was forbidden by the landlord's solicitor to receive the money (*n*). A tender to the landlord's agent, who signed the distress warrant on his behalf, is sufficient (*o*). But a tender to the broker's man, who is merely left in possession under the distress, and has no actual authority to receive the money, is bad (*p*), and so is a tender to a servant (*q*). Where it appeared that the distrainer's wife had been in the usual habit of acting as his agent in such matters, and had in his absence made a distress for damage feasant; it was held, that a tender to her of amends was sufficient (*r*).

To whom a Tender may be made.

The tenant must, at his peril, tender the full amount of the rent in arrear, without any deductions, except in respect of actual or constructive *payments* on account thereof (not items of set-off). He must also tender, at his peril, a sufficient sum for the lawful expenses of the distress (*s*), unless indeed the tender be made before any entry to distrain (*t*). The tender should be made *unconditionally*, so that the party may accept it without prejudice to his right (if any) to recover more. And although where the amount owing is not disputed, the demand of a receipt and refusal to part with the rent without one would seem, under the present Stamp Act, not to vitiate the tender (*u*), a tender of one quarter's rent, coupled with a demand of a receipt up to a particular day, there being a dispute whether one or two quarters' rent was then due, is not valid (*x*); but sending a certain sum "to settle one year's rent," does not impose a condition (*y*), nor does a tender "under protest" (*z*).

Tender must be in full, with Expenses.

(*l*) *Smith* v. *Goodwin*, 4 B. & Adol. 413.
(*m*) *Bennett* v. *Bayes*, 5 H. & N. 391; 29 L. J., Ex. 391.
(*n*) *Hatch* v. *Hale*, 15 Q. B. 10.
(*o*) *Bennett* v. *Bayes*, supra.
(*p*) *Boulton* v. *Reynolds*, 2 E. & E. 369; 29 L. J., Q. B. 11.
(*q*) *Pilkington* v. *Hastings*, Cro. Eliz. 813.
(*r*) *Brown* v. *Powell*, 4 Bing. 230; 5 L. J., C. P. 159; 29 R. R. 538.
(*s*) Post, Sect. 11.
(*t*) *Bennett* v. *Bayes*, 5 H. & N. 391; 29 L. J., Ex. 391.
(*u*) See *Richardson* v. *Jackson*, 8 M. & W. 298. The prior enactments on the subject, 43 Geo. 3, c. 126, ss. 4, 5 (see *Laing* v. *Meader*, 1 C. & P. 257); 55 Geo. 3, c. 184, Sch. tit. *Receipt*. are repealed by 33 & 34 Vict. c. 99, and the law is now governed by the Stamp Act, 1891, s. 103.
(*x*) *Finch* v. *Miller*, 6 C. B. 428.
(*y*) *Brown* v. *Owen*, 11 Q. B. 130; *Bull* v. *Parker*, 2 Dowl., N. S. 345.
(*z*) *Manning* v. *Lunn*, 2 C. & K. 13.

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*Conditions precedent to Distress.*

A landlord, who has accepted the rent in arrear and the expenses of the distress after the impounding, cannot be treated as a trespasser merely because he *retains possession* of the goods distrained; although his refusal to deliver them up to the tenant may amount to a conversion so as to render him liable in trover (*a*).

Detention of Distress after Payment.

Property in Cattle or Goods distrained.

Notwithstanding a distress, the property in the cattle or goods distrained (whether impounded or not) remains vested in the tenant or owner thereof, until they are *sold* under the distress (*b*); and he may sell or otherwise dispose of them subject to the distress; or whenever the distress is determined (without any sale) he may recover them back (*b*). So a purchaser from him may recover them in trover, where the landlord has not *sold* the goods, but taken them himself at a valuation, which he had no legal right to do (*c*). The landlord or person distraining has no property in the cattle or goods distrained, nor even the possession thereof; therefore, if they are rescued, or unlawfully taken out of the pound, he cannot maintain trover (*d*), but only a special action for rescue or pound breach (*e*).

There must be an actual Demise at a fixed Rent.

A landlord has, at common law, no right to distrain unless there be an *actual* demise at a *fixed* rent (*f*). A licence to get all the copperas stone which may be found in a part of a manor, for twenty-one years, at the yearly rent of 25*l*., is not a demise, and will not support a distress for the agreed rent (*g*). Where a tenant holds over on sufferance only, as there is then no "agreed rent" or actual tenancy, a distress cannot lawfully be made, but the remedy is by action for use and occupation (*h*). Where a lease of tithes and land was granted at an entire rent, and it was void as to the tithes, because it was not under seal; it was held, that a distress for an arrear of rent was altogether unlawful, because there was no distinct rent due for the land (*i*). Where a lease was made *by parol* of 100 acres of land at a certain rent, and the lessee accepted the lease and entered upon the land, but afterwards found that eight acres had been previously demised by his lessor to another person who was in possession; it was held, that the demise was altogether void as to the eight acres, and that the rent could not be apportioned, and therefore could not be distrained for (*k*): but it would have been

(*a*) *West* v. *Nibbs*, 4 C. B. 172.

(*b*) *Turner* v. *Ford*, 15 M. & W. 212; *King* v. *England*, 4 B. & S. 782; 33 L. J., Q. B. 145.

(*c*) *King* v. *England*, supra.

(*d*) *Rex* v. *Cotton*, Parker, 121; *Wilbraham* v. *Snow*, 2 Saund. 47 a.

(*e*) *Riddell* v. *Stowey*, 2 Moo. & R. 358; *Turner* v. *Ford*, 15 M. & W. 213; post, Sect. 10.

(*f*) *Dunk* v. *Hunter*, 5 B. & A. 322; *Reynart* v. *Porter*, 7 Bing. 451; *Hancock* v. *Austin*, 14 C. B., N. S. 634.

As to distress under mere agreement for lease since the Judicature Act, see *Walsh* v. *Lonsdale*, L. R., 21 Ch. D. 9, and ante, Chap. IV., Sect. 1.

(*g*) *Ward* v. *Day*, 33 L. J., Q. B. 3, 254.

(*h*) *Alford* v. *Vickery*, Car. & M. 280; *Jenner* v. *Clegg*, 1 Moo. & R. 213; *Williams* v. *Stiven*, 9 Q. B. 14.

(*i*) *Gardiner* v. *Williamson*, 2 B. & Adol. 337; see also *Meggison* v. *Lady Glamis* and *Sells* v. *Same*, 7 Exch. 685.

(*k*) *Neale* v. *Mackenzie* (in error), 1 M. & W. 747; *Holgate* v. *Kay*, 1 C. & K. 341.

otherwise if the demise had been under seal, because that would have operated as a grant of the reversion and its incidents, as to the eight acres, and no apportionment of the rent would have been necessary (*l*). A rent of a certain sum per cube yard of marl dug, and a certain sum per thousand of bricks made from clay dug from land, is a rent which may be ascertained with certainty, and which therefore may be distrained for (*m*). Where the demise was subject to certain rents, provisions, and stipulations, and amongst others that the lessee should not sell hay off the premises, under the penalty of 2*s*. 6*d*. per yard of the hay sold, to be recovered by distress as for rent in arrear; it was held, that this was recoverable by distress as for rent, but was not a rent (*n*).

Agreement for Lease.

Where a person is in possession under a mere agreement for a lease, not amounting to an actual demise, and no other circumstances exist from which a tenancy at a fixed rent can be implied and found by a jury: the common law rule is that as no rent (properly so called) is due for the occupation, but only a compensation in the nature of rent, the owner cannot distrain for non-payment (*o*); but that if the agreement goes on to say, that until the lease shall be executed, the rent, covenants and agreements to be therein contained shall be paid and observed, and the several rights and remedies shall be enforced in the same manner as if the same had been actually executed; that will, on entry, create a tenancy at a fixed rent, for which the landlord may distrain when due although no rent has been paid under the agreement (*p*); and similarly that where an intended purchaser, by the contract of sale, admits himself to be tenant from week to week to the vendor, at a specific rent per week payable in advance or otherwise, such rent may be distrained for (*q*). But these cases must now be compared with *Walsh* v. *Lonsdale* (*r*).

Implied Tenancy at fixed Rent.

An actual tenancy at a fixed rent may be implied from very slight circumstances; thus where a tenant, who had entered on premises under an agreement for a lease, admitted a charge of half-a-year's rent in an account between him and his landlord; it was held, that this was equivalent to payment, and constituted him a tenant from year to year, and made him liable to a distress (*s*). Where the plaintiff took possession of premises under an agreement for a lease to him for seven years, at a yearly rent payable half-yearly, but no

(*l*) *Eccl. Commrs. of Ireland* v. *O'Connor*, 9 Ir. Com. L. R. 242; *Lake* v. *Dean*, 28 Beav. 607.

(*m*) *Daniel* v. *Gracie*, 6 Q. B. 145.

(*n*) *Pollitt* v. *Forrest*, 11 Q. B. 949; 1 C. & K. 560.

(*o*) *Dunk* v. *Hunter*, 5 B. & A. 322; 24 R. R. 390.

(*p*) *Anderson* v. *Midland R. Co.*, 3 E. & E. 614; 30 L. J., Q. B. 94; *Lincro* v. *Judson*, 6 Bing. 206; 8 L. J., C. P. 19; 31 R. R. 388; *Rollason* v. *Leon*, 7 H. & N. 73; 31 L. J., Ex. 96.

(*q*) *Yeoman* v. *Ellison*, L. R., 2 C. P. 681; 36 L. J., C. P. 326. In this case the rent was 80*l*. a week.

(*r*) Ante, Chap. IV., Sect. 1, p. 91.

(*s*) *Cox* v. *Bent*, 5 Bing. 185; 2 M. & P. 281; 7 L. J., C. P. 68; 30 R. R. 566; *Vincent* v. *Godson*, 24 L. J., Ch. 122.

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lease was executed, nor was the quantum of rent to be paid ascertained; and the plaintiff occupied under the agreement for three years, and *paid rent* for two; it was held, that this created a tenancy from year to year, and entitled the landlord to distrain for the arrears due at the rate previously paid (*t*). But where a tenant entered under an agreement containing stipulations for a lease at 25*l.* per year, and an engagement by the landlord to complete certain erections, which were never completed, nor any rent paid, and the tenant, on being called on after some years' occupation, said he was ready to pay upon the erections being completed and an allowance made to him for some repairs; it was held, that a demise at a certain rent could not be implied so as to entitle the landlord to distrain (*u*). So where a person let a furnished house at a certain rent from a future day, and agreed that he would furnish it suitably for a school; it was held, that such furnishing was a condition precedent to the right to demand the rent, and therefore that the lessor, not having furnished it, could not distrain (*x*). Where a person entered upon premises subject to the approbation of the landlord, who afterwards did not approve, but upon his agreeing to pay an advanced rent, as well for the time he had been in possession as for the future, allowed him to continue in possession; it was held, that the landlord might distrain for the advanced rent accrued before the agreement as well as for what accrued afterwards—such agreement giving him the same power by relation to his tenant's first entry into possession, as it did to recover his rent in future (*y*).

Acknowledgment.

An acknowledgment of an antecedent tenancy at a specified rent, with an agreement to go on on certain terms, is sufficient to authorize a distress (*z*).

Surrender.

If a tenancy has existed, a surrender of the term must be complete (*a*), or the landlord's right

Eviction.

to distrain will continue (*b*). If a tenant is evicted by title paramount, but remains in possession under a new agreement with the person who has evicted him, his original landlord cannot distrain on him for rent (*c*). If a lessor exercise his option that a lease shall be void for breach of covenant, he cannot distrain for subsequent rent (*d*). Where the landlord has given a notice to quit and the tenant holds over, but nothing is done to show that a new tenancy is created, the landlord cannot distrain for rent accruing due after the time when the notice expired (*e*). In a previous case a distress

(*t*) *Knight* v. *Bennett*, 11 Moore, 222; 4 L. J., C. P. 94; 28 R. R. 640.
(*u*) *Regnart* v. *Porter*, 7 Bing. 451.
(*x*) *Mechelen* v. *Wallace*, 7 A. & E. 49; *Vaughan* v. *Hancock*, 3 C. B. 766.
(*y*) *M'Leish* v. *Tate*, Cowp. 781.
(*z*) *Eagleton* v. *Gutteridge*, 11 M. & W. 465; 2 Dowl., N. S. 1053; *Gladman* v. *Plumer*, 15 L. J., Q. B. 79; 10 Jur. 109.
(*a*) Ante, Chap. VIII.
(*b*) *Copland* v. *Maynard*, 12 East, 134.
(*c*) *Hopcraft* v. *Keys*, 9 Bing. 613.
(*d*) *Jones* v. *Carter*, 15 M. & W. 718; *Franklin* v. *Carter*, 1 C. B. 750; 3 D. & L. 213; *Bridges* v. *Smyth*, 5 Bing. 410; 2 M. & P. 740; 7 L. J., C. P. 143; 30 R. R. 681.
(*e*) *Alford* v. *Vickery*, 1 C. & M. 280; *Jenner* v. *Clegg*, 1 Moo. & R. 213; *Williams* v. *Stiven*, 9 Q. B. 14.

for rent accruing after the expiration of a notice to quit was considered to operate merely as a waiver of the notice (*f*). It should, however, be borne in mind that a notice to quit cannot be waived without the express or implied consent of *both* parties, and that it differs in this respect from a forfeiture (*g*).

Prolongation of Term by Custom of the Country.

Where it appeared that by the custom of the country the tenant was to have the use of the barns, gate-houses, &c., of the farm for a certain period after the end of the term, for the purpose of threshing out corn and foddering cattle: and the tenancy was determined at Michaelmas, and the landlord in January following distrained a cornrick for rent due at Michaelmas, he having in the meantime obtained an injunction to restrain the tenant from carrying off the premises corn in the straw; it was held, that the holding by the tenant under the custom, though involuntary, was *a prolongation of the original term*, and that the landlord was entitled to distrain (*h*).

## Sect. 3.—*Restraining Distress by Injunction.*

Injunction against Distress.

*Shaw* v. *Jersey.*

Before the Judicature Acts a distress could not be restrained by injunction (*i*). But section 25, sub-s. 8, of the Judicature Act, 1875, which enacts, that "an injunction may be granted by an interlocutory order of the court in all cases in which it shall appear to the court to be just or convenient," extends to authorize an injunction, and such an injunction was granted in *Shaw* v. *Earl of Jersey* (*k*). In that case the plaintiffs were assignees of a mining lease, under which the defendant claimed to be entitled to a certain additional rent. The defendant had distrained twice, and the plaintiffs had sued for unlawful distress. A special case had been stated to determine the construction of the lease. The defendant was restrained from distraining until the determination of this case, by an injunction granted for a fortnight, and to be continued only if the rent should in the meantime be paid into court. An injunction restraining a distress was also granted in *Walsh* v. *Lonsdale* (*l*) upon the terms that the rent be paid into court. It may be observed that such a *conditional* injunction is more favourable for the landlord than the action of replevin, in which the tenant is *compellable* to give security only, although he may if he please make a deposit instead. (See post, Chap. XII.)

(*f*) *Zouch* d. *Ward* v. *Willingale*, H. Blac. 311; 2 R. R. 770.

(*g*) *Blyth* v. *Dennett*, 13 C. B. 178, 180.

(*h*) *Knight* v. *Bennett*, 3 Bing. 361; 11 Moore, 222; 4 L. J., C. P. 94; 28 R. R. 640; *Beavan* v. *Delahay*, 1 H. Blac. 5; 2 R. R. 696; *Nuttall* v. *Staunton*, 4 B. & C. 51; 3 L. J., K. B. 135; 28 R. R. 207.

(*i*) *Shaw* v. *Jersey* (*Earl of*), 4 C. P. D. at p. 261, per Cotton, L.J.

(*k*) *Shaw* v. *Earl of Jersey*, 4 C. P. D. 359—C. A., affirming 4 C. P. D. 120; 48 L. J., C. P. 308; 27 W. R. 787.

(*l*) *Walsh* v. *Lonsdale*, 21 Ch. D. 9, and ante, 91.

CH. XI. SEC. 4.
*Who may distrain (Reversioners).*

## SECT. 4.—*Who may distrain.*

### (a) *Reversioners.*

Distress incident to the Reversion.

The person legally entitled to the immediate reversion on a lease, when any of the rent thereby reserved becomes due, may distrain for such rent by virtue of the common law. But if he afterwards assign the reversion either absolutely or by way of mortgage, the remedy *by distress* for such arrears will be lost (*m*). So the right to distrain for previous arrears of rent may be lost by a severance of the reversion; thus where the plaintiff was tenant to six joint tenants, four of whom conveyed their shares to a third party; it was held, that the six were not entitled to distrain for the arrears of rent due to them before the conveyance (*n*). But a second lease to commence on the expiration of the previous one, creates only an interesse termini during the continuance of the first lease, and does not amount to an assignment of the reversion (*o*). If a lessee for years *assign* his term, reserving a rent, but without an express power of distress, he cannot distrain for it when in arrear, because he has no reversion: his remedy is by an action on the contract (*p*). If a lessee sub-let for a term shorter than his own by one day or more, he has a reversion and consequently a right to distrain, which will pass to his executors (*q*); and so has a tenant from year to year, sub-letting from year to year (*r*). A termor after his term has expired, and a demand of possession by the lessor, cannot distrain upon his sub-tenant continuing in possession (*s*). If a termor surrender his term to the reversioner, reserving to himself a rent, but without an express power of distress, he cannot distrain for the rent when in arrear, because he has no reversion. But if a surrender be made, and a new lease granted, the right to distrain on previous sub-tenants is preserved by the Landlord and Tenant Act, 1730, 4 Geo. 2, c. 28, s. 6, and the Real Property Act, 1845, 8 & 9 Vict. c. 106, s. 9 (*t*).

Joint Tenants.

One joint tenant,—as for instance, one of many trustees—may distrain alone; but he must avow or justify such distress in his

(*m*) Bullen, 26, 74 *Threr* v. *Barton*, Moore, 94; *Dixon* v. *Harrison*, Vaughan, 52; *Brown* v. *Metropolitan Counties Life Insurance Society*, 1 E. & E. 832; 28 L. J., Q. B. 236; *Smith* v. *Torr*, 3 F. & F. 505.

(*n*) *Staveley* v. *Alcock*, 16 Q. B. 636; 20 L. J., Q. B. 320.

(*o*) *Smith* v. *Day*, 2 M. & W. 684; *Blatchford*, app., *Cole*, resp., 5 C. B., N.S. 514; *Doe* v. *Walker*, 5 B. & C. 111.

(*p*) *Smith* v. *Mapleback*, 1 T. R. 441; 1 R. R. 247; *Talentine* v. *Denton*, Cro. Jac. 111; *Parmenter* v. *Webber*, 8 Taunt. 593; 20 R. R. 575; *Preece* v. *Corrie*, 5 Bing. 24; 6 L. J., C. P. 205; 30 R. R. 536: *Pascoe* v. *Pascoe*, 3 Bing. N. C. 898; Bullen, 54.

(*q*) *Wade* v. *Marsh*, Latch. 211; Bullen, 54.

(*r*) *Curtis* v. *Wheeler*, Moo. & M. 493; *Oxley* v. *James*, 13 M. & W. 209.

(*s*) *Burne* v. *Richardson*, 4 Taunt. 720; 14 R. R. 647.

(*t*) Ante, Chap. IX., Sect. 5.

own right, and as bailiff of the others (*u*). A distress for rent may be authorized by one of several joint tenants (*x*). He may sign a distress warrant, and thereby appoint a bailiff to distrain for rent due to all, if the others do not forbid him; and if when applied to they merely decline to act, that will not prevent him from proceeding (*y*). If some of the joint tenants assign their shares, the right of all the joint tenants to distrain for previous arrears of rent is at an end (*z*). A surviving joint tenant may distrain for arrears accrued in the lifetime of his deceased companion (*a*). Where two or more executors or other joint tenants demise to their co-executor or co-tenant their shares at a fixed rent, it seems they may distrain for such rent when in arrear (*b*).

Tenants in Common.

Tenants in common, who were obliged to avow separately (*c*), should make several distresses, each for his own share (*d*); thus, where land was demised by four persons (whose original title did not appear) at one entire rent, to be divided and paid separately in equal portions; and one of the four distrained upon the tenant for her own share of the rent; it was held, that the distress was regular, for whatever might have been the interest of the landlords as between themselves, as between them and the terre-tenant they were tenants in common, and entitled each to a separate distress (*e*). It seems they may all join in one distress; but in justifying such distress they must avow or justify separately for their respective shares (*f*). It has been held that the survivor of two tenants in common may sue in covenant for the whole rent due upon a lease made by them, although the reservation was to both according to their respective interests (*g*). If a rent-charge has been divided by will, or by deed operating under the Statute of Uses, amongst several persons as tenants in common, there may be several distresses without attornment (*h*). After a devise of a reversion to two tenants in common, one of them may distrain for his share of the rent upon the lessee of the devisor, where such lessee has paid the whole rent to the other tenant in common after notice not so to pay (*i*). Where a tenant in common demises his share to his co-tenant, he may distrain for the rent reserved (*k*).

(*u*) *Pullen* v. *Palmer*, 3 Salk. 207; Carth. 328; 5 Mod. 73.
(*x*) Per Jervis, C.J., in *Morgan* v. *Parry*, 17 C. B. 342.
(*y*) *Robinson* v. *Hoffman*, 4 Bing. 562; 3 C. & P. 234; 6 L. J., C. P. 156; 29 R. R. 627.
(*z*) *Staveley* v. *Alcock*, 16 Q. B. 636; 20 L. J., Q. B. 320.
(*a*) Bullen, 47; 2 Rol. Abr. 86.
(*b*) *Cowper* v. *Fletcher*, 6 B. & S. 464; 34 L. J., Q. B. 187.
(*c*) *Pullen* v. *Palmer*, 3 Salk. 207.
(*d*) Bradby, 41.
(*e*) *Whitley* v. *Roberts*, M'Clel. & Y. 107.
(*f*) Bullen, 48.
(*g*) *Wallace* v. *M'Laren*, 1 Man. & R. 516; *Thompson* v. *Hakewill*, 19 C. B., N. S. 713; 35 L. J., C. P. 18.
(*h*) *Rivis* v. *Watson*, 5 M. & W. 255.
(*i*) *Harrison* v. *Barnby*, 5 T. R. 246; 2 R. R. 584; *Powis* v. *Smith*, 5 B. & A. 850; 24 R. R. 587; *Doe* d. *Pritchitt* v. *Mitchell*, 1 Brod. & B. 11; 21 R. R. 567.
(*k*) *Brennan* v. *Hood*, 4 Ir. Com. L. R. 332, Q. B.

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One of several coheirs in gavelkind may distrain for rent due to himself and his coheirs without express authority from them (*l*).

Heirs in Gavelkind.

Coparceners.

Coparceners are considered in law but as one heir, and therefore before partition must join in making a distress (*m*): or one coparcener may distrain alone for the whole rent, each having an estate in every part of it (*n*). No consent from the other coparceners need be previously obtained in order to authorize one coparcener to distrain alone, or alone to appoint a bailiff to distrain for the whole rent (*n*). In the event of a replevin, however, the avowry must be, according to the nature of the estate, joint; or the party distraining alone must avow in her own right for her own share, and make cognizance as bailiff of the other coparceners (*n*). After a partition, coparceners may of common right make several distresses, and their grantees also have the same power (*o*). And even a rent-charge, although entire in its nature, may be divided between coparceners: and thus by act of law the tenant of the land may become subject to several distresses (*p*). But coparceners after they have parted with their estate cannot distrain for previous arrears (*q*).

Tenants in Tail.

Although a tenant in tail make leases not conformable to any enabling act (*r*), such leases are good as against himself, and therefore as a reversioner he may distrain even at common law for the rent reserved thereby (*s*).

Tenants by the Curtesy.

A tenant by the curtesy may distrain of common right (*t*); but a husband, unless he be tenant by the curtesy, cannot distrain for rent which becomes due after the death of his wife under leases of her freehold made by both of them, or by him on her behalf (*u*).

Tenants in Dower.

A widow to whom dowry has been duly assigned by metes and bounds, may distrain for the subsequent rent of that part (*x*). If a rent be assigned to a widow instead of her dower, she may distrain for it, although she has no reversion, and the rent was granted without deed; for such rent is in its nature distrainable of common right (*y*).

Tenants under Execution.

An entry under an execution, either by elegit, statute merchant or statute staple, gives so far an estate in the rent of land as to confer the power of distress, although there is but an uncertain interest in the reversion (*z*), and a tenant by elegit may distrain without attornment (*a*).

(*l*) *Leigh* v. *Shepherd*, 2 Brod. & B. 465; 23 R. R. 516; Bullen, 46.

(*m*) *Stedman* v. *Page*, 1 Salk. 390; *Stedman* v. *Bates*, 1 Ld. Raym. 64.

(*n*) *Leigh* v. *Shepherd*, 2 Brod. & B. 465; 5 Moore, 297; 23 R. R. 516.

(*o*) *Butler and Baker's case*, 3 Co. R. 22 b; Co. Lit. 164 b, 169 b.

(*p*) Co. Lit. 164 b; *Rivis* v. *Watson*, 5 M. & W. 255.

(*q*) *Dixon* v. *Harrison*, Vaughan, 52; and see *Staveley* v. *Alcock*, 16 Q. B. 636.

(*r*) Ante, 3.

(*s*) 1 Swanst. 346, note; Bullen, 50.

(*t*) Bradby, 46; Bullen, 51.

(*u*) See p. 301.

(*x*) Co. Lit. 29 a, 34 b, 144 b; *Stoughton* v. *Leigh*, 1 Taunt. 410; 11 R. R. 810.

(*y*) Co. Lit. 34 b, 169 b; Bullen, 31, 52; Gilb. Rents, 20.

(*z*) Bro. Abr. *Distresses*, pl. 72; *Cubitt's case*, 4 Co. R. 7.

(*a*) *Lloyd* v. *Davies*, 2 Exch. 103.

Lords of Manors and Commoners.

A lord of a manor may of common right distrain for his copyhold rents (*b*), and by the Landlord and Tenant Act, 1730, 4 Geo. 2, c. 28, s. 5, he has the same right as if the rent was reserved upon lease. But copyhold rents are not within 32 Hen. 8, c. 37, giving a remedy by distress for arrears of rent to executors and administrators (*c*). Where two commoners agreed, to their mutual advantage, not to exercise their respective rights for a certain term; it was held that one might distrain the other's cattle damage feasant during that time (*d*). In case of a common absolutely stinted in point of number, one commoner may distrain the supernumerary cattle of another; but not if an admeasurement be necessary; or where the stint has relation to the quantity of common land: and a commoner cannot distrain where the owner of cattle has any colour of right to put them on the land, as that would be taking to himself jurisdiction as to the competency of such right; but if there be no pretence or shadow of right, as in the case of the cattle of a stranger, the commoner may always resort to distress (*e*).

Mortgagees. *Moss* v. *Gallimore.*

A mortgagee, after giving notice of the mortgage to the tenant in possession under a lease or tenancy created *prior* to the mortgage, may distrain for the rent in arrear and unpaid at the time of the notice, as well as for rent which may accrue after such notice, although he was not in the actual seisin of the premises, nor in the receipt of the rents and profits thereof at the time the rent became due (*f*); but he may not distrain for rent due upon a lease made by the mortgagor alone *after* the mortgage, unless he has accepted rent from the tenant, or has given him notice to pay rent, and the tenant has acquiesced, so as to create a new tenancy (express or implied) as between the mortgagee and the tenant (*g*). Payment of rent by the tenant under a distress does not constitute an acquiescence by relation back to the period when notice was given (*h*). But the tenant may expressly attorn to the mortgagee as from a previous day, at a specified rent, which may accordingly be distrained for (*i*).

A mortgagee may distrain on the mortgagor for rent reserved upon an attornment in the mortgage deed, whether such rent be payable in advance or not, and even where the mortgagee has not executed the deed, if the tenancy be at will only, or for a term not exceeding three years (*k*).

(*b*) *Laugher* v. *Humphrey*, Cro. Eliz. 524; Bullen, 57, 58.

(*c*) *Appleton* v. *Doily*, Yelv. 135; Bull. N. P. 57; *Sands* v. *Hempson*, 2 Leon. 142.

(*d*) *Whiteman* v. *King*, 2 H. Blac. 4.

(*e*) *Hall* v. *Harding*, 4 Burr. 2432; 1 W. Blac. 673.

(*f*) *Moss* v. *Gallimore*, 1 Doug. 279; 1 Smith, L. C.; *Pope* v. *Biggs*, 9 B. & C. 245.

(*g*) *Rogers v. Humphreys*, 4 A. & E. 299; *Partington* v. *Woodcock*, 6 A. & E. 690, ante, 54.

(*h*) *Evans* v. *Elliott*, 9 A. & E. 342; *Brown* v. *Storey*, 1 M. & G. 117.

(*i*) *Gladman* v. *Plumer*, 15 L. J., Q. B. 80; 10 Jur. 109.

(*k*) *Morton* v. *Woods*, L. R., 3 Q. B. 658; 37 L. J., Q. B. 242.

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A mortgagor may distrain, under a lease granted by himself after the mortgage (*l*): but he cannot distrain for arrears of rent due on a lease made before the mortgage; for by the act of mortgaging the privity of estate is destroyed (*m*). But if a lessor, after mortgaging his reversion, is permitted by the mortgagee to continue in the receipt of the rents incident to that reversion, he, during such permission, is præsumptione juris authorized, if it should become necessary, to realize the rent by distress, and to distrain for it in the mortgagee's name, as his bailiff: and he may so justify the distress, although it was taken in his own name as for rent due to himself (*n*). So where a mortgage by demise has been paid off by the assignee of the equity of redemption, who takes from the mortgagee an undertaking to execute a transfer of the mortgage, there is an implied authority to the assignee of the equity of redemption to distrain in the name of the mortgagee (*o*).

Mortgagors.

Annuitants.

A mere annuity may be distrained for where the deed creating it expressly confers a power to distrain (*p*); but not generally in other cases (*q*). If an annuity be granted out of an estate, and the grantor, to secure the payment, vests the estate in trustees for a term, to the use of the annuitant, and subject thereto continues in possession, the annuitant may distrain for the arrears: for supposing the term to have given him the reversion, the grantor is to be considered as his sub-tenant, upon whom he might as reversioner distrain at common law (*r*).

Guardians.

Such guardians as may make leases of the infant's lands in their own names (*s*), may, during the minority of their wards, distrain in their own names for arrears of rent reserved by such leases (*t*).

### (b) *Persons not having the Reversion.*

On Exchanges and Partitions.

Although a person who has never had the reversion, or has parted with it, cannot generally distrain (*u*), yet in some particular cases the power of distress is held to be of common right, even without the reversion. Thus a rent granted upon an exchange may be distrained for without any reversion or express power (*x*), and so may a rent granted by one coparcener to another for equality of partition (*y*). In such cases the grantee of the rent

(*l*) Bradby, 99; *Alchorne* v. *Gomme*, 2 Bing. 54.
(*m*) Bullen, 74.
(*n*) *Trent* v. *Hunt*, 9 Exch. 14; *Reece* v. *Stronsberg*, 54 L. T. 133.
(*o*) *Snell* v. *Finch*, 13 C. B., N. S. 651; 32 L. J., C. P. 117.
(*p*) *Chapman* v. *Beecham*, 3 Q. B. 723.
(*q*) Co. Lit. 32 a, 144 b; Bullen, 51, note (9).
(*r*) *Fairfax* v. *Gray*, 2 W. Blac. 1326.
(*s*) See Chap. I., Sect. 21.
(*t*) *Shopland* v. *Ryoler*, Cro. Jac. 55, 98; *Bedell* v. *Constable*, Vaugh. 179; Bullen, 72.
(*u*) *Smith* v. *Mapleback*, 1 T. R. 441; 1 R. R. 247.
(*x*) Lit. ss. 252, 253; Co. Lit. 169 a; Id. 153 a, note (1); Bullen, 31.
(*y*) Lit. ss. 252, 253; Co. Lit. 153 a, note (1); Id. 169 b; *Butler and Baker's case*, 3 Co. R. 22 b; *Stukeley* v. *Butler*, Hob. 172; Bullen, 31, 45.

may distrain for it without any express power in the deed; but if such grantee assign over, neither he nor the assignee can distrain for arrears due before the assignment (*z*).

A woman endowed of a rent by way of jointure in lieu of dower may distrain for it, whether it be rent-service, rent-charge or rent-seck, with or without deed (*a*). Although she have not the reversion, she may distrain for such rent of common right (*b*). Jointures.

The grantee or owner of a rent-charge, although he has no reversion, may distrain for the arrears by virtue of the express power in the deed or will creating the rent-charge (*c*). So may the grantee or owner of a rent-seck, by virtue of the Landlord and Tenant Act, 1730, 4 Geo. 2, c. 28, s. 5 (*d*). Grantee of Rent-charge.

The rents paid by copyholders, as tenants of the manor, to the lord, have always been considered as rent-service, fealty being necessarily incident to this species of tenure, and therefore they are distrainable of common right (*e*). Lords of Manors.

### (c) *Tenants pur autre Vie.*

By 32 Hen. 8, c. 37, s. 4, tenants pur autre vie may sue or distrain for arrears due during the life, and unpaid after the death of the cestui que vie, in like manner as at common law they might have done during his life. 32 Hen. 8, c. 37, s. 4.

### (d) *Executors and Administrators.*

By the common law, executors or administrators could not distrain for arrears incurred in the lifetime of the owner of the rent (*f*); but by 32 Hen. 8, c. 37, s. 1, the executors and administrators of tenants in fee, fee-tail, or for term of life, of rent-services, rent-charges, rent-seck and fee-farm rents, were empowered to distrain upon the lands chargeable with the payment thereof, so long as such lands remain in the possession of the tenant who ought to have paid them, or of any other person claiming under him by purchase, gift or descent (*g*); and the Civil Procedure Act, 1833, 3 & 4 Will. 4, c. 42, enacts by sects. 37 and 38 that— 32 Hen. 8, c. 37, s. 1. 3 & 4 Will. 4, c. 42, ss. 37, 38.

**37.** It shall be lawful for the executors or administrators of *any* lessor or landlord to distrain upon the lands *demised for any term, or at will*, for the arrearages of rent due to such lessor or landlord in his lifetime, in like manner as such lessor or landlord might have done in his lifetime.

**38.** Such arrearages may be distrained for after the end or determination of such term or lease at will, in the same manner as if such term or lease

(*z*) Ante, Chap. VII.

(*a*) *Coll* v. *Bishop of Coventry*, Hob. 140, 153.

(*b*) Co. Lit. 169 b; Id. 34 b; Gilb. Rents, 20; Bullen, 31, 52.

(*c*) Ante, 443; and see *Owen* v. *Wynne*, 4 E. & B. 579, and Sect. 13, infra.

(*d*) Ante, 443.

(*e*) *Laugher* v. *Humphrey*, Cro. Eliz. 524; ante, 442.

(*f*) Co. Lit. 162 a; Preamble of 32 Hen. 8, c. 37, s. 1.

(*g*) See *Hool* v. *Bell*, 1 Ld. Raym. 172; 3 Salk. 136, as to the comprehensive application of this statute.

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had not been ended or determined; provided that such distress be made within the space of six calendar months after the determination of such term or lease, and during the continuance of the possession of the tenant from whom such arrears became due (*h*); provided also, that all and every the powers and provisions in the several statutes made relating to distresses for rent shall be applicable to the distresses so made.

Death of lessee.

Where the lessee of lands dies before the expiration of the term, and his administrator continues in possession during the remainder and after the expiration of it, a distress may be taken for all the arrears (*i*), not exceeding six years (*j*); but it is otherwise where a mere tenant at will dies and his widow continues in possession (*k*).

Demise to co-executor.

Where several executors demise to their co-executor at a fixed rent, it seems they may distrain for such rent when in arrear (*l*).

Distress before Probate.

An executor may distrain before probate, and may ratify a distress made by a bailiff in the name of the testator immediately after his death (*m*).

(e) *Husbands.*

Husbands in Right of their Wives.

Arrears of rent, arising out of land in which the wife has only a chattel interest, whether accruing before or during the marriage, might always by the common law be distrained for by the husband; and by 32 Hen. 8, c. 37, s. 3, the husband was allowed to distrain for arrears accrued before or during the marriage in respect of the wife's freeholds (*n*), but not for subsequently accruing rent, unless he were tenant by the curtesy (*o*). After the death of the wife, the husband might distrain alone for all the rent due in right of the wife in her lifetime, even if it accrued to her in autre droit, as executrix (*p*).

Though the wife might generally join with her husband, in no case whatever could she before the Married Women's Property Act, distrain alone (*q*).

(f) *Corporations.*

Under implied Tenancies from Year to Year. *Wood* v. *Tate.*

If a lease be made by or on behalf of a corporation aggregate, not under their common seal, although it be invalid as a lease, yet if the tenant hold under it and pay part of the agreed rent to the corporation or their bailiff or agent, that is sufficient to create a tenancy from year to year at a fixed rent, and to entitle the corporation to distrain for such rent (*r*).

(*h*) Compare Landlord and Tenant Act, 1709, Sect. 10 (a), post.

(*i*) *Braithwaite* v. *Cooksey*, 1 H. Blac. 465; 2 R. R. 807.

(*j*) Real Property Limitation Act, 1833, s. 42, Sect. 10 (b), post.

(*k*) *Turner* v. *Barnes*, 2 B. & S. 435; 31 L. J., Q. B. 170.

(*l*) *Cowper* v. *Fletcher*, 6 B. & S. 464; 34 L. J., Q. B. 187.

(*m*) *Whitehead* v. *Taylor*, 10 A. & E. 210.

(*n*) Bullen, 56, 57; *Ognel's case*, 4 Co. R. 51 a.

(*o*) *Howe* v. *Scarrott*, 4 H. & N. 723; 28 L. J., Ex. 325; ante, Chap. VII., Sect. 8.

(*p*) *Osborne* v. *Wickenden*, 2 Saund. 195; *Parry* v. *Hindle*, 2 Taunt. 181.

(*q*) Bullen, 54.

(*r*) *Wood* v. *Tate*, 2 B. & P., New R. 247; 9 R. R. 645.

By the Landlord and Tenant Act, 1730, 4 Geo. 2, c. 28, s. 5 (*s*), bodies politic and corporate are placed on the same footing as other persons with respect to the recovery of rent-seck, chief rents, and rents of assize.

4 Geo. 2, c. 28, s. 5.

Corporations sole may sue or distrain in like manner as other lessors.

Churchwardens and Overseers.

Any one of the churchwardens and overseers of a parish holding property under the Poor Relief Act, 1819, 59 Geo. 3, c. 12 (*t*), may, on behalf of himself and the others, distrain for rent due in respect of the property (*u*).

### (g) *Persons having Special Powers.*

Rent-charge.

It is of the very essence of a rent-charge that a power of distress should be given by the deed or will creating the charge (*x*), and a distress may be made accordingly when any of such rent is in arrear. So the assignee of a rent-charge may distrain for arrears thereof which become due after the assignment (*y*), but not for previous arrears (*z*).

Rent-seck.

The grantor or owner of a rent-seck may distrain for arrears by virtue of the Landlord and Tenant Act, 1730, 4 Geo. 2, c. 28, s. 5 (*a*). So a devisee may distrain for rent devised to him out of land, whether the land be expressly charged with a distress or not (*b*). A person who has possession of land, though he has not the legal estate, may by agreement grant another a power of distress (*c*). A covenant that the grantor of a rent should not replevy the goods distrained until the rent be paid, is void (*d*). Where by an inclosure act a yearly *corn-rent* was substituted in lieu of tithes, and a power of distress was given for the recovery thereof; it was held, that the goods of a tenant, coming in under the owner of land which had remained for several years untenanted, and wholly unprofitable, were liable to be distrained for such corn-rent in arrear (*e*).

### (h) *Receivers and Agents.*

By Private Receiver.

*Jolly* v. *Arbuthnot.*

A private receiver cannot generally distrain without an express power for that purpose (*f*). In *Jolly* v. *Arbuthnot*, by a receivership deed executed contemporaneously with a mortgage in fee, which it

(*s*) Ante, 443.
(*t*) Ante, 33.
(*u*) *Gouldsworth* v. *Knights*, 11 M. & W. 337.
(*x*) Ante, 443.
(*y*) *Maund's case*, 7 Co. R. 28.
(*z*) *Brown* v. *Metropolitan Counties Life Insurance Society*, 1 E. & E. 832; 28 L. J., Q. B. 236.
(*a*) Ante, 443.
(*b*) *Buttery* v. *Robinson*, 3 Bing. 392; 11 Moore, 262; 4 L. J., C. P. 108; 28 R. R. 656; *Sallory* v. *Leaver*, L. R., 9 Eq. 22.
(*c*) *Chapman* v. *Beecham*, 3 Q. B. 723; *Pollitt* v. *Forrest*, 11 Q. B. 961.
(*d*) 1 Inst., 145 b.
(*e*) *Newling* v. *Pearce*, 1 B. & C. 437; *Bendyshe* v. *Pearce*, 4 Moo. 99.
(*f*) Bullen, 72; *Ward* v. *Shew*, 9 Bing. 608; 9 Exch. 19.

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recited, the mortgagor and mortgagee appointed a receiver, and constituted him their agent and attorney to receive the rents of the mortgaged property, and to use such remedies by way of entry and distress as should be requisite for that purpose. By the same deed the mortgagor attorned as tenant from year to year to the receiver, and there was a proviso that if default should be made in payment of the mortgage money or interest at the times appointed, the mortgagee might enter and avoid the tenancy created by the attornment. There was also a proviso that nothing therein contained should lessen the rights, powers or remedies of the mortgagee under the mortgage (*g*). On the mortgagor being found bankrupt, it was held, that the relation of landlord and tenant had been created between the receiver and mortgagor by the receivership deed, and that the receiver was entitled to distrain, and take the goods which had belonged to the mortgagor on the mortgaged premises (*h*).

Receivers appointed by Order of Court.

Receivers appointed by the High Court have a power, where they consider it necessary, to distrain, and need not apply first to the Court for a particular order for that purpose (*i*), because as the Court never makes an immediate order, but appoints a future day for a tenant to pay, it might be an injury to the estate to wait till that time, as it would give the tenant an opportunity to convey his goods off the premises in the meantime. If, however, there is any doubt who has the legal right to the rent, then the receiver should make an application to that Court for an order, as he must distrain in the name of the person who has that right (*k*); unless indeed the tenant has attorned for him, and so created a tenancy as between them (*l*), in which case he should of course distrain in his own name (*m*).

Agents.

An authority to tenants to pay rent to a third person, whose receipt shall be a discharge, does not entitle that person to distrain, although he receives the rents for his own benefit (*n*). If a person having express or implied authority to distrain for rent due to another, says at the time that he distrains for rent due to himself, he may nevertheless justify as bailiff of the other (*o*).

(*g*) The real object of this was to enable the mortgagee to obtain all the advantages, without subjecting himself to the liabilities of a mortgagee *in possession*.

(*h*) *Jolly* v. *Arbuthnot*, 4 De G. & J. 224; 28 L. J., Ch. 547.

(*i*) *Pitt* v. *Snowden*, 3 Atk. 750; *Dancer* v. *Hastings*, 4 Bing. 2; 12 Moore, 34; 5 L. J., C. P. 3; 29 R. R. 740; *Bennett* v. *Robins*, 5 C. & P. 379.

(*k*) *Hughes* v. *Hughes*, 3 Bro. C. C. 87; 1 Ves. jun. 161.

(*l*) *Evans* v. *Mathias*, 7 E. & B. 590, 601; 26 L. J., Q. B. 309; *White* v. *Smale*, 22 Beav. 72; 26 Id. 191; *Barton* v. *Rock*, 22 Id. 81.

(*m*) *Jolly* v. *Arbuthnot*, 4 De G. & J. 224; 28 L. J., Ch. 547.

(*n*) *Ward* v. *Shew*, 9 Bing. 608.

(*o*) *Trent* v. *Hunt*, 9 Ex. 14; *Snell* v. *Finch*, 13 C. B., N. S. 651; 32 L. J., C. P. 117.

(i) *Sequestrators of Ecclesiastical Benefices.*

By Sequestrators.

By the Sequestration Act, 1849, 12 & 13 Vict. c. 67, any sequestrator duly appointed to collect or receive the profits of any ecclesiastical benefice is empowered to levy any distress in his own name for the recovery of tithes, tithe rent-charge or rent, &c., payable to the incumbent of the sequestrated benefice. Sequestrators appointed by the High Court appear to stand on the same footing as receivers (*p*).

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## Sect. 5.—*Distress on Agricultural or Pastoral Holding, or on Market Garden.*

Application of Agricultural Holdings Act.

If the Agricultural Holdings Act, 1883, 46 & 47 Vict. c. 61, applies, that is, if the demised premises be either wholly agricultural or wholly pastoral, or partly agricultural and partly pastoral, or wholly or partly cultivated as a market garden, held under a landlord for a term of years, or for lives, or for lives and years, or from year to year, and the tenant hold no employment under the landlord (*q*), then the landlord's rights of distress are subject to four (*r*) special limitations particularly laid down by sections 44 to 47 of the act.

One year's Arrears alone Recoverable.

First, it is enacted by sect. 44 that the six years' arrears which the landlord might otherwise have distrained for shall be reduced to one year's arrears, the words being that "it shall not be lawful to distrain for rent which became due more than one year before the making of such distress;" but a proviso recognizes and encourages the continuance of the very common practice of deferring the collection of rents for a quarter or half-year. (See p. 490, post.)

Exemption of Agisted Stock and Hired Machinery and Breeding Stock.

Secondly, it is enacted by sect. 45 that agricultural or other machinery on hire, and live stock on hire for breeding purposes, are to be absolutely exempt from distress, and that agisted cattle, where a fair price is paid by the owner, are to be exempted conditionally, that is, in case other sufficient distrainable goods should be on the premises, and even when in such case distrainable, are to be distrainable only for the amount due to the tenant from the owner for their keep. (See p. 483, post.)

Determination of dispute by County Court or Justices of the Peace.

Thirdly, as to procedure in case of an alleged wrongful distress, it is enacted by sect. 46 that any dispute relating to a distress may be heard and determined either by a county court or a court of summary jurisdiction, either of which courts, subject to appeal to

(*p*) Supra, 462.

(*q*) See ss. 54 and 61 of the act, post, Appendix A., and see the application of the act considered, post, Chap. XXI.

(*r*) Four other limitations, contained in s. 49 (costs), s. 50 (sale in public auction-room), s. 51 (fifteen days for replevy), and s. 52 (distress by certificated bailiffs), are, with amendments, made generally applicable to all tenancies, by the Law of Distress Amendment Act, 1888, 51 & 52 Vict. c. 21 (post, App. A.), which repeals sections 49, 50, 51, and 52 of the Agricultural Holdings Act, 1883.

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quarter sessions from a court of summary jurisdiction, and to the High Court from the county court (*s*), may make an order for restoration or "any other order which justice requires." (See Chap. XII., Sect. 3, post.)

Set-off of Compensation.

Fourthly, by sect. 47, where any compensation under the Agricultural Holdings Act or under any custom or contract has been ascertained, the amount of it may be set off against any rent due, and the landlord may only distrain for the balance.

Can the Agricultural Holdings Act be contracted out of?

These sections, which present not a few difficulties, will be examined in detail presently (*t*); but the question must at once be shortly considered, whether or not the parties may by special stipulation "contract out of" these sections, and legally, by preventing their taking effect, continue the rights and liabilities of the ordinary law.

Upon the general principle *quilibet potest renunciare juri pro se introducto*, there appears to be some reason for saying that the tenant may give up his rights under these sections, and perhaps an additional reason is supplied by the fact that the rights under other sections of the act, those which secure compensation for improvements, can by the express provision of the act in no case be contracted out of. The rule appears to be that a statute can be contracted out of unless it be contrary to public policy to contract out of it (*u*), or unless some third person's rights be damaged (*x*). It can hardly be said to be contrary to public policy to contract out of these sections; but considering the extent to which the rights of third parties may be directly affected, it is submitted on the whole that they cannot be contracted out of.

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### SECT. 6.—*Distress in Case of Bankruptcy.*

Landlord may distrain for Six Months' Rent.

No stay of distress.

The landlord's right to distrain for rent, when the tenant becomes bankrupt, which was always recognized by bankruptcy law (*y*), is limited to six months' rent due prior to the adjudication. If any more arrears be then due, they may be proved for. Such is the effect of sect. 42, sub-sect. 1, of the Bankruptcy Act, 1883, 46 & 47 Vict. c. 52, as amended by sect. 28 of the Bankruptcy Act, 1890, 53 & 54 Vict. c. 71, which cut down the arrears recoverable from twelve months to six, but otherwise left sect. 42, sub-sect. 1 of the Act of 1883 untouched.

(*s*) See *Hanmer* v. *King*, 57 L. T. 367.

(*t*) See pp. 483, 490.

(*u*) That the Employers' Liability Act, 1880, could be contracted out of, see *Griffiths* v. *Earl Dudley*, 9 Q. B. D. 357.

(*x*) See Broom's Legal Maxims, 6th ed., at p. 668.

(*y*) Goods in the custody of a messenger in bankruptcy were not exempt from distress, as being in the custody of the law. *Briggs* v. *Sowry*, 8 M. & W. 729.

The distress under sect. 42, sub-sect. 1 of the Act of 1883 (which re-enacts without alteration sect. 34 of the Bankruptcy Act, 1869) is not a "legal process" within the meaning of sect. 10, sub-sect. 2, of the Bankruptcy Act, so as to be stayable under that section (*z*); and notwithstanding the possession of a receiver, may be begun, continued, and ended without any leave from any court whatever (*a*).

Preferential payments.

The general law upon this subject is more fully given and considered in connection with the general rights of the parties in case of bankruptcy (ante, Chap. VII., Sect. 11, sub-sect. (e), p. 297), while the particular and very important law of "preferential payments" for wages, &c., is dealt with in sect. 16 of this chapter, post.

## Sect. 7.—*Distress upon Company in Liquidation.*

Restriction of right to distrain, by Companies Act, 1862.

Distress upon a joint stock company's goods is restricted by the Joint Stock Companies Acts, and is not affected by the 10th section of the Judicature Act, 1875, which imports certain bankruptcy rules into winding-up (*b*). By sect. 87 of the Companies Act, 1862 (25 & 26 Vict. c. 89), it is enacted, that "where an order has been made for winding-up a company under this act no suit, action, or *other proceeding* shall be proceeded with or commenced against the company except with leave of the court, and subject to such terms as the court may impose;" and by sect. 163, that "where any company is being wound up by the court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding-up shall be void to all intents." It is settled by authority, though the point of construction is very doubtful (*c*), that these two sections are to be read together, and the enactment of sect. 163 that a distress shall be "void" means that it shall be void unless leave be given under sect. 87 (*d*). But the landlord to obtain the benefit of leave under sect. 87 must either show some special equity, or that the rent ought to be paid as one of the expenses of the winding-up (*e*), and a mortgagee under an "attornment clause" stands in a less favourable position than a landlord (*f*). Thus, where the liquidators and

Distress void unless leave given.

(*z*) *Birmingham Gaslight Co., Ex parte, Fanshaw, In re*, L. R., 11 Eq. 615; 40 L. J., Bank. 52; 24 L. T. 639; 19 W. R. 603.

(*a*) *Till, Ex parte, Mayhew, In re*, L. R., 16 Eq. 97; 42 L. J., Bank. 84; 21 W. R. 574.

(*b*) *Thomas* v. *Patent Lionite Co.*, 17 Ch. D. 250; 50 L. J., Ch. 544; 44 L. T. 392; 29 W. R. 596, C. A.

(*c*) See per cur. in *Lancashire Cotton Spinning Co., In re*, 36 Ch. D. 656; 56 L. J., Ch. 761; 57 L. T. 511; 36 W. R. 305, C. A.

(*d*) *Re Exhall Coal Mining Co. (Limited)*, 33 L. J., Ch. 595; 10 Jur. N. S. 576; 4 De G., J. & S. 37; 13 W. R. 219; and see *Eyton* v. *Denbigh, &c. R. Co.*, L. R., 6 Eq. 14; *Rickman* v. *Johns*, Id. 488; *Lundy Granite Co., In re, Heaven, Ex parte*, L. R., 6 Ch. 482; 40 L. J., Ch. 588; 24 L. T. 922; 19 W. R. 609.

(*e*) See the cases above cited.

(*f*) Ib.; *Higginshaw Mills and Spinning Co., In re*, [1896] 2 Ch. D. 544; 65 L. J. Ch. 771; 75 L. T. 5; 45 W. R. 56—C. A.

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receivers of a cotton mill company took possession of the mill without objection by the mortgagee, and kept it in working order to prevent deterioration and to facilitate sale, the court refused to give the mortgagee leave to distrain for interest accrued since the date of taking possession, holding that the possession of the liquidators and receivers was as much for the benefit of the mortgagee as of the company (*g*). It is settled, too, that leave will not be given to distrain for rent accrued due from the company before the winding-up order (*h*); though this rule has been held not to apply to a case where the company were sub-tenants only, and the landlord had accepted a collateral security for the rent from the company (*i*); and that the 10th section of the Judicature Act, 1875, which assimilates the rules in bankruptcy to the rules in winding-up as to rights of secured creditors does not so far assimilate them as to allow the landlord to distrain for such rent (*k*). For rent due before the presentation of the petition—to which the winding-up order has relation back (*l*)—the landlord must prove, with the other creditors, in the winding-up.

Rent due before winding-up order.

It has been said that the court will not, at the instance of the liquidator, restrain further proceedings under a distress levied before winding-up commenced, but not completed by sale, unless there are special reasons rendering it inequitable to allow the distress to go on; but the opinion has been intimated that the court has jurisdiction both in a compulsory and a voluntary winding-up, to restrain further proceedings under such distress (*m*).

Rent due after winding-up order.

As to rent accrued after the winding-up order, "if the company for its own purposes, and with a view to the realization of the property to better advantage, remains in possession of the estate, which the lessor is not therefore able to obtain possession of, common sense and ordinary justice require the court to see that the landlord receive the full value of his property" (*n*) and to give the leave to

(*g*) *Higginshaw Mills Co., In re*, [1896] 2 Ch. D. 544—C. A., and (f) infra.

(*h*) *Ic Progress Assurance Co.*, L. R., 9 Eq. 370; *Traders' North Staffordshire R. Co., In re*, L. R., 19 Eq. 60; *Thomas* v. *Patent Lionite Co.*, supra (*b*), and *Brown, Bailey, and Dixon, In re, Roberts and Wright, Ex parte*, 18 Ch. D. 649; 50 L. J., Ch. 738, where mortgagees having a right of distress for interest were refused leave to distrain for arrears accrued before the winding-up. For exception in case where landlord not a legal creditor, see note (*s*) infra.

(*i*) *Carriage Co-operative Supply Association, In re, Clemence, Ex parte*, 23 Ch. D. 154, per Fry, J., not approved, though not dissented from, in *New City Constitutional Club Co., In re*, 56 L. J., Ch. 332.

(*k*) *Coal Consumers' Association, In re*, 4 Ch. D. 625; *Thomas* v. *Patent Lionite Co.*, supra.

(*l*) *South Kensington Stores, In re*, infra (*q*).

(*m*) *Roundwood Colliery Co., In re, Lee* v. *Roundwood Colliery Co.*, [1897] 1 Ch. 373; 66 L. J., Ch. 186; 75 L. T. 508; 45 W. R. 217, per Stirling, J. (reversed on other points), following *Great Ship Co., In re*, 33 L. J., Ch. 245; 4 De G., J. & S. 63.

(*n*) Per James, L.J., in *Lundy Granite Co., In re*, L. R., 6 Ch. 466, cited with approval by Hall, V.-C., in *North Yorkshire Iron Co., In re*, 7 Ch. D. 664. See also *Silkstone and Dodworth Coal and Iron Co., In re, Perkins, Ex parte*, 17 Ch. D. 158; 50 L. J., Ch. 444; 44 L. T. 405; 29 W. R. 484, per Fry, J.

distrain; nor is the existence of a power of re-entry in the lease any reason for refusing such leave (*o*). The Apportionment Act, 1870 (*p*), may be resorted to for dividing a quarter's rent into a part which may only be proved for and a part which may be distrained for (*q*), and the right to distrain begins to run, not from the date of the winding-up order, but from the date of the presentation of the winding-up petition (*r*).

Distress where Landlord "Stranger" to Company.

It has been twice held by the Court of Appeal (*s*), that the landlord's common law right of distress is not restricted by the Companies Act in cases where he is a "stranger" to the company—that is, in cases where the company is not his tenant, but the goods of the company are found upon the premises of a person who is. These decisions proceed upon the ground that in such cases the landlord has no right of proof in the winding-up, not being a creditor of the company.

Review of cases.

All the cases up to 1882 will be found fully reviewed in *Oak Pitts Colliery Co., In re* (*t*), in which the Court of Appeal appears to have laid down the principles upon which leave is given or refused to the same effect as above stated.

Furniture comprised in Debentures.

Goods (as furniture), comprised in debentures, if the value of them is less than the debenture debt, cease to be the property of the company, within the meaning of sect. 163, and the landlord may distrain as at common law (*u*).

Further Rights of Landlord.

A landlord who has demised a mine to a company for a term of years, has a right, if, before the expiration of the term, the company is ordered to be wound up, to enter a claim against the company in respect of the contingent liability to the future non-payment of rent by the assignee of the lease (*x*). Where a company who were assignees of land granted for a feu duty, came to be wound up, the grantor was held entitled to prove for arrears of feu duties, and also to enter a claim for the capitalized value of future feu duties (*y*).

Preferential payments.

As to charge on proceeds of distress for certain "preferential payments" to clerks and others, see Sect. 16, post.

(*o*) *North Yorkshire Iron Co., In re*, ubi supra.

(*p*) Ante, Chap. X., Sect. 6.

(*q*) *South Kensington Co-operative Stores, In re*, 17 Ch. D. 250; 50 L. J., Ch. 446; 44 L. T. 471; 29 W. R. 662, per Fry, J.; *Shackell* v. *Chorlton*, [1895] 1 Ch. 378: 64 L. J. Ch. 353; 72 L. T. 188: 43 W. R. 394: 2 Manson, 233; 13 R. 301, per Kekewich, J.

(*r*) See *South Kensington, &c.*, supra (*q*).

(*s*) *In re Lundy Granite Co.*, ubi supra (exhaustively explained by Jessel, M.R., in *Traders' North Staffordshire Co., In re*, ubi supra); *Regent United Service Stores, In re*, 8 Ch. D. 616.

(*t*) *Oak Pitts Colliery Co., In re, Eyton's Claim*, 21 Ch. D. 322; 51 L. J., Ch. 768; 47 L. T. 7; 30 W. R. 759—C. A., in which it was held that the mere fact of a liquidator not endeavouring to surrender was not enough for giving leave to distrain.

(*u*) *New City Constitutional Co., In re*, 56 L. J., Ch. 332—C. A.

(*x*) *Re Haytor Granite Co.*, L. R., 1 Ch. App. 77; 35 L. J., Ch. 154; *Re London and Colonial Co.*, L. R., 5 Eq. 561.

(*y*) *Gartness Iron Co., In re*, L. R., 10 Eq. 412; 39 L. J., Ch. 814; 23 L. T. 389; 18 W. R. 1103, per Bacon, V.-C.

CH. XI. SEC. 8.
*Subject-matters of Distress (Rules and Exemptions).*

## SECT. 8.—*The Subject-matters of Distress.*

### (a) *General Rules and Exemptions.*

Distress is of the Nature of a Pledge.
*Simpson* v. *Hartopp.*

A distress being anciently considered merely as a pledge in the hands of the lord to compel the tenant to perform the service or duty required, could not at common law be sold; but was to be restored in the same plight to the owner, when such service or duty was performed; and therefore nothing could be distrained unless it could be returned in specie and undamaged (*z*), and in the same state as when taken (*a*). This is why tenants' fixtures and the flesh of animals lately slaughtered cannot be distrained (*b*). The right to sell the distress was first given by 2 W. & M. c. 5, but that statute did not, except with respect to sheaves of corn, which were not at common law distrainable, do away with the exceptions founded on the common law rule. Subsequent statutes have further altered the law.

List of Things exempted from Distress.

The present exceptions, of which the more important will be considered in detail presently, may here be briefly stated as follows:—

*Things absolutely privileged—*

Fixtures. Fixtures (*c*) and other things which cannot be restored in same plight as taken:

Animals. Animals feræ naturæ (*d*):

Trade. Goods delivered to a person in the way of his trade (*e*):

Use. Things in actual use (*f*):

Custody of Law. Things in the custody of the law (*g*):

Tools, &c. The things protected from a county court execution, being the wearing apparel and bedding of the tenant or his family and the tools of his trade up to the value of 5*l.* (*h*):

Ambassador. The goods of an ambassador (*i*):

Lodger. The goods of a lodger (*k*):

Looms. Frames, looms, or machines used in the woollen, cotton, or silk manufactures (*l*):

Gas-meters. Gas-meters, and fittings for gas (which term includes a gas-stove (*m*), being the property of a gas company incorporated by act of parliament (*n*):

(*z*) Gilb. Distr. 34, 48; Co. Lit. 47 b; *Pitt* v. *Shew*, 4 B. & A. 207; *Darby* v. *Harris*, 1 Q. B. 895.

(*a*) *Simpson* v. *Hartopp*, Willes, 515; 1 Smith, L. C.

(*b*) *Morley* v. *Pincombe*, 2 Exch. 101; *Brown* v. *Shevill*, 2 A. & E. 138.

(*c*) *Hellawell* v. *Eastwood*, 6 Ex. 295, and 472, post.

(*d*) Co. Lit. 47, and 473, post.

(*e*) *Swire* v. *Leach*, 34 L. J., C. P. 150, and 474, post.

(*f*) *Simpson* v. *Hartopp*, 1 Smith, L. C., and 472, post.

(*g*) Page 476, post.

(*h*) Law of Distress Amendment Act, 1888, 51 & 52 Vict. c. 21, s. 4, and 479, post, where see as to the loss of the privilege in case of tenancy expired.

(*i*) Diplomatic Privileges Act, 1708, 7 Ann. c. 12, s. 3. See *Novello* v. *Toogood*, 1 B. & C. 554; 1 L. J., K. B. 181; 25 R. R. 507; *Parkinson* v. *Potter* (rates), 16 Q. B. D. 152; 55 L. J., Q. B. 153; 53 L. T. 818; 34 W. R. 215.

(*k*) 34 & 35 Vict. c. 70, and 480, post.

(*l*) 6 & 7 Vict. c. 40, ss. 18, 19.

(*m*) *Gaslight and Coke Co.* v. *Hardy*, 17 Q. B. D. 619; 55 L. T. 585; 35 W. R. 50—C. A.

(*n*) Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 14.

Railway rolling stock in any works not belonging to the tenant of the works (*o*) :

*If the Agricultural Holdings Act applies*, hired machinery and breeding stock.

*Things privileged sub modo or conditionally, i.e. privileged only if there be other sufficient distress on the premises—*

Beasts of the plough and sheep (*p*) :

Tools of trade (*q*) :

*If the Agricultural Holdings Act applies*, agisted stock.

Crown Property.

There is no modern decision as to crown property ; but it is laid down in the old books that a man cannot distrain during the possession of the crown (*r*); and it would seem to follow that crown property, even though the crown be not tenant, is privileged on premises demised to a subject.

Stranger, Distress on Goods of.

Subject to the above exceptions, all cattle, goods and chattels which are found upon the demised premises may be distrained for rent, whether they be the effects of a tenant or of a stranger (*s*), the reason being that the landlord has a lien on them in respect of the place in which they are found, and not in respect to the person to whom they belong. Where a stranger's goods are seized, he has, as in any other case where one man's goods are lawfully seized for another man's debt, a right to recover damages from the tenant (*t*). Moreover a stranger may dispute the landlord's title and is not estopped from disputing it as the tenant himself (see ante, p. 225) is (*u*).

Action against Tenant.

Dispute of Landlord's Title.

Distress, ordinarily on Demised Premises only.

The property must be upon the premises, except in the case of a fraudulent removal (*x*), or cattle feeding or depasturing upon any common appendant or appurtenant to the demised premises (*y*), and except in the case of distresses by the crown (*z*).

(*o*) 35 & 36 Vict. c. 50, s. 3, post, 482.

(*p*) *Keen* v. *Priest*, 4 H. & N. 236, and 483, post.

(*q*) *Gorton* v. *Falkner*, 4 T. R. 565 ; 2 R. R. 463, and 485, post.

(*r*) Vin. Abr. "Distress" (2nd ed.), p. 125 ; Br. Distress, pl. 46.

(*s*) Gilb. Distr. 33 ; Bac. Abr. "Distress" (7th ed.), p. 690.

"The general rule at common law was," observes Blackburn, J., in *Lyons* v. *Elliott*, 1 Q. B. D. at p. 213, "that whatever was found on the demised premises, whether belonging to a stranger or not, might be seized by the landlord and held as a distress till the rent was paid or the service performed. This state of things produced no harm, because at common law the landlord not being able to sell the distress, he generally gave up the goods as soon as he found they were not the tenant's, as his continuing to hold them would not induce the tenant to pay. But in the reign of William and Mary a very harsh and unjust law (2 W. & M. c. 5) was passed by which the right was given to the landlord to sell any goods seized, and to apply the proceeds to the payment of the rent unless the tenant or owner of the goods first paid it ; and this held out a great temptation to a landlord to take the goods of a stranger although he knew that they were not the tenant's."

(*t*) *Exhall* v. *Partridge*, 8 T. R. 308 ; 4 R. R. 656.

(*u*) *Tadman* v. *Henman*, [1893] 2 Q. B. 168 ; 5 R. 479.

(*x*) Post, Sect. 10 (e).

(*y*) Distress for Rent Act, 1737, 11 Geo.2, c. 19, s. 8, post. p. 493.

(*z*) Bullen, 76.

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Money out of a bag cannot be distrained, for one piece cannot be known from another; but money in a bag sealed may be distrained; for the bag sealed may be known again (*a*).

Money.

Where a mortgage was made by two partners of a freehold of which they were tenants in common, and each attorned tenant to the mortgagees of one moiety at a separate rent, it was held by Bacon, C.J., who pointed out that his decision was "directly against the common sense and justice of the case," that, under separate distresses for rent in respect of each moiety, the mortgagees could not seize the partnership assets, but only such goods as each partner was separately entitled to (*b*).

Partnership Property. *Parke, Ex parte.*

(b) *Corn and Growing Crops.*

Distress of Corn and Growing Crops.

By the common law cocks and sheaves of corn and other farm produce and growing crops could not be distrained, but were absolutely privileged from distress for rent, although there were no other goods on the premises (*c*). But by 2 W. & M. sess. 1, c. 5, s. 3, "any person having rent in arrear and due upon any demise, lease or contract, may seize and secure any sheaves or cocks of corn, or corn loose or in the straw, or hay lying or being in any barn or granary, or upon any hovel, stack or rick, or otherwise upon any part of the land or ground charged with such rent, and lock up or detain the same in the place where the same shall be found, for or in the nature of a distress, until the same shall be replevied or sold: but the same must not be removed from such place to the damage of the owner." Under this statute it seems that the landlord *must* sell at the expiration of five days, if the corn be not replevied (*d*).

2 W. & M. sess. 1, c. 5, s. 3.

11 Geo. 2, c. 19, ss. 8, 9. Grass, Hops, Roots, Fruits, &c., may be distrained.

By the Distress for Rent Act, 1737, 11 Geo. 2, c. 19, ss. 8, 9, the landlord may take and seize, as a distress for arrears of rent, all sorts of corn and grass, hops, roots, fruits, pulse or other product (*e*) whatsoever growing upon any part of the estate demised, as a distress for arrears of rent; and the same may cut, gather, make, cure, carry and lay up, *when ripe*, in the barns or other proper place on the premises; and if there should be no barn or proper place on the premises, then in any other barn or proper place which he shall hire or otherwise procure for that purpose, and as near as may be to the premises; and in convenient time appraise, sell, or otherwise dispose of the same, towards satisfaction of the rent, and of the charges of such distress,

(*a*) Bac. Abr. "Distress" B., citing 22 Ed. 4, 50 b.

(*b*) *Parke, Ex parte, Potter, In re*, L. R., 18 Eq. 381: 30 L. T. 618; 22 W. R. 768. A distress for the whole rent, however, may be made on the goods of any tenants holding under a joint demise, or a demise in common. See Bullen, 80.

(*c*) *Simpson* v. *Hartopp*, Willes, 512; 1 Smith, L. C.

(*d*) *Piggott* v. *Birtles*, 1 M. & W. 448.

(*e*) These words do not include young trees growing in a nursery ground, but only other things *ejusdem generis* to those enumerated; *Clark* v. *Gaskarth*, 8 Taunt. 431; 20 R. R. 516.

appraisement and sale; the appraisement thereof to be taken when cut, gathered, cured and made, and not before; provided that notice (*f*) of the place where such distress shall be lodged, shall within the space of one week after the lodging or depositing thereof in such place, be given to the tenant, or left at the last place of his abode; and if the tenant shall pay or tender the arrears of rent and costs of the distress before the corn, &c., be cut, the distress shall cease, and the corn, &c., be delivered up.

One Week's Notice to Tenant of Place of Distress.

By the Sale of Farming Stock Act, 1816, 56 Geo. 3, c. 50, s. 6, landlords are not to distrain for rent "on any corn, hay, straw or other produce," which have been seized in execution and sold by the sheriff or other officer according to provisions of that act, under the contract of the tenant not to take the straw, &c. off the premises, and which at the time of the sale have been severed, "nor on any turnips whether drawn or growing," if sold according to the provisions of the act. By the Landlord and Tenant Act, 1851, 14 & 15 Vict. c. 25, s. 2 (*g*), growing crops seized and sold under an execution are liable for accruing or subsequent rent.

56 Geo. 3. c. 50, s. 6.

Turnips.

The grantee of a rent-charge, with power to distrain in the same manner as the law directs in case of rent in arrear, may under such power, and 2 W. & M. sess. 1, c. 5, and the Landlord and Tenant Act, 1730, 4 Geo. 2, c. 28, s. 5, distrain oats and hay in stacks or trusses (*h*). Trees, shrubs and plants growing in lands which the defendants had demised to the plaintiffs for a term, and which they had converted into nursery ground, and planted subsequently to the demise, are not distrainable by the landlord under the Distress for Rent Act, 1737, 11 Geo. 2, c. 19, as it applies only to corn and other products of the land which may become ripe, and are capable of being cut and laid up (*i*). Growing crops cannot be sold before they are ripe (*k*), but where the jury find that no damage has been sustained by the premature sale, the tenant is not entitled to a verdict even for nominal damages (*l*). A tenant's growing crops, taken in execution and sold, and remaining on the premises for the purpose of being reaped, are distrainable by the landlord for rent become due after the taking in execution (*m*). A custom that a tenant may leave his away-going crop in the barns, &c., of the farm for a certain time after the lease has expired, operates as a

Cases decided upon the Subject.

(*f*) See Form of such Notice, Appendix D., Sect. 5.

(*g*) This act is set out verbatim in Appendix A., Sect. 4.

(*h*) *Johnson* v. *Faulkner*, 2 Q. B. 925. But see *Miller* v. *Green*, 2 C. & J. 143; 8 Bing. 92.

(*i*) *Clark* v. *Gaskarth*, 8 Taunt. 431, 742; 20 R. R. 516; *Clarke* v. *Calvert*, 3 Moo. 114.

(*k*) *Owen* v. *Legh*, 3 B. & A. 470; 22 R. R. 455; *Proudlove* v. *Twemlow*, 1 Cr. & M. 326.

(*l*) *Rodgers* v. *Parker*, 18 C. B. 112; 25 L. J., C. P. 229; and see *Lucas* v. *Tarleton*, 3 H. & N. 116.

(*m*) Landlord and Tenant Act, 1851, 14 & 15 Vict. c. 25, s. 2; post, Appendix A., Sect. 4, where this act is set out verbatim. As to the previous law, see *Wharton* v. *Naylor*, 12 Q. B. 673; 6 D. & L. 136.

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prolongation of the term; and the landlord may distrain the corn so left, for rent in arrear, before six months have expired from the determination of the term (*n*). Corn sown by a tenant at will (who died before harvest), and purchased by another person, cannot be distrained by the landlord for rent due from a subsequent tenant (*o*).

## SECT. 9.—*The Exemptions from Distress.*

### (a) *Fixtures.*

Fixtures are absolutely exempt from Distress.

Things annexed to the freehold, such as buildings and fixtures, constitute, for the time being, part of the freehold, and are absolutely exempt from distress, although there are no other goods on the premises. Therefore furnaces, millstones, chimney-pieces and the like cannot be distrained, because they cannot be taken away without doing damage to the freehold, which the law will not allow (*p*); and because those things only can be distrained for rent which the landlord can afterwards restore in the plight in which they were before the distress, and without injury thereto by the removal (*q*). So also kitchen ranges, stoves, coppers, grates and other fixtures of the like nature put up by the tenant for the more convenient or profitable use of the demised premises, and which he is entitled to sever and remove during the term, are not distrainable for rent (although they may be seized and sold by the sheriff under an execution against the goods of the tenant) (*r*), unless the tenant has by his lease or agreement renounced his right to disannex and remove them during the term (*s*). A railway is not distrainable (*t*). Machinery fixed to the freehold, not for the improvement or profitable use of the land, but only for the purpose of being more conveniently used as machinery; for instance, a mule used for spinning cotton, though sunk into a stone floor and secured by molten lead, retains its chattel character, and may be distrained for rent (*u*). A mere temporary removal of fixtures for purposes of necessity is not sufficient to destroy the privilege (*x*), thus a smith's anvil on which he works is not distrainable; for it is accounted part of the forge,

Railway.

(*n*) *Bearan* v. *Delahay*, 1 H. Blac. 5; 2 R. R. 696; *Knight* v. *Benett*, 3 Bing. 364; 4 L. J. C. P. 94; 28 R. R. 643.

(*o*) *Eaton* v. *Southby*, Willes, 131.

(*p*) *Simpson* v. *Hartopp*, 1 Smith, L. C.; Amos & F. 314—318 (2nd ed.).

(*q*) Co. Lit. 47 b; *Pitt* v. *Shew*, 4 B. & A. 207; *Darby* v. *Harris*, 1 Q. B. 895; *Dalton* v. *Whittem*, 3 Q. B. 961; *Thompson* v. *Pettitt*, 10 Q. B. 101; *Moore* v. *Drinkwater*, 1 F. & F. 134; Smith L. & T. 196 (2nd ed.); Bullen, 92.

(*r*) *Poole's case*, 1 Salk. 368; *Place* v. *Fagg*, 4 M. & R. 277; *Bates* v. *Duke of Beaufort*, 8 Jur., N. S. 270, L. J.

(*s*) *Dumergue* v. *Rumsey*, 2 H. & C. 777; 33 L. J., Ex. 88.

(*t*) *Turner* v. *Cameron*, L. R., 5 Q. B. 336; 39 L. J., Q. B. 125.

(*u*) *Hellawell* v. *Eastwood*, 6 Exch. 295; 1 Smith, L. C.

(*x*) *Gorton* v. *Falkner*, 4 T. R. 567; 2 R. R. 463.

though it be not actually fixed by nails to the shop (*y*); so a millstone is not distrainable, though it be removed out of its proper place in order to be picked; because such removal is of necessity, and the stone still continues to be part of the mill (*y*); nor a limekiln, which is considered not to be a personal chattel, but part of the freehold (*z*). In like manner keys (*a*), windows, and charters concerning the realty, being by construction of law parcel of the freehold, are not liable to be distrained (*b*). If a landlord under a distress of rent, sever fixtures from the freehold and dispose of them, he is liable in trover; the articles may be described in the statement of claim as goods and chattels; and the plaintiff does not thereby waive his right of maintaining that the distress is illegal because fixtures cannot be distrained for rent in arrear (*c*). In such action their value as chattels only (not as fixtures) can be recovered (*d*). But it seems otherwise in an action of trespass (*e*). No action can be maintained for a mere constructive seizure of fixtures as a distress, but without any actual seizure or severance or removal thereof (*f*).

Keys.

### (b) *Animals Feræ Naturæ.*

When Animals Feræ Naturæ may be distrained.

Those things wherein no man can have an absolute and valuable property, such as cats, wild rabbits and animals feræ naturæ, cannot be distrained (*g*); but if deer, which are feræ naturæ, are kept in a private enclosure (not being a park) for the purpose of sale or profit, this so far changes their nature, by reducing them to a kind of stock or merchandise, that they may be distrained for rent (*h*). And deer in a park when reclaimed become personal chattels, and cease to be parcel of the inheritance (*i*), so that it seems they also may be distrained for rent (*k*), as likewise may birds kept in cages, as parrots or canaries, and even pheasants and partridges in coops before they can fly, inasmuch as they may be the subject of larceny (*l*). As for dogs, they are not indeed the subject of larceny; and Lord Coke (*m*) thought them not to be distrainable, but the better opinion seems to be that they are (*n*).

Deer.

Dogs.

(*y*) Bro. Abr. tit. *Distress*, pl. 23; Amos & F. 317 (2nd ed.).
(*z*) *Niblet* v. *Smith*, 4 T. R. 504.
(*a*) 11 Co. R. 50; 6 Exch. 311.
(*b*) Gilb. Distr. 34, 48; *Hellawell* v. *Eastwood*, 6 Exch. 295.
(*c*) *Dalton* v. *Whittem*, 3 Q. B. 961; Smith L. & T. 199 (2nd ed.).
(*d*) *Clarke* v. *Holford*, 2 C. & K. 540.
(*e*) *Thompson* v. *Pettitt*, 10 Q. B. 101; *Moore* v. *Drinkwater*, 1 F. & F. 134.
(*f*) *Beck* v. *Denbigh*, 29 L. J., C. P. 273.
(*g*) Co. Lit. 47; Bullen, 90.
(*h*) *Davies* v. *Powell*, Willes, 46.
(*i*) *Ford* v. *Tynte*, 2 J. & H. 150; 31 L. J., Ch. 177.
(*k*) *Morgan* v. *Earl of Abergavenny*, 7 C. B. 768; Bullen, 90.
(*l*) *Reg.* v. *Cory*, 10 Cox, C. C. 23; *Reg.* v. *Shickle*, L. R., 1 C. C. R. 158; 38 L. J., M. C. 21.
(*m*) Co. Lit. 47 a.
(*n*) *Davies* v. *Powell*, Willes, 48; *Bunch* v. *Kennington*, 1 Q. B. 679; Smith L. & T. 203 (2nd ed.); Bullen, 90. And see the question discussed in the notes to *Simpson* v. *Hartopp*, 1 Smith, L. C.

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*Exemptions from Distress (Goods sent to Trader).*

### (c) *Goods delivered to a Person in the way of his Trade.*

Exemption for the Benefit of Trade.

Things delivered to a person exercising a public trade, to be carried, wrought, worked up or managed in the way of his trade or employ, are absolutely exempt from distress, although there are no other goods on the premises (*o*). Thus a horse standing in a smith's shop to be shod, materials sent to a weaver, or cloth to a tailor to be made up, and the like, are privileged for the sake of trade and commerce, which could not be carried on if such things under these circumstances could be distrained for rent due from the person in whose custody they are (*p*). But although materials delivered by a manufacturer to a weaver, to be by him manufactured at his own house, are privileged from distress for rent due from the weaver to his landlord, yet a frame or other machinery delivered by the manufacturer to the weaver along with the materials, for the purpose of being used in the weaver's house in the manufacture of such materials, is not privileged, unless there are other goods upon the premises sufficient to satisfy the rent due (*q*).

Farrier.

Weaver.

The result of the cases has been said to be, that if articles are sent to a place to remain there, they are distrainable, but that if sent for a particular object, and the remaining at the place be an incident necessary for the completion of that object, they are not (*r*). But this rule will not account for all the decisions, and the exemption seems rather to arise solely for the benefit of trade (*s*).

Pawnbroker.

Goods pledged with a pawnbroker are not distrainable for rent due from him, notwithstanding they have remained in his possession above one year without any interest being paid (*t*).

Horse.

Carriage.

Horses and carriages standing at livery may be distrained (*u*), but a carriage sent to a coachmaker and commission agent for sale may not (*x*), nor may goods warehoused in the ordinary course of business at a furniture repository (*y*).

Boat.

The privilege does not attach to a boat sent by the owner to salt works, and left a reasonable time in a canal on the premises, for the purpose of being loaded with salt (*z*), nor to a ship in the course of being built in a dock (*a*), nor to brewers' casks sent to a public-house with beer, and left there till the beer is consumed (*b*).

Picture.

Nor to a picture sent back by the

(*o*) *Simpson* v. *Hartopp*, Willes, 512; 1 Smith, L. C.; Bullen, 95.

(*p*) Co. Lit. 47 a; *Gisbourn* v. *Hurst*, 1 Salk. 249; *Gibson* v. *Ireson*, 3 Q. B. 39.

(*q*) *Wood* v. *Clarke*, 1 C. & J. 484; *Gibson* v. *Ireson*, 3 Q. B. 39.

(*r*) *Parsons* v. *Gingell*, 4 C. B. 545; 16 L. J., C. P. 227.

(*s*) See *Lyons* v. *Elliott*, note (*l*), infra.

(*t*) *Swire* v. *Leach*, 18 C. B., N. S. 479; 34 L. J., C. P. 150.

(*u*) *Francis* v. *Wyatt*, 1 W. Bl. 483; 3 Burr. 1498; *Parsons* v. *Gingell*, supra.

(*x*) *Findon* v. *M'Laren*, 6 Q. B. 891.

(*y*) *Miles* v. *Furber*, L. R., 8 Q. B. 77; 42 L. J., Q. B. 41; 27 L. T. 756; 21 W. R. 262.

(*z*) *Muspratt* v. *Gregory*, 1 M. & W. 633; *S. C.* (in error), 3 M. & W. 677.

(*a*) *Clarke* v. *Millwall Dock Co.*, 17 Q. B. D. 494; 55 L. J., Q. B. 378; 54 L. T. 814; 34 W. R. 698—C. A., affirming Pollock, B.; 53 L. T. 316.

(*b*) *Joule* v. *Jackson*, 7 M. & W. 450.

purchaser to the artist to be altered (*c*). But where a butcher had sent a beast to the shop of another butcher to be slaughtered, and after it had been slaughtered the carcass remained in the shop for some time (but how long did not appear), it was held that the carcass was privileged (*d*).

Butcher.

Goods of a principal in the hands of a factor for sale are privileged from distress for rent due from such factor to his landlord, on the ground that the rule of public convenience, out of which the privilege arises, is within the exemption of a landlord's general right to distrain (*e*). On the same principle goods landed at a wharf and consigned to a broker as agent of the consignor, for sale, and placed by the broker in the wharfinger's warehouse over the wharf for safe custody until an opportunity for selling them should occur, were held not distrainable for rent due in respect of the wharf and warehouse (*f*). Similarly, corn sent to a factor for sale, and deposited by him in the warehouse of a granary-keeper, he not having any warehouse of his own, is under the same protection against a distress for rent as if it were deposited in a warehouse belonging to the factor himself (*g*).

Goods in the Hands of a Factor or Agent.

Goods sent to an auctioneer to be sold on premises occupied by him, or in an open yard belonging to premises in his occupation, are privileged (*h*), though the place of sale is merely hired for the occasion, or the occupation has been acquired by the auctioneer by an act of trespass (*i*). But there must be a de facto occupation by the *auctioneer*, otherwise the privilege is lost. Therefore where an auction was held on the tenant's premises of the tenant's goods, and the goods of the plaintiff were for convenience being sold along with them, it was held, both on authority (*k*) and principle, that, as the auctioneer was in no sense the occupier of the premises, the goods of the plaintiff might be distrained along with those of the tenant (*l*).

Auctioneer.

The cattle and goods of guests at an inn, so long as they remain on the premises, are exempt from a distress for rent due from the innkeeper (*m*). But they must be actually within the premises of

Goods at an Inn.

(*e*) *Von Knoop* v. *Moss and Jameson*, 7 T. L. R. 500, per Mathew. J.

(*d*) *Brown* v. *Shevill*, 2 A. & E. 138.

(*e*) *Gilman* v. *Elton*, 3 Brod. & B. 75; 23 R. R. 567.

(*f*) *Thompson* v. *Mashiter*, 1 Bing. 283; 8 Moore, 254; 1 L. J., C. P. 104; 25 R. R. 624.

(*g*) *Matthias* v. *Mesnard*, 2 C. & P. 353. But wine sent to a warehouse merely to be *matured* has been held not exempt. *Ex parte Russell*, 18 W. R. 753.

(*h*) *Adams* v. *Grane*, 1 Cr. & M. 380; *Brown* v. *Arundell*, 10 C. B. 54; *Williams* v. *Holmes*, 8 Exch. 861.

(*i*) *Brown* v. *Arundell*, supra.

(*k*) *Crosier* v. *Tomkinson*, infra.

(*l*) *Lyons* v. *Elliott*, 1 Q. B. D. 210; 45 L. J., Q. B. 159; 33 L. T. 806; 24 W. R. 296. This decision has been not a little criticised (see Redman and Lyon L. & T. 2nd ed., p. 164, 3rd ed., p. 221); but it seems that, as the goods of third parties have never been exempted generally, the burden of proof is upon each third party to bring himself within the benefit of the exemption he sets up.

(*m*) Bac. Abr. *Inns and Innkeepers* (B.); *Crosier* v. *Tomkinson*, 2 Ld. Ken. 439.

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the inn itself, and not in any place to which the innkeeper may have removed them for his convenience: thus, where a racehorse was distrained for rent at a stable half a mile distant from the inn, the distress was determined to be a good one, and that the plaintiff had no remedy but against the innkeeper (*n*). It was once held that the consent of the landlord to the goods being upon the premises would not avail to prevent his power of distress: but if such consent were fraudulently given for the purpose of obtaining a distress, equity would relieve upon the ground of fraud: thus, where the servants of a grazier driving a flock of sheep to London, were encouraged by an innkeeper to put the sheep into pasture grounds belonging to the inn, and the landlord, seeing the sheep, consented that they should stay there for one night, and then distrained them for rent, the grazier was relieved against the distress (*o*).

### (d) *Things in actual Use.*

Things in use may not be distrained.

Things in actual use are absolutely privileged from distress for rent, or even for damage feasant, because of the danger to the public peace (*p*). Therefore a horse, whilst a man is riding upon him, or an axe in a man's hand cutting wood, or the like, cannot be distrained (*q*). But a dog used for sporting purposes, or permitted to run into the woods, and not led by a string, is not exempt from a distress for damage feasant (*r*). Horses, whilst drawing a cart, and the harness thereon, are exempt from a distress, even for damage feasant (*s*). Yarn being carried on a man's shoulders to be weighed cannot be distrained any more than a net in a man's hand, or a horse on which a man is riding (*t*). At common law, it seems that wearing apparel, though taken off for natural repose only, is liable to distress, but that clothes actually in wear are exempt (*u*).

Wearing Apparel.

### (e) *Goods in the Custody of the Law.*

Goods in the Custody of the Law cannot be taken under a Distress.

Goods in the custody of the law are not distrainable for rent; for it would be repugnant that it should be lawful to take goods out of the custody of the law (*x*). Therefore cattle or goods already taken damage feasant, or by the sheriff under an execution, attachment or extent, cannot be distrained for rent whilst in such custody (*y*),

(*n*) *Crosier* v. *Tomkinson*, 2 Ld. Ken. 439.
(*o*) *Fowkes* v. *Joyce*, 2 Vern. 129; 3 Lev. 260; 2 Wms. Saund. 290, n. (7).
(*p*) Smith L. & T. 202 (2nd ed.).
(*q*) Co. Lit. 47 a; *Storey* v. *Robinson*, 6 T. R. 138; 3 R. R. 137; *Field* v. *Adams*, 12 A. & E. 649.
(*r*) *Bunch* v. *Kennington*, 1 Q. B. 679.
(*s*) *Field* v. *Adams*, 12 A. & E. 649.
(*t*) *Read's case*, Cro. Eliz. 594.
(*u*) *Bissett* v. *Caldwell*, 1 Peake, 50; 3 R. R. 648; *Baynes* v. *Smith*, 1 Esp. 206. For exemption up to 5*l.* value, see sub-sect. (f), post.
(*x*) Co. Lit. 47 a; Gilb. Distr. 44; *Rex* v. *Cotton*, Parker, 120; *Eaton* v. *Southby*, Willes, 131; Bulleu, 84.
(*y*) *Peacock* v. *Purvis*, 2 Brod. & B. 362; 23 R. R. 465; *Wright* v. *Dewes*, 1 A. & E. 641; *Wharton* v. *Naylor*, 12 Q. B. 673; 6 D. & L. 136.

though if the sheriff relinquish possession, they may be distrained (*z*), so that if the sheriff sell, and the vendee allow the goods to remain on the premises for more than a reasonable time, they may be distrained (*a*). But by the Landlord and Tenant Act, 1709, 8 Ann. c. 14 [c. 18 in the Statutes Revised], s. 1, no goods taken on any lands leased for life, years, at will, or otherwise, shall be *taken in execution*, unless the *party at whose suit* execution issued, *before removal* of the goods, pay to the landlord the arrears of rent, if not exceeding one year's rent; and if more, then the amount of one year's rent, due at the time of the execution (*b*). There are similar enactments, with variations, in the Act relating to the County Courts (*c*), and the Court of Admiralty (*d*).

Satisfaction of Arrears by Execution Creditor.

8 Ann. c. 14.

If the sale of goods under an execution be fraudulent, as where a fictitious bill of sale is made, and the goods remain on the premises, they may be distrained for rent (*e*). And where the execution was irregular, as where a sheriff's officer executed a writ of fieri facias by going to the house and informing the debtor he came to levy on his goods, and laying his hand on a table, said, "I take this table," and then locked up the warrant in the table-drawer, took the key and went away, without leaving any person in possession—and after the writ was returnable the landlord distrained; it was held, that it was a lawful distress (*f*). The goods may be distrained if the execution has been waived (*g*). Where a sheriff's officer, being in possession of a tenant's effects under an outlawry, made a distress on them for rent, and on the request of the landlord sold the goods distrained, and afterwards the outlawry was reversed, the officer was held liable to pay the produce of the goods to the landlord, for they were not in custodiâ legis, the judgment being mere waste paper (*h*).

Fraudulent and Irregular Executions will not prevent a Distress.

Goods seized by a messenger under a bankruptcy have been held not to be privileged as being in the custody of the law (*i*).

Messenger in Bankruptcy.

In *Sutton* v. *Rees*, a receiver in a legatees' suit advertised furniture in a leasehold house for sale. The superior landlord claimed rent, but took no other steps, and the furniture was sold. It was held, that the landlord had no lien on the proceeds of the sale, but must come in with the other creditors, and it was said that he should have distrained, first obtaining leave of the court so to do (*k*).

Receiver.

(*z*) *Blades* v. *Arundale*, 1 M. & S. 711; 14 R. R. 555.

(*a*) *Peacock* v. *Purvis*, 2 Brod. & B. 362; 23 R. R. 465; *Davis, In re; Pollen Trustees, Ex parte*, 55 L. J., Q. B. 217; 54 L. T. 304; 34 W. R. 442—Bank.

(*b*) See post, Sect. 15 (a).

(*c*) County Courts Act, 1888, s. 160, post, Sect. 15 (b).

(*d*) 24 Vict. c. 10, s. 16; post, Sect. 15 (c).

(*e*) *Smith* v. *Russell*, 3 Taunt. 400.

(*f*) *Blades* v. *Arundale*, 1 M. & S. 711; 14 R. R. 555.

(*g*) *Seven* v. *Mihil*, 1 Ld. Ken. 370.

(*h*) *St. John's College, Oxford* v. *Murcott*, 7 T. R. 259.

(*i*) *Briggs* v. *Sowry*, 8 M. & W. 729; *Newton* v. *Scott*, 9 M. & W. 434; 10 Id. 471; *Phillips* v. *Sherrill*, 6 Q. B. 944.

(*k*) *In re Sutton* and *Sutton* v. *Rees*, 32 L. J., Ch. 437; 9 Jur., N. S. 456.

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*Exemptions from Distress (Goods in Custody of Law).*

In Cases of Extents.

An immediate extent against a Crown debtor tested after a distress taken for rent justly due to the landlord with notice of the tenant being the Crown debtor, and appraisement of the goods and chattels, but before sale, prevails against the distress (*l*): so where a man was outlawed and an extent issued thereupon, and his goods were seized, although the landlord distrained three days before the extent, it was held that he was not entitled to any part of the rent due, under the Landlord and Tenant Act, 1709, 8 Ann. c. 18 (*m*). Where an officer entered under an extent, and improperly continued on the premises for a longer period than he ought, the court would not permit the rent accruing subsequently to the seizure to be paid out of the proceeds; but left the landlord to his action against either the tenant for use and occupation, or the officer for wrongfully continuing on the premises (*n*). The landlord of premises on which goods have been seized under an extent in aid is not entitled, under the Landlord and Tenant Act, 1709, to call on the sheriff to pay a year's rent due before the teste of the writ (*o*).

Growing Corn seized and sold under a Fi. fa.

Formerly, where a tenant's growing corn was seized and sold under a fi. fa. pursuant to 2 W. & M. c. 5, s. 3 (*p*), and the vendee permitted it to remain till it was ripe, and then cut it, the landlord could not distrain on it for rent before the expiration of a reasonable time for the vendee to remove and carry it away; such corn whilst in the possession of the sheriff's vendee, being considered as in the custody of the law (*q*). So the landlord could not distrain for rent on any corn, hay, straw or other agricultural produce, sold by the sheriff under an execution, subject to a special agreement with the purchaser for him to use and consume the same on the demised premises according to the terms of the lease or agreement, or the custom of the country (*r*). Now, by the Landlord and Tenant Act, 1851, 14 & 15 Vict. c. 25, s. 2, "in case all or any part of the growing crops of the tenant of any farm or lands shall be seized and sold by any sheriff or other officer by virtue of any writ of fieri facias, or other writ of execution, such crops, so long as the same shall remain on the farms or lands, shall, in default of sufficient distress of the goods and chattels of the tenant, be liable to the rent which may accrue and become due to the landlord *after* any such seizure and sale, and to the remedies by distress for recovery

14 & 15 Vict. c. 25, s. 2.

Crops sold under Fi. fa. liable, so long as on the Farm, to Distress for Rent due after Sale.

(*l*) *Rex* v. *Cotton*, Parker, 112.

(*m*) *Rex* v. *Sotherby*, Bunb. 5.

So numbered in the Revised Statutes. Commonly numbered "16" and sometimes cited as "the Statute of Anne."

(*n*) *Rex* v. *Hill*, 6 Price, 19; 20 R. R. 615; *Lane* v. *Crockett*, 7 Id. 566; *Harrison* v. *Barry*, 7 Id. 690; 21 R. R. 781.

(*o*) *Rex* v. *Decaux*, 2 Price, 17.

(*p*) Ante, 470.

(*q*) *Wharton* v. *Naylor*, 12 Q. B. 673; 6 D. & L. 136; *Peacock* v. *Purvis*, 2 Brod. & B. 362; 23 R. R. 465; *Wright* v. *Dewes*, 1 A. & E. 641.

(*r*) 56 Geo. 3, c. 50; ante, Sect. 8 (b) and post, Sect. 10 (*i*).

of such rent; and that notwithstanding any bargain and sale or assignment which may have been made or executed of such growing crops by any such sheriff or other officer." In consequence of this enactment, which was passed to reverse the law of *Wharton* v. *Naylor* (*s*), the tenant's crops can only be sold under an execution for their value *minus the rent* to which they may become liable, and the costs of a distress; but the landlord may afterwards abstain from distraining, and so in effect benefit the purchaser pro tanto at the tenant's expense; after which he may sue the tenant for such rent, or distrain upon his other goods for the amount.

### (f) *Clothes, Bedding and Tools up to £5 value.*

Exemption under Act of 1888, of Clothes, Bedding, or Tools.

The Law of Distress Amendment Act, 1888, 51 & 52 Vict. c. 21, s. 4, exempts "Any goods of the tenant or his family which would be protected from seizure in execution under s. 96 of the County Courts Act, 1846, 9 & 10 Vict. c. 95, or any enactment amending or substituted for the same," with the proviso however "that this enactment shall not extend to any case where the lease, term or interest of the tenant has expired *and* where possession of the premises has been demanded *and* where the distress is made not earlier than seven days after such demand."

Proviso.

The County Courts Consolidation Act, 1888, 51 & 52 Vict. c. 43, which repeals the County Court Act, 1846, with other prior County Court Acts, by s. 147 re-enacts s. 96 of that Act as follows:—

> Every bailiff or officer executing any process of execution issuing out of the court against the goods and chattels of any person may by virtue thereof seize and take any of the goods and chattels of such person, excepting the wearing apparel and bedding of such person or his family, and the tools and implements of his trade, to the value of five pounds (*t*), which shall to that extent be protected from such seizure.

Restoration of Clothes, Bedding, or Tools.

The clothes, &c., exempt under s. 4 of the Act of 1888 may, by s. 4 of the Law of Distress Amendment Act, 1895, 58 & 59 Vict. c. 24, be directed to be restored by order of a court of summary jurisdiction, which if they have been sold may by the same section direct "that such sum as the court may determine to be the value thereof shall be paid to the complainant by the person who levied the distress or directed it to be levied."

Bedding.

It has been doubted in the Metropolitan Police Courts whether the bedstead, &c., is included in the term bedding, which does not include it either in the dictionary or in the upholsterer's sense. On the whole it is submitted that the term ought to be construed in the restricted sense, but the point is a very doubtful one.

(*s*) *Wharton* v. *Naylor*, 12 Q. B. 673.

(*t*) This it is conceived means five pounds for all the excepted goods together.

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## (g) *The Goods of Lodgers.*

At common law, as we have seen, the goods of third persons are liable to be distrained for rent, subject to the exceptions in the case of goods delivered to a person in the way of his trade, and other cases. An important statutory exception has been made in favour of lodgers by the Lodgers' Goods Protection Act, 1871, 34 & 35 Vict. c. 79. By this act, which does not extend to Scotland (*t*), after reciting that "lodgers are subjected to great loss and injustice by the exercise of the powers possessed by the superior landlord to levy a distress on their furniture, goods and chattels, for arrears of rent due to such superior landlord by his immediate lessee or tenant," it is enacted (sect. 1) that—

Lodgers' Goods Protection Act, 1871.

Lodger may serve Declaration that Tenant does not own Goods,

If any superior landlord shall levy or authorize to be levied a distress on any furniture, goods, or chattels of any lodger for arrears of rent due to such superior landlord by his immediate tenant, such lodger may serve such superior landlord, or the bailiff or other person employed by him to levy such distress, with a declaration in writing (*u*) made by such lodger, setting forth that such immediate tenant has no right of property or beneficial interest in the furniture, goods, or chattels so distrained or threatened to be distrained upon, and that such furniture, goods, or chattels are the property or in the lawful possession of such lodger; and also setting forth whether any and what rent is due and for what period from such lodger to his immediate landlord; and such lodger may pay to the superior landlord, or the bailiff or other person employed by him as aforesaid, the rent, if any, so due as last aforesaid, or so much thereof as shall be sufficient to discharge the claim of such superior landlord (*v*).

and may pay Rent to superior Landlord.

Inventory.

And to such declaration shall be annexed a correct inventory, subscribed by the lodger, of the furniture, goods, and chattels referred to in the declaration; and if any lodger shall make or subscribe such declaration and inventory, knowing the same or either of them to be untrue in any material particular, he shall be deemed guilty of a misdemeanor (*w*).

Declaration inoperative against subsequent Distress. *Thwaites* v. *Wilding.*

A declaration under this section is no protection unless it has been made after the distress has been levied or authorized or threatened, and it is inoperative against a distress subsequently levied which has not been authorized or threatened before the declaration is made. So it was held by the Court of Appeal in *Thwaites* v. *Wilding* (*y*), on the very reasonable ground—though the decision may seem rather hard upon lodgers—that the conditions of the statute must be rigidly

(*t*) See sect. 4 of the Act.

(*u*) See Form of Declaration, Appendix D., No. 12.

(*v*) By sect. 3, "any payment made by any lodger pursuant to the first section of this act shall be deemed a valid payment of any rent due from him to his immediate landlord."

(*w*) And therefore, no punishment being mentioned in the Statute, liable on conviction to fine or imprisonment without hard labour or both, in the discretion of the Court, and also to requirement to find sureties. See Russ. on Crimes p. 66.

(*y*) *Thwaites* v. *Wilding*, 12 Q. B. D. 4; 53 L. J., Q. B. 1; 49 L. T. 396; 32 W. R. 80, C. A., affirming 11 Q. B. D. 421; 52 L. J., Q. B. 734; 49 L. T. 201.

complied with by the lodger, in order to deprive the landlord of his remedy at common law.

By sect. 2 :—

If Distress proceeded with, Justices may order Goods to be restored to Lodger.

If any superior landlord, or any bailiff or other person employed by him, after being served with the before-mentioned declaration and inventory, and after the lodger shall have paid or tendered to such superior landlord, bailiff, or other person, the rent, if any, which by the last preceding section such lodger is authorized to pay, shall levy or proceed with a distress on the furniture, goods, or chattels of the lodger, such superior landlord, bailiff, or other person shall be deemed guilty of an illegal distress, and the lodger may apply to a justice of the peace for an order for the restoration to him of such goods; and such application shall be heard before a stipendiary magistrate, or before two justices in places where there is no stipendiary magistrate, and such magistrate or justices shall inquire into the truth of such declaration and inventory, and shall make such order for the recovery of the goods or otherwise as to him or them may seem just, and the superior landlord shall also be liable to an action at law at the suit of the lodger, in which action the truth of the declaration and inventory may likewise be inquired into.

Landlord also liable to Action.

Who is a "Lodger." *Phillips* v. *Henson.*

It is clear that "lodger" in this act cannot mean "sub-tenant." On the other hand, every lodger is to some extent a "tenant," and a person occupying by far the greater part of a house under a contract in writing was held to be a "lodger" within the act in *Phillips* v. *Henson* (*z*), where the only rooms retained by the mesne landlord were "a housekeeper's room on the basement and two or three empty attics and a stable." Nor is it necessary that the mesne landlord should even reside on the premises; it is enough if he retain by himself or an agent such control and dominion over them as the master of a house usually has (*a*). The question whether the party claiming under the act is a "lodger" or not ought not to be left to the jury (*b*) in an action for illegal distress; though it is a question for determination by justices upon the hearing of an application for an order under the statute (*c*).

The Lodger must sleep on the premises.

The lodger must sleep and reside on the premises, and a person occupying the premises in daytime only for the purpose of his business is not a "lodger" within the statute (*d*).

A Lodger may sue for selling before five days.

If the landlord sell before the five days within which by the statute of William and Mary [post, Sect. 10 (g)] the tenant has the power to replevy, the lodger has a right of action against him, and this although the declaration under the statute may not have been served till after sale (*e*).

(*z*) *Phillips* v. *Henson*, 3 C. P. D. 26; 47 L. J., C. P. 273; 26 W. R. 214, per Grove and Lindley, JJ.; the latter learned judge is reported as observing that "probably the act would not apply to an under-tenant who has the exclusive possession of the whole house."

(*a*) *Morton* v. *Palmer*, 51 L. J., Q. B. 7; 45 L. T. 426; 30 W. R. 115—C. A.; *Ness* v. *Stephenson*, 9 Q. B. D. 245.

(*b*) Ib.

(*c*) *Ness* v. *Stephenson*, supra, note (*a*).

(*d*) *Heawood* v. *Bone*, 13 Q. B. D. 179; 51 L. T. 125.

(*e*) *Sharp* v. *Fowle*, 12 Q. B. D. 385;

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The declaration need not state that no rent is owing from the lodger to his immediate landlord, though such be the case, nor even that the person by whom it is made is a lodger (*f*).

Declaration.

### (*h*) *Railway Rolling Stock.*

Railway Rolling Stock, marked with Owner's Name and not being Property of Tenant, exempt from Distress.

Upon a principle similar to that of the Lodgers' Goods Protection Act, 1871, railway rolling stock is protected from distress, in cases where it is not the actual property of the tenant, by the Railway Rolling Stock Protection Act, 1872 (35 & 36 Vict. c. 50). By sect. 3 of this act :—

Rolling stock (*g*) being in a work (*h*) shall not be liable to distress for rent (*i*) payable by a tenant (*k*) of the work, if such rolling stock is not the actual property of such tenant, and has upon it a distinguishing metal plate affixed to a conspicuous part thereof, or a distinguishing brand or other mark conspicuously impressed or made thereon, sufficiently indicating the actual owner thereof.

Restoration by Order of Justices.

By sect. 4, where any such rolling stock is distrained, a court of summary jurisdiction (*l*) may make against the landlord such summary order for restoration of the rolling stock, or for payment of the real value thereof, and as to costs, as to the court seems just.

Tenant's Interest is not protected.

By sect. 5, the act does not extend to protect from distress the interest which any tenant may have in any rolling stock otherwise protected under the act; and, in case of disagreement between the landlord and the parties claiming such rolling stock as to the mode of disposing of such interest, the same is to be settled by the court of summary jurisdiction.

Appeal to Quarter Sessions.

By sect. 6, as amended by the Summary Jurisdiction Acts, 1879 and 1884, any party who thinks himself aggrieved by any order or adjudication of a court of summary jurisdiction under the act, or by dismissal of his complaint by any such court, may appeal therefrom to Quarter Sessions subject to the conditions and regulations prescribed by s. 31 of the Summary Jurisdiction Act, 1879.

53 L. J., Q. B. 309; 50 L. T. 758; 32 W. R. 539. Here the damages had been agreed upon as 17*l.*, but the action would be for irregular distress, and proof of special damage would be necessary. See *Rodgers* v. *Parker*, 18 C. B. 112.

(*f*) *Harris, Ex parte*, 16 Q. B. D. 130; 55 L. J., M. C. 24; 53 L. T. 655; 34 W. R. 132—C. A.

(*g*) By sect. 2, this "includes wagons, trucks, carriages of all kinds, and locomotive engines used on railways."

(*h*) By sect. 2, this "includes any colliery, quarry, mine, manufactory, warehouse, wharf, pier, or jetty in or on which is any railway siding," the effect of which is to include a shed connected by a siding with a railway; *Euston Estate Company* v. *Western Waggon Company*, 54 L. T. 735.

(*i*) By sect. 2, this "includes royalty or other reservation in the nature of rent."

(*k*) By sect. 2, this "includes a lessee, sub-lessee, or other person having an interest in a work under a lease or agreement, or by use and occupation, or being otherwise liable to pay rent in respect of a work."

(*l*) By sect. 2, this "means any justices of the peace, metropolitan police magistrate, stipendiary magistrate, sheriff, sheriff substitute, or other magistrate or officer, by whatever name called, who is capable of exercising jurisdiction in summary proceedings for the recovery of penalties."

By sect. 7, "no order or conviction of a court of summary jurisdiction under this act shall be quashed for want of form, or be removed by certiorari or otherwise (at the instance either of the Crown or of any private party) into any superior court."

Exclusion of Certiorari.

### (i) *Hired Machinery and Breeding Stock.*

If the Agricultural Holdings Act applies (*m*), there is an absolute exemption of hired machinery and breeding stock. For it is provided by the second paragraph of s. 45 of that act that "agricultural or other machinery which is the bonâ fide property of a person other than the tenant, and is on the premises of the tenant under a bonâ fide agreement with him for the hire or use thereof in the conduct of his business, and live stock of all kinds which is the bonâ fide property of a person other than the tenant, and is on the premises of the tenant solely for breeding purposes, shall not be distrained for rent in arrear." These words will, it is conceived, protect such machinery as is, in accordance with a common practice, on the premises under an agreement that until it be paid for, it shall be and remain the property of the person letting it out (*n*).

### (j) *Cattle, Beasts of the Plough, and Sheep.*

51 Hen. 3, stat. 4.

Sheep privileged conditionally.

By 51 Hen. 3, stat. 4, no man "shall be distrained by his beasts that gain his land, nor by his sheep, while there is another sufficient distress to be found (except for damage feasant)" (*o*). This is in affirmance of the common law (*p*). Cart colts and young steers, not broken in or used for harness or the plough, are not privileged from distress as beasts which gain the land (*q*). Beasts of the plough may be distrained if the only other subject of distress is growing crops, because the landlord is entitled to distrain whatever is immediately available, and to hold the growing crops for the residue (*r*).

Reasonable grounds of belief that no other sufficient Distress.

If a landlord distrains, inter alia, his tenant's cattle and beasts of the plough for rent in arrear, and it appear after the sale that there would have been sufficient to satisfy the arrears and expenses without taking or selling such cattle, such distress is not thereby proved to be an illegal distress, contrary to the above statute, if there were reasonable grounds for supposing (as from the appraisement of proper and competent persons at the time of the making) that without the taking of the beasts of the plough there would not have been

(*m*) Sect. 5, p. 463, ante.
(*n*) See form, Lely and Pearce-Edgcumbe's Ag. Hold. Act, p. 299.
(*o*) *Davies* v. *Aston*, 1 C. B. 746; 3 D. & L. 188.
(*p*) 2 Inst. 132.
(*q*) *Keen* v. *Priest*, 4 H. & N. 236.
(*r*) *Piggott* v. *Birtles*, 1 M. & W. 441.

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a sufficient distress (*s*); and where beasts of the plough are lawfully taken on a distress, the sale of them need not be postponed to that of other goods (*s*).

Sheep of a Sub-tenant privileged. *Keen* v. *Priest.*

The sheep of a *sub-tenant* are privileged from distress for rent if there are other goods on the premises sufficient to satisfy the rent, whether belonging to such sub-tenant or to any other person (*t*). The owner of sheep seized and sold under a distress for rent, which was unlawful because there were other goods on the premises belonging to him which might have been distrained for the same rent, is entitled to recover from the distrainer, not merely nominal damages, but the full value of the sheep so seized (*t*).

When Cattle may be distrained.

Cattle which are upon land by way of agisting may be distrained for rent (*u*); and where a stranger put in his beasts to graze for a night, by the consent of the lessor and licence of the lessee, it was held, that the lessor might distrain them for rent due out of those lands which he consented that the beasts should graze on; because such consent was no waiver of his right to distrain, unless it had been expressly agreed to; and being but a parol agreement, it could not alter the original contract between the lessor and lessee, from which the power to distrain arises (*x*). It seems to have been held in one case, that cattle which are being driven to a market or fair, and are put into pasture on the way for one night, are privileged from distress (*y*). If the landlord come to distrain, and the tenant, seeing him, drive cattle off the land, the landlord may follow the beasts and distrain them out of the premises, if he had once a view of the cattle on his land; but if the beasts go off the land of themselves before he observes them, he cannot distrain them afterwards (*z*); though if the distrainer once enter the premises to distrain the cattle, it seems that they cannot afterwards be driven off to prevent a distress (*a*).

Defects of Fences.

Where beasts escape, and come upon land by the negligence or default of their owner, and are trespassers there, they may be distrained immediately by the landlord for rent in arrear (*b*); but where they come upon land by the insufficiency of fences, which the tenant or his landlord ought to repair, the lessor cannot distrain such beasts till they have been levant and couchant; that is, they must be lying down and rising up on the premises for a night and a day without pursuit made by the owner of them,—and after actual notice has been given to the owner that they are there, and he has neglected to

(*s*) *Jenner* v. *Yolland*, 2 Chit. R. 167; 6 Price, 5; 20 R. R. 608.

(*t*) *Keen* v. *Priest*, 4 H. & N. 236; 28 L. J., Ex. 157.

(*u*) Roll. Abr. 669.

(*x*) *Fawkes* v. *Joyce*, 3 Lev. 260; 2 Vent. 50; 2 Wms. Saund. 290, n. 7.

(*y*) *Tate* v. *Gleed*, 2 Wms. Saund. 290 (a), in notes to *Poole* v. *Longueville*.

(*z*) Co. Lit. 161 a.

(*a*) *Clement* v. *Milner*, 3 Esp. 95.

(*b*) Gilb. Dist. 45; Co. Lit. 47 a, note (301); *Kemp* v. *Crawes*, 2 Lutw. 1577; 1 Ld. Raym. 168; Bullen, 103.

remove them (*c*). Where cattle passing along a public highway stray into an adjoining field through defect of fences, the owner of the cattle is bound to remove them within a reasonable time, until the expiration of which they cannot lawfully be distrained for damage feasant (*d*). What is a reasonable time is a question for the jury with reference to all the surrounding circumstances (*d*).

*Singleton* v. *Williamson*.

In *Singleton* v. *Williamson*, the plaintiff was owner of a close A., and the defendant was owner of closes B. and C. Between A. and B. there was a fence which, as against the owner of A., the owner of B. was bound to keep in repair, but which he had neglected to do. Between B. and C. there was a sufficient fence. The cattle of the plaintiff strayed from A. through a gap into B., and there breaking down the fence between B. and C., were distrained by the defendant as, he alleged, damage feasant in C. It was held, in trover to recover the cattle, that the defendant had no right to distrain the cattle, as the first wrongful act had been committed by himself in leaving the fence between B. and A. insufficiently repaired, the natural result of which wrongful act was the damage complained of; and that the jury were properly directed that the state of the fence between B. and C., and whether or not the cattle were damage feasant, was immaterial (*e*).

Distress damage feasant.

Distress on Cattle feeding upon Common.

It may be added here that by the Distress for Rent Act, 1737, 11 Geo. 2, c. 19, s. 8, every landlord may take and seize, as a distress for arrears of rent, any cattle or stock of his tenant feeding or depasturing *upon any common* appendant or appurtenant, or any ways belonging to any part of the premises demised; and that by 56 Geo. 3, c. 50, s. 6, cattle feeding on crops sold under the provisions of that act cannot be distrained (*f*).

### (k) *The Tools of Trade.*

Tools of Trade.

The tools and implements of a man's trade are absolutely privileged from distress for rent, if they be in actual use at the time (*g*). If they be not in actual use, they are only privileged, in case there be sufficient other distress upon the premises (*h*). But the distrainer is a trespasser ab initio only as to those particular goods which were not distrainable; the distress may be valid as to the residue, and a satisfaction pro tanto of the rent (*i*). Ledgers, day-books, vouchers and other business papers seem not to be distrainable. In one case

(*c*) *Poole* v. *Longueville*, 2 Wms. Saund. 289; Smith L. & T. 204 (2nd ed.).
(*d*) *Goodwin* v. *Cheveley*, 4 H. & N. 631; 28 L. J., Ex. 298.
(*e*) *Singleton* v. *Williamson*, 7 H. & N. 410; 31 L. J., Ex. 17.
(*f*) See this act. post, Appendix A.
(*g*) *Simpson* v. *Hartopp*, Willes, 512; 1 Smith, L. C.; *Gorton* v. *Falkner*, 4 T. R. 565; 2 R. R. 463.
(*h*) *Nargett* v. *Nias*, 1 E. & E. 439; 28 L. J., Q. B. 143.
(*i*) *Harvey* v. *Pocock*, 11 M. & W. 740; *Davies* v. *Aston*, 1 C. B. 746; 3 D. & L. 188.

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the plaintiff recovered 40*s.* damages in trespass against the landlord and his broker for an illegal seizure thereof under a distress (*k*). In commenting upon the dictum of Lord Coke, that the books of a scholar would be privileged from distress, Mr. Smith expresses an opinion that this exemption would include a lawyer's books also (*l*).

Books.

Threshing Machine.

A threshing machine, which is not a fixture, is liable to a distress, unless in actual use at the time, or there be other sufficient distress (*m*). If a man has two mill-stones, and one only is in use, and the other lies by not used, it may be distrained for rent (*n*).

### (l) *Agisted Stock.*

Conditional Exemption of Agisted Stock.

If the Agricultural Holdings Act applies (*o*), agisted stock, that is stock taken in by the tenant to be fed, in some parts of the country called "tacks," is conditionally exempt from distress under some circumstances. For it is provided by s. 45 of that act that "Where live stock [i.e. by s. 61 'any animal capable of being distrained' (*p*)] belonging to another person has been taken in by the tenant at a fair price, such stock shall not be distrained where there is other sufficient distress to be found." These words do not include the case of animals who come upon a holding pursuant to an agreement whereby the tenant [for 2*l.*] allowed the owner of the animals "the exclusive right to feed the grass on the land for 4 weeks" (*q*). As to the "fair price" it has been held not to be necessary that there should be a price in money, and that an agreement "milk for meat" as it is termed, i.e. that the tenant should keep for his own use and by way of payment, the milk of agisted cows, is within the section (*r*).

Limit on Amount recoverable.

The section goes on to provide that if the live stock be distrained by reason of other sufficient distress not being found, "there shall not be recovered by such distress a sum exceeding the amount of the price so agreed to be paid for the feeding, or if any part of such price has been paid, exceeding the amount remaining unpaid."

Power of Owner to Redeem.

Moreover the owner of the stock, who at common law would be subject to the common loss of third persons, has a special statutory privilege, it being further enacted that "it shall be lawful for him to redeem the stock at any time before it is sold (*s*) by paying to the distrainer a sum equal to such price as aforesaid," and that "any payment so made to the distrainer shall be in full discharge as

(*k*) *Gauntlett* v. *King*, 3 C. B., N. S. 59.

(*l*) Smith L. & T. 205 (2nd ed.); and see Bac. Abr. "Distress," B.

(*m*) *Fenton* v. *Logan*, 9 Bing. 676. As to absolute exemption, if on agricultural holding, see sub-s. (i), ante, 483.

(*n*) Year Book, Easter T. 14 H. 8, pl. 6, cited in *Simpson* v. *Hartopp*, supra (*g*).

(*o*) Sect. 5, ante, 463.

(*p*) See sub-s. (b), ante, 473.

(*q*) *Masters* v. *Green*, 20 Q. B. D. 807; 59 L. T. 476; 36 W. R. 521.

(*r*) *London & Yorkshire Bank* v. *Belton*, 15 Q. B. D. 457; 54 L. J., Q. B. 568; 34 W. R. 31.

(*s*) As to time of sale, see Sect. 10, sub-s. (h), post.

against the tenant of the like amount which would be otherwise due from the owner of the stock to the tenant in respect of the price of the feeding." A proviso is added that so long as any portion of the stock shall remain on the holding, the right to distrain such portion shall continue to the full extent of the price agreed to be paid (or of the part, if any, remaining unpaid), for the feeding of the whole.

## Sect. 10.—*Proceedings in Distress.*

### (a) *When to be made.*

Distress must be between Sunrise and Sunset.

*Tutton* v. *Darke.*

A distress for rent cannot be made after sunset and before sunrise, however light it may be (*t*)—because the tenant would not have any notice to make a tender of his rent, which possibly he might do in order to prevent the distress (*u*). It seems doubtful whether, for the purposes of a distress, sunrise commences with the first beams of the sun above the horizon, or when the middle of the sun is upon the horizon, or when the sun has completely emerged; "persons who distrain should bear in mind that a distress is to be made in the daytime and they ought not to go so near the limits as to raise any doubt on the subject" (*x*). An almanack is not evidence of the time of sunrise or sunset on a particular day, nor will the court take judicial notice of such time (*y*). It was ruled in one case, where rent being due to the defendant from the plaintiff, who was about to remove her goods, the defendant entered the house after sunset, and for some hours prevented her from so doing, and locked some of the doors, that the plaintiff was entitled to a verdict, but only for the actual damage (*z*), but it seems that the full value for the goods distrained ought to have been given (*a*).

Sunday.

It is conceived that distress is not "process" within the meaning of the Sunday Observance Act, 1677, 29 Car. 2, c. 7, s. 6, which forbids the service or execution of any writ, process, warrant, judgment or decree on Sunday.

Distress must not be till after Rent Day.

*Duppa* v. *Mayo.*

A distress cannot be made the same day on which the rent becomes due, for it is not in arrear until the next day (*b*). The custom of a place or an agreement between the landlord and tenant, if there be no objection to it in point of law, may indeed empower the landlord to distrain for it earlier, for *convention vincit legem;* as

(*t*) *Tutton* v. *Darke* and *Nixon* v. *Freeman*, 5 H. & N. 647; *Keen* v. *Priest*, 4 H. & N. 240, per Watson, B.

(*u*) Gilb. Distr. 50; Co. Lit. 142 a; *Aldenburgh* v. *Peaple*, 6 C. & P. 212.

(*x*) *Tutton* v. *Darke* and *Nixon* v. *Freeman*, supra.

(*y*) *Tutton* v. *Darke*, 5 H. & N. 647, 649, per Pollock, C.B.; *Collier* v. *Nokes*, 2 C. & K. 1013.

(*z*) *Lamb* v. *Wall*, 1 F. & F. 503.

(*a*) *Edmondson* v. *Nuttall*, 17 C. B., N. S. 280; *Attack* v. *Bramwell*, 3 B. & S. 520; 32 L. J., Q. B. 146.

(*b*) *Duppa* v. *Mayo*, 1 Saund. 287; 2 Salk. 578; Co. Lit. 47 b, note (b); Bullen, 119; *Dibble* v. *Bowater*, 2 E. & B. 564.

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where a person took a shop, and agreed to pay a year's rent in advance (*c*). So where, by the custom of the country, half-a-year's rent became due on the day on which the tenant entered, it was held that the landlord might distrain before the half-year had expired (*d*). On the other hand, the right to distrain may be *postponed* by agreement, ex. gr. until the landlord has produced his receipt for the rent due from him to the superior landlord (*e*). So a power of distress may be granted *after* demand of the rent from the tenant personally, or in some other specified manner; but where the rent is to be paid, "being lawfully demanded," the distress itself is a sufficient demand (*f*).

Distress may be within Six Months after Lease Determined.

8 Ann. c. 14, ss. 6, 7.

At common law a distress could not have been made after the expiration of the lease (*g*). But by the Landlord and Tenant Act, 1709, 8 Ann. c. 14 [c. 18 in the Statutes Revised], ss. 6, 7, "any person or persons having any rent in arrear or due upon any lease for life or lives, or for years, or at will, ended or determined (*h*), may distrain for such arrears after the determination of the said respective leases, in the same manner as they might have done if such lease or leases had not been ended or determined:" "provided that such distress be made within the space of *six* calendar months after the determination of such lease, and during the continuance of such landlord's title or interest, and during the possession of the tenant from whom such arrears became due."

Before this act, if rent had been reserved payable, say at Lady-day and Michaelmas, the lord would have lost his remedy by distress for his last half-year's rent; for he could not have distrained for it until it was in arrear, and before then the term would have ended (*i*).

Distress on Part after Lease determined;

Where the tenant is allowed to hold over part of the demised property, the landlord may distrain on that part for arrears of rent due in respect of the whole (*k*) unless a new tenancy has been created as to the part (*l*). And where the term is prolonged as to part by the custom of the country the landlord may distrain although the six months have expired (*m*). Nor does six months' limit apply to a case where the landlord was a tenant for the life, and the

(*c*) *Jenner* v. *Clegg*, 1 Moo. & R. 213; *Lee* v. *Smith*, 9 Ex. 662.

(*d*) *Buckley* v. *Taylor*, 2 T. R. 600; 1 R. R. 554; *M'Leish* v. *Tate*, Cowp. 781; *Tracey* v. *Talbot*, 6 Mod. 214; *Jenner* v. *Clegg*, 1 Moo. & R. 213; *Lee* v. *Smith*, 9 Exch. 662.

(*e*) *Giles* v. *Spencer*, 3 C. B., N. S. 244; 26 L. J., C. P. 237.

(*f*) *Browne* v. *Dunnery*, Hob. 208; *Kind* v. *Ammery*, Hutton, 23.

(*g*) Co. Lit. 47 b; *Pennant's case*, 3 Co. R. 64; *Williams* v. *Stiren*, 9 Q. B. 14; Bullen, 120.

(*h*) Semble, per Willes, J., in *Grimwood* v. *Moss*, 42 L. J., C. P. at p. 240, that this does not include determination by *forfeiture*.

(*i*) Co. Lit. 47 b; Bullen, 120; Smith L. & T. 222 (2nd ed.).

(*k*) *Nuttall* v. *Staunton*, 4 B. & C. 51; 6 D. & R. 155; 3 L. J., K. B. 135; 28 R. R. 207.

(*l*) *Wilkinson* v. *Peel*, [1895] 1 Q. B. 516; 64 L. J., Q. B. 178; 72 L. T. 151; 43 W. R. 302; 15 R. 213.

(*m*) *Beavan* v. *Delahay*, 1 H. Blac. 5; 2 R. R. 696; *Knight* v. *Bennett*, 3 Bing. 364; 4 L. J., C. P. 95; 28 R. R. 643; *Griffiths* v. *Puleston*, 13 M. & W. 358.

term is prolonged till the end of the current year, under the Landlord and Tenant Act, 1851, 14 & 15 Vict. c. 25, s. 1, in lieu of emblements (*n*).

and in case of Death of Tenant, &c.

Where the original tenant dies and his representative enters, the landlord may distrain upon the latter within six months after the end of the term (*o*). But where a tenant at will dies and his widow remains in possession, no distress can be made, because not only the tenancy but also the possession of the tenant from whom the arrears became due has ceased (*p*). Where the tenant of a farm remained a few days after the expiration of his term, and, after entry by a new tenant, went away, leaving a cow and some pigs, but giving no further intimation of a purpose to return or to continue holding any part of the farm, it was held, that the landlord could not justify distraining the goods so left for arrears of rent, under this statute, inasmuch as the possession of the tenant had ceased (*q*).

(b) *What Arrears recoverable.*

Only six years' arrears of rent are recoverable by distress in ordinary cases, and if the Agricultural Holdings Act applies (*r*), only one year's arrears are so recoverable.

3 & 4 Will. 4, c. 27, s. 42.

By the Real Property Limitation Act, 1833, 3 & 4 Will. 4, c. 27, s. 42 :—

Only 6 Years' Arrears may be recovered.

No arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or . . . any damages in respect of such arrears of rent or interest, shall be recovered by distress, action or suit, but within *six* years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable or his agent. . . .

This section applies to rents reserved on ordinary leases (*s*). But it is well observed by Mr. Smith (*t*) that the power to distrain for this limited amount is not lost *by reason of the mere non-payment of rent* for any time short of the period after the lapse of which the right to recover the land is gone; and we shall see presently that, although only six years of rent can be recovered by distress, twenty years' arrears may be recovered in an action of covenant (*u*).

Real Property Limitation Act, 1874.

By the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 1, it is enacted that—

No person shall make an entry or distress, or bring an action or suit to recover any land or rent, but within twelve years next after the time at

(*n*) *Haines* v. *Welch*, L. R., 4 C. P. 91; 38 L. J., C. P. 118.

(*o*) *Braithwaite* v. *Cooksey*, 1 H. Blac. 465; 2 R. R. 807.

(*p*) *Turner* v. *Barnes*, 2 B. & S. 435; 31 L. J., Q. B. 170.

(*q*) *Taylerson* v. *Peters*, 7 A. & E. 110.

(*r*) Ante, Sect. 5, and post, 490.

(*s*) *Humfrey* v. *Gery*, 7 C. B. 567; *Manning* v. *Phelps*, 10 Exch. 59.

(*t*) Smith L. & T. (2nd ed., p. 190), citing *Doe* v. *Oxenham*, 7 M. & W. 131.

(*u*) Post, Chap. XIII., Sect. 1, "Action on Covenant for Rent;" *Paget* v. *Foley*, 2 Bing. N. C. 679.

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which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to the person making or bringing the same.

It has been established by authority, that the repealed second section of the Real Property Limitation Act, 1833, 3 & 4 Will. 4, c. 27, with which the above section is substantially identical, excepting that the period of twelve is substituted for the period of twenty years, *does not apply to rent reserved on a demise* (which is a mere incident to the reversion), but to rents wherein a distinct estate may be had independently of any title to the land out of which the rent issues (*x*), ex. gr. an ancient quit rent (*y*), or a fee farm rent reserved in letters patent (*z*). The right to distrain, therefore—for six years' arrears—subsists as long as the relation of landlord and tenant subsists, and for the whole length, however long, of a term created by deed, notwithstanding the non-payment of the rent for any number of years (*a*).

Distress on Agricultural Holding.—One Year's Arrears only recoverable.

If the Agricultural Holdings Act, 1883, applies (*b*), only one year's arrears of rent are recoverable by distress. For, by s. 44 of that act—

It shall not be lawful for any landlord entitled to the rent of any holding to which this act applies to distrain for rent which became due in respect of such holding more than one year before the making of such distress.

But in order to provide for the continuance without loss to the landlord, of the very common practice of deferring the collection of rents from the day at which they became due to a day later by a quarter or half-year than such day, this important proviso is added:—

Deferring of Collection by "ordinary course of dealing."

Where it appears that according to the ordinary course of dealing between the landlord and tenant of a holding, the payment of the rent of such holding has been allowed to be deferred until the expiration of a quarter of a year or half a year after the date at which such rent legally became due, then *for the purpose of this section* the rent of such holding shall be deemed to have become due at the expiration of such quarter or half-year as aforesaid, as the case may be, and not at the date at which it legally became due.

The words "for the purpose of this section" are important as showing that the proviso does not turn the deferred date into a legal date absolutely, but merely for the purpose of fixing the time for a

(*x*) *Grant* v. *Ellis*, 9 M. & W. 113; *Archbold* v. *Scully*, 9 H. L. 360. See criticism of the decisions in the Jurist Newspaper, 9 Jur., N. S., Pt. II., p. 315.

(*y*) *Owen* v. *De Beauvoir*, 16 M. & W. 547; 5 Exch. 166.

(*z*) *Humfrey* v. *Gery*, 7 C. B. 567.

(*a*) See *Grant* v. *Ellis*, 9 M. & W. 113; *Doe* d. *Davey* v. *Oxenham*, 7 M. & W. 131.

(*b*) Ante, Sect. 5.

distress, and it has been expressly held in *Bull, Ex parte, Bew, In re* (*c*), that the landlord may distrain for rent legally due but not yet payable according to the ordinary course of dealing, *and also* for rent legally due more than a year, but payable less than a year previously, although the total amount distrained for exceeds one year's rent. With regard to the exact periods of quarters and half-years, it seems that if a longer period than these shall have been allowed, the landlord will be able to count from the end of the quarter or half-year forming part of such longer period, but that if a shorter period shall have been allowed, such shorter period cannot be taken into account at all.

*Bull, Ex parte.*

### (c) *Where Distress must be made.*

By the Statute of Marlebridge (52 Hen. 3, c. 15), "it shall be lawful for no man from henceforth for any manner of cause to take distresses *out of his fee*, nor in the king's highway, nor in the common street, but only to the king and his officers having special authority to do the same."

52 Hen. 3, c. 15.

As a general rule, the distress must be made on the land from whence the rent issues, and not elsewhere (*d*), except in the case of the king (or queen regnant), who may distrain on any of his tenants' lands wherever situate (*e*), and except in the case of fraudulent removals (*f*), and distresses for gale rents of quarries in the Forest of Dean (*g*). A further important exception, that the parties may by agreement arrange for a right of distress upon land other than that out of which the rent issues, appears to have been assumed to be legal by the Exchequer Chamber in *Daniel* v. *Stepney* (*h*).

Distress must be on Land out of which Rent issues.

*Daniel* v. *Stepney.*

Where two pieces of land are let by two separate demises, although both are contained in one deed, a joint distress cannot be made for them; as that would be to make the rent of one issue out of the other (*i*). Where a single rent issues out of land in the occupation of several tenants, a distress may be made for the whole amount upon the land of any one of them (*k*).

Two separate Demises, &c.

The distress may be made upon *any part* of the land, as the entire rent issues out of the whole and every part (*l*). Where the tenant of a farm holds over part of it after the expiration of the term,

Distress on Part.

(*c*) *Bull, Ex parte, Bew, In re*, 18 Q. B. D. 642; 56 L. J., Q. B. 270; 56 L. T. 571; 35 W. R. 455; 4 M. B. R. 54.

(*d*) Co. Lit. 161 a; Gilb. Distr. 40; Bullen, 124; Com. Dig. *Distress* (A. 3), (B. 1); *Capel* v. *Buszard*, 6 Bing. 150; Smith L. & T. 211 (2nd ed.).

(*e*) 2 Inst. 132; Com. Dig. *Distress* (A. 3); Smith L. & T. 211 (2nd ed.).

(*f*) Post, sub-s. (f).

(*g*) 59 Geo. 4, c. 86, s. 7.

(*h*) *Daniel* v. *Stepney*, L. R., 9 Exch. 185; see further on this point, p. 443, ante.

(*i*) *Rogers* v. *Birkmire*, 2 Stra. 1040: Rep. temp. Hardw. 245.

(*k*) 1 Roll. Abr. 671; Bullen, 125; *Woodcock* v. *Titterton*, 12 W. R. 685, Q. B.

(*l*) Com. Dig. tit. *Distress* (A. 3); Bullen, 125; *Woodcock* v. *Titterton*, supra.

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pursuant to some clause in the lease or the custom of the country, a distress may be made on that part for all the arrears within six months after the expiration of the tenancy (*m*).

Barges between high and low water mark.

Where A. demised to B. a wharf, next the River Thames, described by abutments, together with all ways, paths, passages, easements, profits, commodities and appurtenances whatsoever to the said wharf belonging; and by the indenture the exclusive use of the land of the River Thames opposite to and in front of the wharf between high and low water mark, as well when covered with water as dry, for the accommodation of the tenants of the wharf, was demised as appurtenant to the wharf, but the land itself between high and low water mark was not demised; it was held that the lessor could not distrain for rent in arrear barges the property of B. lying in the space between high and low water mark, and attached to the wharf by ropes (*n*).

Cart on paved part of road.

But where a tenant rented a stable, and was in the habit of keeping his cart on a part of the road adjoining the stable, which had been paved for that purpose by his landlord; held, that a distress for rent might be made of the cart whilst on the paved part of the road, which must be considered as part of the demised premises (*o*).

Lands in different Counties.

Where lands lying in different counties are held under one demise at one entire rent, a distress may be lawfully taken in either county for the whole rent in arrear, and chasing a distress over is a continuance of the taking: but where the counties do not adjoin, a distress cannot be chased out of one county into the other (*p*).

Distress on Highway.

By the Statute of Marlebridge (52 Hen. 3, c. 15) no person can make a distress on the highway, it being privileged for the convenience of passengers and the encouragement of commerce (*q*); but it would seem that where a farm adjoins a highway, goods standing in the highway, within the middle of it, and on that part of it next the demised premises, may be distrained (*r*). If the landlord or his agent come to distrain cattle which he sees upon the land, and the tenant or any other person drives the cattle off the land, the landlord or his agent may then follow them and distrain them, even on the highway: but if he have no view of the cattle whilst on the land, although the tenant drive them off purposely to prevent a distress; or if the cattle themselves, after the view, go out of the fee, or the tenant or any other person, after the view, remove them for any other purpose than that of preventing a distress; in these cases the landlord or his

(*m*) *Nuttall* v. *Staunton*, 4 B. & C. 51; 28 R. R. 207; *Beavan* v. *Delahay*, 1 H. Blac. 5; 2 R. R. 696; *Knight* v. *Bennett*, 3 Bing. 361; 4 L. J., C. P. 94; 28 R. R. 640.

(*n*) *Capel* v. *Buszard*, 6 Bing. 150; 3 Y. & J. 344; 8 B. & C. 141; 32 R. R. 359, 361; Bullen, 124.

(*o*) *Gillingham* v. *Gwyer*, 16 L. T. 640, per Lush, J.

(*p*) *Walter* v. *Rumball*, 1 Ld. Raym. 55; 12 Mod. 77; 1 Salk. 247.

(*q*) Co. Lit. 160 b; Gilb. Distr. 51; Bullen, 125.

(*r*) *Hodges* v. *Lawrence*, 18 Just. Peace, 347, Ex.

agent cannot distrain them (*s*). Cases of fraudulent removal to avoid a distress are considered hereafter (*t*).

By the Distress for Rent Act, 1737, 11 Geo. 2, c. 19, s. 8, landlords are enabled to take as a distress for rent any cattle or stock belonging to their tenants depasturing upon any common appendant or appurtenant or in any way belonging to the premises demised. This enactment does not extend to a distress for a rent-charge (*u*).

Distress on Commons.

11 Geo. 2, c. 19.

(d) *Of the Mode of a Distress, and of Certificated Bailiff.*

A distress may be made either by the landlord himself, or, as is now the usual practice, by his authorized agent or bailiff (*x*). The Statute of Westminster 2nd (13 Edw. 1, stat. 1, c. 37) which enacts that no distress shall be taken except by bailiffs "sworn and known," does not apply to distresses taken for rent in arrear (*y*). It would seem that an infant cannot be a bailiff (*z*). A person employed as a distraining broker, if engaged in the service of the landlord only, and paid a salary by him, is a servant within the meaning of the Larceny Act, 1861, 24 & 25 Vict. c. 96, s. 67, and may be found guilty of embezzlement (*a*).

By whom.

Who may be Bailiff to distrain.

If the landlord does not himself distrain in person, the distress must be levied by a certificated bailiff. For it is enacted by s. 7 of the Law of Distress Amendment Act, 1888, 51 & 52 Vict. c. 21, repealing and re-enacting, with amendments, s. 52 of the Agricultural Holdings Act, 1883, which applied to agricultural holdings only, that "no person shall act as a bailiff to *levy* any distress for rent unless he shall be authorized to act as a bailiff by a certificate in writing under the hand of a county court judge" (*b*), which by s. 1 of the Law of Distress Amendment Act, 1895, 58 & 59 Vict. c. 24, may at any time be cancelled or declared void by a judge of that county court. It has been held that the managing director of a brewery company was a bailiff of the company within this section, so as to require a certificate (*c*).

Distress by Certificated Bailiff.

Manager of Company.

A certificated bailiff may, by s. 7 of the Act of 1888, be removed by the judge for extortion or misconduct, and nothing in the section exempts him from any other penalty or proceeding for extortion or misconduct.

(*s*) Co. Lit. 161 a; 2 Inst. 132; *Clement* v. *Milner*, 3 Esp. 95; Bullen, 125, 126.

(*t*) Sect. 10 (e).

(*u*) Bullen, 126.

(*x*) Smith L. & T. 222 (2nd ed.); Bullen, 129.

(*y*) *Begbie* v. *Hayne*, 2 Bing. N. C. 124; *Child* v. *Chamberlain*, 6 C. & P. 213.

(*z*) *Cuckson* v. *Winter*, 2 Man. & R. 313.

(*a*) *Reg.* v. *Flanagan*, 10 Cox, C. C. 561.

(*b*) In *Sanders, In re, Ex parte Sergeant*, 54 L. J., Bank. 331, it had been held, on the repealed s. 52 of the Act of 1883, where the words were "judge of a county court," that the certificate of *any* county court judge was sufficient: and rule 4 (infra) is expressly to this effect.

(*c*) *Hogarth* v. *Jennings*, [1892] 1 Q. B. 907; 61 L. J., Q. B. 601; 66 L. T. 821; 40 W. R. 517—C. A.

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Effect of Levy by Uncertificated Bailiff.

It is provided by the same section that "if any person not holding a certificate under this section shall levy a distress contrary to the provisions of this act, the person so levying, and any person who has authorized him so to levy, shall be deemed to have committed a trespass," and it is added by s. 2 of the Act of 1895, that he shall, without prejudice to any civil liability, be liable on summary conviction to a fine not exceeding 10*l.*, the evidence of himself and his wife being admissible by s. 5 of that act on the hearing of the charge against him.

It appears that if a landlord choose to levy himself, there is nothing in the section to prevent an uncertificated bailiff working out the distress by sale.

Isolated Transaction.

An isolated transaction, as well as engaging in the business generally, seems to be within the section (*d*).

The Certificate of the Bailiff.

The certificate, by the same 7th section of the Act of 1888, "may be general or apply to a particular distress or distresses," and may be granted in such manner as may be prescribed by rules of the Lord Chancellor made under s. 8 of the Act, s. 7, providing that a county court registrar may grant certificates where authorized by the rules to do so.

Rules of Lord Chancellor.

The present (February, 1898) rules, which were made in 1889 and 1895, and are printed in full in the Appendix to this book, provide (inter alia) that any practising solicitor on paying the prescribed fee is to be entitled to either a general or special certificate, and that such certificate may also be granted to any fit and proper person and "shall authorize the bailiff named in it to levy at any place in England or Wales"; also that a special certificate may be granted by the judge or registrar, but a general certificate only by the judge in person; also that a general certificate shall, unless previously determined, have effect until the 1st of February next after the expiration of twelve months from the granting thereof; also that a list of bailiffs holding certificates shall be made on every 1st of February, and exhibited in every court.

Landlord liable at Common Law for *irregular* acts of his Bailiff,

Before the act the landlord was, at common law, personally responsible for all *irregular* acts committed by his bailiff in the making of a distress: ex. gr. for distraining goods to an excessive amount; for selling without five days' notice; for selling without a proper appraisement; for not selling for the best price; for making extortionate charges; for not leaving the overplus in the hands of the sheriff, under-sheriff or constable; and the like (*e*).

but not for unauthorized *illegal* acts.

But the landlord was not liable for *illegal* acts committed by his bailiff, not authorized by the warrant of distress or otherwise (*f*), especially where he disclaimed such acts immediately they came to his knowledge (*g*), though

(*d*) See Lely and Pearce-Edgcumbe's Agricultural Holdings Act, p. 130.

(*e*) *Hascler* v. *Lemoyne*, 5 C. B., N. S. 530; 28 L. J., C. P. 103; *Ward* v. *Shew*, 9 Bing. 608; *Dawe* v. *Cloud*, 14 L. T. 155.

(*f*) *Freeman* v. *Rosher*, 13 Q. B. 780.

(*g*) *Harry* v. *Rickman*, 1 Moo. & R. 126.

a slight recognition by the landlord of what had been illegally done on his behalf might amount to an adoption and ratification of such illegal acts, and so render him personally liable for them (*h*).

Liability of Landlord for acts of Certificated Bailiff.

The act does not anywhere expressly relieve the landlord from his common law liability, and it is conceived, though with some doubt, that it does not impliedly relieve him from it, so that he will be liable for the irregular though not for the illegal acts of a bailiff certificated by the court.

Liability of Bailiff to recoup Landlord Compensation Paid to Tenant for Excessive Distress.

And it would seem to follow that, as was held (*i*), before the act in a case where a bailiff charged the tenant with costs beyond those allowed by the Distress (Costs) Act, 1817, 57 Geo. 3, c. 93 (post, sect. 11), a landlord may recover from the bailiff compensation paid by the landlord to the tenant for an excessive distress by the bailiff.

### (e) *The Distress Warrant.*

Distress Warrant.

Where the bailiff distrains he should properly have a warrant or authority in writing from his employer, which is commonly called a "warrant of distress," or a "distress warrant" (*k*). The warrant did not require a stamp under the old Stamp Acts (*l*), nor does it under the Stamp Act, 1891.

No Stamp.

Joint Tenants and Tenants in Common.

One of several joint-tenants may sign a warrant of distress, and appoint a bailiff to distrain for rent due to all, if the others do not forbid him: and if, when applied to, they merely decline to act, that will not prevent him from proceeding (*m*). Tenants in common may distrain, each for his own share, but have no implied authority to distrain for each other: they may, however, join in a warrant to distrain for rent due to all of them (*n*): coparceners are more like joint-tenants; either they should all sign (*o*), or any one may sign on behalf of herself and the others (*p*). So one of several co-heirs in gavelkind may sign the distress warrant on behalf of himself and his co-heirs without express authority from them (*p*).

Mortgagor.

A mortgagor, who is permitted to remain in possession and to receive the rents and profits, has implied authority to distrain for the arrears as the bailiff or agent of the mortgagee; and he may so justify the distress notwithstanding he took it in his own name as for rent due to himself (*q*).

Ratification of Authority to Distrain.

A man may distrain without any express previous authority; and if he afterwards obtain the assent of the person in whose right the

(*h*) *Haseler* v. *Lemoyne*, 5 C. B., N. S. 530; 28 L. J., C. P. 103.
(*i*) *Megson* v. *Mapleton*, 49 L. T. 744.
(*k*) See forms, Appendix D., No. 1.
(*l*) *Pyle* v. *Partridge*, 15 M. & W. 20.
(*m*) *Robinson* v. *Hoffman*, 4 Bing. 562; 3 C. & P. 234; ante, 454.
(*n*) Ante, 456; Bullen, 48.
(*o*) *Stedman* v. *Page*, 1 Salk. 390; *Horne* v. *Lewin*, 1 Ld. Raym. 639.
(*p*) *Leigh* v. *Shepherd*, 2 Brod. & B. 465; 23 R. R. 516; ante, 456.
(*q*) *Trent* v. *Hunt*, 9 Exch. 14; *Snell* v. *Finch*, 13 C. B., N. S. 651; 32 L. J., C. P. 117.

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distress was made, such assent will be equivalent to a previous command, and will have relation to the time of the distress taken (*r*). Where, in replevin against a broker, it is proved that the landlord employs the solicitor to defend the broker, that is sufficient evidence of the broker's authority to distrain in the absence of any written warrant (*s*). So where a distress was made in the name of a person who was dead, a recognition of it by the executor was held good (*t*). Where a warrant of distress was addressed to Messrs. T., or their agent, and their clerk erased the name of T. and substituted that of W., by whom the distress was made, and the landlord's agent who had signed the warrant knew of the distress being so made, and communicated with W. respecting it: it was held, that the employment of W. was sufficiently authorized by the agent to make the latter liable on an indemnity given by him to T. (*u*).

Indemnity to Broker.

Generally speaking, a warrant of distress creates an express or implied indemnity to the bailiff and his assistants against actions (in any form) which are maintainable on the ground that the landlord had no legal right to distrain. But the indemnity does not extend to illegal acts, nor to those irregular acts for which the landlord is responsible to the tenant (*x*). On the contrary, the landlord has a remedy over against the bailiff for any loss or damage he may have sustained by reason of such negligence or misconduct (*y*). Where a landlord gave authority to a broker to distrain the goods of his tenant, and an indemnity against all costs and charges that he might be at "on that account," and upon making the distress, the broker's men, being told by the son of the tenant that a cask contained spent liquor of no value, took the cask to pieces and let the liquor run off, when in fact it was cochineal dye belonging to a third person, who for wasting it recovered damages in trover against the broker: it was held, that he could not recover the amount of those damages from the landlord in an action on the indemnity; and that such an indemnity could apply only to such cases where the distress was illegal, because the landlord had no right to distrain (*z*). Where the landlord's agent employed a broker to levy a distress on the premises of an auctioneer, and urged him to make the levy forthwith as there was a large quantity of furniture in the auction room, and by the warrant he directed him to distrain the several goods and chattels on the premises, whereupon the broker seized all the goods, but some of them turned out to be privileged

(*r*) Gilb. Distr. 32; Bro. Abr. tit. *Traverse*, 3; *Lamb* v. *Mills*, 4 Mod. 378; *Trevillian* v. *Pine*, 11 Mod. 112.

(*s*) *Duncan* v. *Meikleham*, 3 P. & C. 172.

(*t*) *Whitehead* v. *Taylor*, 10 A. & E. 210.

(*u*) *Toplis* v. *Grane*, 5 Bing. N. C. 636; 7 Scott, 620.

(*x*) Ante, 494.

(*y*) 2 Chit. Pl. 503 (7th ed.).

(*z*) *Draper* v. *Thompson*, 4 C. & P. 84.

from distress: it was held, that an indemnification of the broker was implied to be given by the agent (*a*); though in ordinary cases a broker who takes privileged goods cannot look for an indemnity from his employer (*a*). Where the warrant of distress contained the following clause:—"And for your so doing this shall be your sufficient warrant and authority and indemnification against all costs and charges in respect of any law expenses, action or actions, that may arise, as well as any other and all other charges or expenses which you or your agent may be at or be brought against you or your agent on this account:" it was held, that the indemnity extended to the costs of defending an action of trover wrongfully brought by the tenant (who admitted the tenancy and the rent being due) against the landlord's agent for goods taken under the distress, in which action the tenant was nonsuited (*b*).

Outer door may not be broken open. *Semayne's case.*

The outer door of the tenant's house cannot lawfully be broken open in order to make a distress (*c*); but if the outer door be open, the person distraining may enter into the house (*d*) and may also justify breaking open an inner door or lock to find any goods which are distrainable (*e*). But though the sheriff may (*f*), the person distraining may not, break open a barn or outhouse (*g*), as was held in *Brown* v. *Glenn* (*g*), where the door of a stable not within the curtilage was broken open and the horses therein seized for rent; and Lord Coke in the Institutes lays down that the person distraining may not break open gates or break down enclosures (*h*). The cases on this point were reviewed by Bowen, L.J., in *American Concentrated Meat Co.* v. *Hendry* (*i*). There the plaintiffs were sub-tenants of two warehouses and an enclosed yard, forming part of larger premises demised to a tenant. The head landlord's broker peaceably entered the demised premises through a building which had not been sub-let, and therefrom eventually entering the yard of the sub-tenants, broke open the door of one of the sub-let warehouses and distrained upon the goods therein for rent due to the head landlord. Bowen, L.J., who tried the case without a jury, held that the fact that the broken door of the warehouse was not one of the outer enclosures of the whole premises demised was immaterial if it was the outer door of the warehouse, and that the distress was illegal. The Court of Appeal affirmed this judgment, treating the question as a clear one of fact.

*American Concentrated Meat Co.* v. *Hendry.* Review of Cases by Bowen, L.J.

(*a*) *Toplis* v. *Grane*, 5 Bing. N. C. 636.
(*b*) *Ibbett* v. *De la Salle*, 6 H. & N. 233; 30 L. J., Ex. 44.
(*c*) See the notes to *Semayne's case*, a case of execution by the sheriff, 1 Smith, L. C.
(*d*) *Semayne's case*, supra.
(*e*) *Browning* v. *Dann*, Bull. N. P. 81 (*c*).
(*f*) *Penton* v. *Browne*, 1 Sid. 181.
(*g*) *Brown* v. *Glenn*, 16 Q. B. 254; 9 Vin. Abr. 128, *Distress* (E. 2), pl. 6.
(*h*) Co. Lit. 161 a.
(*i*) *American Concentrated Meat Co.* v. *Hendry*, 62 L. J., Q. B. 388; 68 L. T. 742; 5 R. 335, n.—C. A., affirming Bowen L.J.

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Climbing over Fence, &c.

But the distrainer may climb over a fence and so gain access to the house by an open door (*k*) or window (*l*); he may also open the outer door by the usual means adopted by persons having access to the building, as by turning the key, lifting the latch, or drawing back the bolt (*m*); but he may not put his hand through a hole in the door, or through a broken pane of glass, and remove a bar, window-latch, or other fastening, those not being the usual or accustomed modes of obtaining admission to the premises (*n*).

Distress through open window.

An entry to make a distress through an open window is lawful (*o*). But if the distrainer break open a window, or even unfasten a hasp, or open an unfastened window (*p*), it is illegal, and the distress void *ab initio* (*q*). It is legal, however, further to open an already partly-open window, for the purpose of effecting an entry to distrain (*r*), even if the window be open but two or three inches (*s*).

Re-entry to Distrain.

"Abandonment."

Generally speaking, a second distress for the same rent cannot lawfully be made where the first has been abandoned (*t*). But "abandonment" does not always take place by a mere leaving of the premises, otherwise the distrainer would lose his remedy by a forcible ejectment. When a person has once peaceably entered to distrain, and has been forcibly put out, he may legally break open a door or window to re-enter and complete the distress: but if he has merely got his foot or arm between the door and lintel, or by putting a pair of shears, or stick, between the door and lintel, and so preventing the door being closed, that is not a sufficient entry to entitle him afterwards to break open a door or window to distrain (*u*). Where a man put in possession under a distress left the house for a purpose not necessary, but reasonably convenient, for a short time, and being forcibly kept out, broke the outer door: it was held, that there was not an abandonment of the distress, and that he was justified in breaking the outer door for the purpose of re-entering (*x*). But where a broker's man, having taken possession of property under a distress, and remained two days, left the house in a state of excitement bordering on insanity; and the landlord, thinking that his leaving had been procured by the drugging of his liquor by the

(*k*) *Eldridge* v. *Stacey*, 15 C. B., N. S. 458; 12 W. R. 51.

(*l*) *Long* v. *Clarke*, [1894] 1 Q. B. 119; 63 L. J., Q. B. 108; 69 L. T. 654; 42 W. R. 130; 9 R. 186—C. A. approving *Eldridge* v. *Stacey*, ubi supra, and overruling *Scott* v. *Buckley*, 16 L. T. 573.

(*m*) *Ryan* v. *Shilcock*, 7 Ex. 72; 21 L. J., Ex. 55.

(*n*) Fitz. Abr. tit. *Distress*, pl. 21; cited 7 Exch. 76; *Hancock* v. *Austin*, 14 C. B., N. S. 634; 32 L. J., C. P. 252.

(*o*) *Nixon* v. *Freeman*, 5 H. & N. 467, 652; 29 L. J., Ex. 271.

(*p*) *Nash* v *Lucas*, L. R., 2 Q. B. 590; 8 B. & S. 531.

(*q*) *Attack* v. *Bramwell*, 3 B. & S. 520; 32 L. J., Q. B. 146; *Hancock* v. *Austin*, supra.

(*r*) *Crabtree* v. *Robinson*, 15 Q. B. D. 313; 54 L. J., Q. B. 544; 33 W. R. 936, per Manisty and Field, JJ.

(*s*) Ib.

(*t*) See post, Sect. 13.

(*u*) *Boyd* v. *Profaze*, 16 L. T. 431, per Mellor, J.

(*x*) *Bannister* v. *Hyde*, 2 E. & E. 627; 29 L. J., Q. B. 141; *Eldridge* v. *Stacey*, 15 C. B., N. S. 458.

parties in the house (which was not proved), six days afterwards broke into the house and took away the goods without any previous demand of admission; it was held, that he had no right to enter again after so long a delay, and that the owner of the goods might maintain trover for them (*y*).

Abandonment is a question for the Jury.

It is always a question for the jury whether there has or not been an abandonment (*z*). There is no abandonment of a distress where the distrainer, having seized the goods of a stranger on the premises without having given him notice of the distress, permits him to take them away for a temporary purpose, the distrainer intending that they shall be returned, which is done (*a*). Where a bailiff or broker, after having been ejected from a distress, re-enters to distrain, he should confine himself to the same goods (*b*). After a lawful entry to distrain the broker may, if necessary, break open the outer door to get out and remove the distress (*c*). In making a distress for rent, circumstances may occur which may require the presence of a police officer. But to justify the landlord in calling him in, it must be shown that his presence was rendered necessary either from threats of resistance or the apprehension of violence (*d*).

### (f) *Distress on Goods fraudulently removed.*

Fraudulent Removal.

To prevent the clandestine removal of goods off the demised premises by tenants, to avoid distress for rent, the Landlord and Tenant Act, 1709, 8 Ann. c. 14 [c. 18 in the Statutes Revised], s. 2, authorized landlords to follow and distrain them within *five* days after such removal. And by the Distress for Rent Act, 1737, 11 Geo. 2, c. 19, s. 1, this term was extended to *thirty* days, with a power to break open places of concealment, but a saving for bonâ fide sales. By sect. 1, it is enacted that "in case any tenant or tenants, lessee or lessees for life or lives, term of years, at will, sufferance or otherwise, of any messuages, lands, tenements or hereditaments, upon the demise or holding whereof any rent is or shall be reserved, due or made payable, shall fraudulently or clandestinely convey away, or carry off or from such premises, his, her or their goods or chattels, to prevent the landlord or lessor, landlords or lessors, from distraining the same for arrears of rent so reserved, due or made payable, it shall and may be lawful to or for every landlord, &c., or any person or persons by him, her or them for that purpose lawfully empowered, *within the space of thirty days* next ensuing such conveying away or carrying off such goods or chattels as aforesaid, to take and seize such goods and

11 Geo. 2, c. 19, s. 1.

Goods fraudulently removed may be seized within *Thirty* Days wherever found.

(*y*) *Russell* v. *Rider*, 6 C. & P. 416.
(*z*) *Eldridge* v. *Stacey*, 15 C. B., N. S. 458. Here the expulsion was forcible, but the distrainer did not return for three weeks.
(*a*) *Kerby* v. *Harding*, 6 Ex. 234.
(*b*) *Smith* v. *Farr*, 3 F. & F. 505.
(*c*) *Pugh* v. *Griffith*, 7 A. & E. 827.
(*d*) *Skidmore* v. *Booth*, 6 C. & P. 777.

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chattels wherever the same shall be found, as a distress for the said arrears of rent; and the same to sell or otherwise dispose of, in such manner as if the said goods and chattels had actually been distrained by such landlord, &c. in and upon such premises for such arrears of rent. Sect. 2 provides, "that no landlord or lessor, or other person entitled to such arrears of rent, shall take or seize any such goods or chattels as a distress for the same, which shall be sold bonâ fide and for a valuable consideration, before such seizure made, to any person or persons not privy to such fraud as aforesaid" (*e*). Sect. 7 enacts, "that where any goods or chattels fraudulently or clandestinely conveyed or carried away by any tenant or tenants, lessee or lessees, his, her or their servant or servants, agent or agents, or other person or persons aiding or assisting therein, shall be put, placed or kept in any house, barn, stable, out-house, yard, close or place, locked up, fastened or otherwise secured, so as to prevent such goods or chattels from being taken and seized as a distress for arrears of rent; it shall and may be lawful for the landlord or landlords, lessor or lessors, his, her or their steward, bailiff, receiver, or other person or persons empowered, to take and seize as a distress for rent such goods and chattels (first calling to his, her or their assistance the constable, headborough, borsholder or other peace-officer of the hundred, borough, parish, district or place where the same shall be suspected to be concealed, who are hereby required to aid and assist therein); and, in case of a dwelling-house (oath being also first made before some justice of the peace of a reasonable ground to suspect that such goods or chattels are therein) in the day time, to break open and enter into such house, barn, stable, out-house, yard, close and place, and to take and seize such goods and chattels for the said arrears of rent, as he, she or they might have done by virtue of this or any former act, if such goods and chattels had been put in any open field or place." The subsequent proceedings under a distress after a fraudulent removal are precisely the same as in ordinary cases.

Sect. 2. Saving for bonâ fide Sale before Seizure.

Power to break open Places of Concealment.

Assistance of Constable.

What Cases are within Statute 11 Geo. 2, c. 19, as to "Fraudulent Removal."

To justify a distress under this statute the defendant was bound to plead specially, even before the Judicature Act (*f*). Where the removal has been after the landlord has conveyed away his reversion, he cannot seize under the statute (*g*). The removal must have taken place *after* the rent became due (*h*), and as rent becomes *due* on the morning of the day on which it is payable, but is not *in arrear* until the following day (*i*), if the tenant fraudulently removes his goods on the very day the rent becomes due, the landlord may on the next

(*e*) Sections 3—6 are stated post, 502.

(*f*) *Fletcher* v. *Marillier*, 9 A. & E. 457; *West* v. *Nibbs*, 4 C. B. 172; *Williams* v. *Roberts*, 7 Exch. 618.

(*g*) *Ashmore* v. *Hardy*, 7 C. & P. 501.

(*h*) *Watson* v. *Main*, 3 Esp. 15; 6 R. R. 806; *Rand* v. *Vaughan*, 1 Bing. N. C. 767; Bullen, 127.

(*i*) *Dibble* v. *Bowater*, 2 E. & B. 564.

day (but not before), or within thirty days after such removal, follow and distrain upon them pursuant to the statute (*j*).

But after the tenant has given up possession upon the expiration of a tenancy, the landlord cannot follow and seize, inasmuch as the Landlord and Tenant Act, 1709, 8 Anne, c. 14, ss. 6 and 7, which allows a distress after the expiration of a tenancy, allows it only when the tenant continues in actual possession (*k*).

Distress only when Tenant in Possession.

The act applies to all cases where a landlord is, by the conduct of his tenant in removing goods from premises for which rent is due, turned over to the barren right of bringing an action for his rent. Thus where a tenant openly, and in the face of day, and with notice to his landlord, removed his goods without leaving sufficient on the premises to satisfy the rent then due, and the landlord followed and distrained the goods, it was held, that although the removal might not be *clandestine*, yet if it was *fraudulent* (which was a question for the jury), the landlord was justified under the statute (*l*).

Fraudulent, though not clandestine Removal.

It is to be observed that the words of the act are "fraudulently *or* clandestinely." The mere removal is not of itself fraudulent as against the landlord: to justify him in following them he must show that the goods were removed with a view to elude a distress, and also that sufficient goods were not left upon the premises (*m*). It would seem that it is a question for the jury whether the removal be fraudulent within the statute, although it be admitted at the trial that the removal was to avoid a distress (*n*).

The statute applies to the goods of the *tenant* only, and not to those of a stranger or lodger; therefore a defence justifying the following goods off the premises, and distraining them for rent in arrear, must show that they were the tenant's goods (*o*); and if the tenant has given a bill of sale over his goods, the holder of the bill of sale becomes the owner of the goods, and may remove them to elude distress without being liable to the action by the landlord for double value (*p*) under s. 3 (post, p. 502); but the trustees of a bankrupt lessee are considered as the actual tenants (*q*). It is not necessary that the party upon whose land the goods are seized after removal there should himself be party or privy to the fraud (*r*).

Statute applies to Goods of Tenant only.

Bill of Sale.

(*j*) See note (*i*) on p. 500.

(*k*) *Gray* v. *Stait*, 11 Q. B. D. 668; 52 L. J., Q. B. 412; 49 L. T. 288; 31 W. R. 662—C. A.

(*l*) *Opperman* v. *Smith*, 4 D. & R. 334; *Buch* v. *Meats*, 5 M. & S. 200; 17 R. R. 310.

(*m*) *Parry* v. *Duncan*, 7 Bing. 243; *Inkop* v. *Morchurch*, 2 F. & F. 501. But see *Gilham* v. *Arkwright*, 16 L. T. 88, where it was ruled by Patteson, J. (*Parry* v. *Duncan* being cited), that the landlord need not prove that a sufficient distress was not left on the premises.

(*n*) *John* v. *Jenkins*, 1 C. & M. 227 *Inkop* v. *Morchurch*, 2 F. & F. 501.

(*o*) *Thornton* v. *Adams*, 5 M. & S. 38; 17 R. R. 257; *Postman* v. *Harrell*, 6 C. & P. 225; *Fletcher* v. *Marillier*, 9 A. & E. 457; *Foulger* v. *Taylor*, 5 H. & N. 202.

(*p*) *Tomlinson* v. *Consolidated Credit & Mortgage Association*, 24 Q. B. D. 135; 62 L. T. 162; 38 W. R. 118—C. A.

(*q*) *Welch* v. *Myers*, 4 Camp. 368; 19 R. R. vii, viii.

(*r*) *Williams* v. *Roberts*, 7 Exch. 618.

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The presence of a constable is required and must be stated in the defence where doors or gates are broken open (*s*). The presence of a special constable appointed for the occasion is sufficient (*t*).

Presence of Constable.

Metropolitan Police District.

In the Metropolitan Police District, by virtue of the Metropolitan Police Act, 1839, 2 & 3 Vict. c. 47, s. 67, any constable may stop and detain, until due inquiry can be made, all carts and carriages which he shall find employed in removing the furniture of any house or lodging between the hours of eight in the evening and six in the following morning, *or* whenever the constable shall have good grounds for believing that such removal is made for the purpose of evading the payment of rent. It is also provided, by further sections of the same statute, that both the tenant fraudulently removing goods, and also all persons assisting him, shall forfeit to the landlord double the value of the goods distrained, to be recovered before justices if the goods be worth less than 50*l.*, or by an action of debt if they be worth more.

11 Geo. 2, c. 19, ss. 3—6. Forfeiture of double Value.

By the Distress for Rent Act, 1737, 11 Geo. 2, c. 19, s. 3, "to deter tenants (*u*) from such fraudulently conveying away their goods and chattels, *and others from wilfully aiding or assisting therein or concealing the same*," it is enacted, "that if any tenant or lessee (*u*) shall fraudulently remove and convey away his or her goods or chattels as aforesaid, or if any person or persons shall *wilfully and knowingly aid or assist* any such tenant or lessee in such fraudulent conveying away or carrying off of any part of his or her goods or chattels, or in concealing the same, all and every person or persons so offending shall forfeit and pay to the landlord or landlords, lessor or lessors, from whose estates such goods and chattels were fraudulently carried off as aforesaid, double the value of the goods by him, her or them respectively carried off or concealed as aforesaid, to be recovered by action of debt."

Double Value, where Goods worth less than 50*l.*, may be recovered before Justices. 11 Geo. 2, c. 19, s. 4.

Sect. 4 provides, "that where the goods and chattels so fraudulently carried off or concealed shall not exceed the value of 50*l.*, it shall and may be lawful for the landlord or landlords, from whose estates such goods or chattels were removed, his, her or their bailiff, servant or agent, in his, her or their behalf, to exhibit a complaint in writing against such offender or offenders, before two or more justices of the peace of the same county, riding or division of such county, residing near the place whence such goods and chattels were removed, or near the place where the same were found, not being interested in the lands or tenements whence such goods were removed; who may summon the parties concerned, examine the fact and all proper witnesses upon oath, or if any such

(*s*) *Rich* v. *Woolley*, 7 Bing. 651.

(*t*) *Cartwright* v. *Smith*, 1 Moo. & R. 284.

(*u*) As to tenant who has given a *bill of sale*, see *Tomlinson's case*, p. 501, supra.

witness be one of the people called Quakers, upon affirmation required by law; and in a summary way determine whether such person or persons be guilty of the offence with which he or they are charged; and to inquire in like manner of the value of the goods and chattels by him, her or them respectively so fraudulently carried off or concealed as aforesaid: and upon full proof of the offence, by order, under their hands and seals, the said justices may and shall adjudge the offender or offenders to pay double the value of the said goods and chattels to such landlord or landlords, his, her or their bailiff, servant or agent, at such time as such justices shall appoint; and, in case the offender or offenders, having notice of such order, shall refuse or neglect so to do, may and shall, by warrant under their hands and seals, levy the same by distress and sale of the goods and chattels of the offender or offenders; and for want of such distress may commit the offender or offenders to the house of correction, there to be kept to hard labour, *without bail or mainprize, for the space of six months, unless the money so ordered to be paid as aforesaid shall be sooner satisfied.*" The words printed in italics are repealed by the Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), in consequence of the provision of a sliding scale of terms of imprisonment in default of distress (which scale does not go beyond three months) by s. 5 of the Summary Jurisdiction Act, 1879, 42 & 43 Vict. c. 49. Sects. 5 and 6 provide, "that it shall be lawful for any person, who thinks himself aggrieved by such order of the said two justices, to appeal to the next general or quarter sessions;" and that "where the party appealing shall enter into a recognizance with one or two sufficient surety or sureties in double the sum so ordered to be paid, with condition to appear at such general or quarter sessions, the order of the said two justices shall not be executed against him in the meantime."

Appeal to Quarter Sessions. Sects. 5, 6.

The third section of the above act is so far penal, that it is incumbent, in an action by the landlord against a third party, for assisting the tenant in such fraudulent removal, to bring the case by strict proof within the words of the first section (*x*); and the landlord must not only prove that the defendant assisted the tenant in such fraudulent removal, but also that he was privy to the fraudulent intent of the tenant (*y*). But a creditor, with the assent of his debtor, may take possession of the goods of the latter, and remove them from the premises for the purpose of satisfying a bona fide debt, without incurring the penalty inflicted by the third section, although the creditor takes possession knowing the debtor to be in distressed circumstances, and under an apprehension that the

Decisions on sect. 3 of 11 Geo. 2, c. 19, providing for Recovery of Double Value by Action.

(*x*) Ante, 499.
(*y*) *Brooke* v. *Noakes*, 8 B. & C. 537; *Reg.* v. *JJ. of Radnor*, 9 Dowl. 90.

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landlord will distrain (*z*); and the holder of a bill of sale over the tenant's goods is not, as we have seen, within the act, but may safely remove the goods (*a*).

Bill of Sale. Holder of Bill of Sale.

In an action on that section against the tenant for fraudulently removing his goods from off the premises to avoid a distress for rent, it is not necessary to show an actual participation in the act, if the removal was with his privity (*b*); and in such a case it seems that it is immaterial whether the removal took place by night or with any particular concealment. In an action upon the statute against a defendant for aiding and assisting a tenant in removing and concealing his cattle, to hinder the landlord from distraining, the acts and orders of the tenant are admissible evidence of his own fraud, and of knowledge on the part of the defendant, if by other evidence he is proved to have contributed to the facility of it. Circumstances of suspicion may be laid before the jury to prove such a fraudulent co-operation as the legislature contemplated, and it is not necessary, to support such an action, that it should be proved that a distress was in progress, or about to be put in execution, or even contemplated; it is enough if the rent be shown to be in arrear, and that the goods have been removed afterwards (*c*).

No Interrogatories.

It has been held that the action is a penal one, so that the plaintiff may not administer interrogatories to the defendant (*d*).

Decisions on Sect. 4, providing Recovery before Justices.

The fourth section, which gives a summary remedy before two magistrates, provided the value of the goods shall not exceed 50*l*., does not take away the jurisdiction of the High Court in cases where the goods are of less than that value (*e*). And the fact that the landlord in the first instance made his complaint before a magistrate will not preclude him from afterwards maintaining an action; for the remedy given by that section is cumulative, and therefore the landlord may elect at his option which course may be most convenient to himself (*f*). Justices may determine whether the goods have been fraudulently removed, even in cases where there are conflicting claims to the premises (*g*). Justices, either of the county from which tenants fraudulently remove goods, or of that in which they are concealed, may convict the offenders in their own

(*z*) *Bach* v. *Meats*, 5 M. & S. 200; 17 R. R. 310.

(*a*) *Tomlinson's case*, 24 Q. B. D. 135, C. A., and p. 501, ante, where also it was held, approving *Lane* v. *Tylor*, 56 L. J., Q. B. 461, that the landlord had no cause of action for removal of the goods within five days after seizure under the bill of sale, contrary to s. 13 of the Bills of Sale Act, 1882.

(*b*) *Lister* v. *Brown*, 1 C. & P. 121; 3 D. & R. 501.

(*c*) *Stanley* v. *Wharton*, 9 Price, 301; 10 Id. 138; 23 R. R. 683; *Woodgate* v. *Knatchbull*, 2 T. R. 154; 1 R. R. 449.

(*d*) *Hobbs* v. *Hudson*, 25 Q. B. D. 232; 59 L. J., Q. B. 562; 62 L. T. 764; 38 W. R. 682—C. A.

(*e*) *Horsfall* v. *Davy*, Holt, 147; 1 Stark. R. 169; 17 R. R. 624; *Basten* v. *Carew*, 3 B. & C. 649; 3 L. J., K. B. 111; 5 D. & R. 558; 27 R. R. 453; *Bromley* v. *Holder*, 1 Moo. & M. 175.

(*f*) *Stanley* v. *Wharton*, 9 Price, 301; 10 Id. 138; 23 R. R. 683.

(*g*) *Coster* v. *Wilson*, 3 M. & W. 411.

counties (*h*). The goods need not be enumerated or specified in the order of the justices: it is sufficient if they find the value (*i*). The adjudication of the justices is an order and not a conviction, and cannot, therefore, like a conviction, be returned to the sessions in an amended form (*k*). It must show on the face of it that the party removing the goods was tenant; and that is not sufficiently shown by stating, that on complaint duly made, the party was charged with having fraudulently removed his goods from certain premises to prevent A. B. from distraining them for arrears of rent due to him for the said premises, and that, it appearing that he did so remove, &c., he is convicted thereof. It would seem, also, that the order should state that the complainant was the party's landlord, or the bailiff, servant or agent of such landlord (*l*). An order of justices convicting a person aiding and abetting a fraudulent removal of goods to avoid a distress, must show that the defendant acted wilfully and knowingly (*m*). An order, which states that the witnesses were examined upon oath, is not bad because it omits to state that they were examined on oath as to the value of the goods removed; nor is the warrant on such an order invalid for omitting to state that the witnesses were examined upon oath (*n*).

Notice of Appeal in 7 Days.

It was held, even before the Summary Jurisdiction Act, 1884, 47 & 48 Vict. c. 43, that the appeal under sect. 5 is subject to the conditions of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), sects. 31 and 32, and that therefore notice of appeal must be given within seven days after the decision appealed against (*o*).

### (g) *How Distress impounded.*

Of Impounding at Common Law.

At common law, where a distress was made, the cattle or goods were to be kept in a pound: which is nothing more than a prison for that purpose, and is either *overt*, that is, public and open overhead, or *covert*, that is, private and coverted or protected from the rain, &c. (*p*). Household goods and other things liable to damage from the weather, or which may easily be carried away, should be put in a pound covert (*q*). But all animals distrained should regularly be put into a pound overt, because at common law the owner was at his peril to sustain them, wherefore they ought to be put into such open place as he could resort to for the purpose; and

(*h*) *Rex* v. *Morgan*, Cald. 157.
(*i*) *Rex* v. *Rabbitts*, 6 D. & R. 343; Burn's Justice, tit. *Distress*.
(*k*) *Reg.* v. *JJ. of Cheshire*, 5 B. & Adol. 439; *Rex* v. *Bissex*, Sayer, 304; 3 Burn's Justice, 1109 (30th ed.).
(*l*) *Rex* v. *Davis*, 5 B. & Adol. 551.
(*m*) *Reg.* v. *JJ. of Radnorshire*, 9 Dowl. 90.
(*n*) *Coster* v. *Wilson*, 3 M. & W. 411.
(*o*) *Reg.* v. *Justices of Shropshire*, 6 Q. B. D. 669; 50 L. J., M. C. 72; 29 W. R. 567.
(*p*) Co. Lit. 47 b; Bullen, 142; Smith L. & T. 233 (2nd ed.).
(*q*) Co. Lit. 47 b; Bullen, 143.

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if they were placed in a private pound, the distrainer was bound to supply them at his peril with provision, for which he had no satisfaction, and if they died for want of sustenance, he was considered answerable for them (*r*).

12 & 13 Vict. c. 92, s. 5. Persons impounding Animals to provide Food and Water.

By the Cruelty to Animals Act, 1849, 12 & 13 Vict. c. 92, s. 5, "every person who shall impound or confine, or cause to be impounded or confined, in any pound or receptacle of the like nature, any animal, shall provide and supply, during such confinement, a sufficient quantity of fit and wholesome food and water to such animal; and every such person who shall refuse or neglect to provide and supply such animal with such food and water as aforesaid shall for every such offence forfeit and pay a penalty of twenty shillings." The penalty imposed by this section falls not upon the keeper of the pound, but upon the distrainer (*s*).

Sect. 6. Power to any of the Public to supply Food and Water.

By sect. 6, in case any animal shall continue confined without fit and sufficient food and water for more than twelve successive hours, any person whosoever may enter the pound or other receptacle of the like nature and supply the animal with fit and sufficient food and water during the remainder of the confinement without being liable to any action of trespass or any other proceeding by any person whomsoever, and the reasonable cost of the food and water is to be paid by the owner of the animal, before such animal is removed, *to the person who shall supply the same;* and by the Cruelty to Animals Act, 1854, 17 & 18 Vict. c. 60, s. 1, every person who impounds any animal, and provides such animal with food and water, may recover from the owner of such animal not exceeding double the value of the food and water supplied, and may, if he think fit, instead of proceeding for the recovery of the value thereof, after the expiration of seven clear days from the time of impounding, sell the animal openly at any public market (after having given three days' public printed notice thereof) and apply the produce in discharge of the value of such food and water supplied, and the expense of and attending such sale, rendering the overplus (if any) to the owner of the animal. Where several animals are distrained for rent, one of them may be sold for the expenses of all—and this may be repeated *toties quoties* (*t*).

17 & 18 Vict. c. 60, s. 1. Expenses of Food and Water—how recovered by Distrainer.

Liability of Distrainer.

A distrainer is liable for any injury which animals distrained receive in consequence of the wet, muddy or otherwise unfit state of the pound at the time of impounding (*u*). The distrainer cannot tie or bind a beast in the pound, though it be to prevent its

(*r*) 1 Inst. 4; Co. Lit. 47 b; Bullen, 143.

(*s*) *Dargan* v. *Davies*, 2 Q. B. D. 118; 46 L. J., M. C. 122; 35 L. T. 810.

(*t*) *Leyton* v. *Hurry*, 8 Q. B. 811.

(*u*) *Wilder* v. *Speer*, 8 A. & E. 547; *Bignell* v. *Clarke*, 5 H. & N. 485; 29 L. J., Ex. 257.

escape (*x*); for any act of his which tends to the injury of the thing distrained is done at his peril; but if animals distrained die in the pound, or are stolen, without any fault of the distrainer or insufficiency of the pound, in such case he who made the distress is not answerable, but has an action of trespass, if the distress was for damage feasant, or may distrain again if the distress was for rent (*y*). The distrainer cannot work or use the thing distrained, whether it be in pound overt or covert: because the distrainer has only the custody of the thing as a pledge. An exception to this rule exists in respect to milch kine, which may be milked by the distrainer, because it may be necessary to their preservation, and consequently of benefit to the owner (*z*).

Liability of Pound-keeper.

A pound-keeper is bound to receive everything offered to his custody, and is not answerable whether the thing were legally impounded or not (*a*): an action of trespass, therefore, will not lie against him merely for receiving a distress, though the original taking be tortious; for the pound being the custody of the law, if the distress be wrongfully taken, the distrainer is answerable, not he. When the cattle are once impounded he cannot let them go without a replevin or the consent of the party (*b*). Neither can a pound-keeper bring an action if the pound be broken, but it must be brought by the party interested (*c*).

1 & 2 Ph. & M. c. 12.

Cattle may not be driven more than 3 Miles, &c.

By 1 & 2 Ph. & M. c. 12, s. 1, no distress of cattle is to be driven out of the hundred, rape, wapentake or lathe, where the same is taken, except it be to a *pound overt within the same shire*, nor above three miles from the place where the same is taken, nor impounded in several places, whereby the owner may be constrained to sue several replevins, on pain of forfeiting to the party grieved one hundred shillings and treble damages. By sect. 2, no person shall take for keeping in pound or impounding any distress above four-pence for any one whole distress; and where less has been used, there less, on pain of forfeiting 5*l.* to the party grieved, besides what he should take above four-pence. On this statute it has been held that where lands lying in two adjoining counties were let under one demise at one entire rent, and the landlord distrained cattle in both counties for rent in arrear, he might chase them all into one county; but that if the counties had not adjoined it would have been otherwise (*d*). The offence created by this statute for impounding a

Fee on impounding.

Decisions.

(*x*) Gilb. on Distr. 65; Smith L. & T. 234 (2nd ed.).

(*y*) *Vasper* v. *Eddows*, 1 Salk. 148; 1 Ld. Raym. 719; Holt, 256.

(*z*) Cro. Jac. 148; Bac. Abr. tit. *Distress* (D. 2).

(*a*) *Badkin* v. *Powell*, Cowp. 476, 478; *Branding* v. *Kent*, 1 T. R. 62.

(*b*) *Badkin* v. *Powell*, Cowp. 476, 478.

(*c*) Id. 479; Fitz. N. B. 228; 2 Chit. Pl. 549 (7th ed.).

(*d*) *Walter* v. *Rumball*, 1 Ld. Raym. 53; 1 Salk. 247; *Woodcroft* v. *Thompson*, 3 Lev. 48; *Gimbart* v. *Pelah*, 2 Stra. 1272; Bullen, 145.

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distress in a wrong place is but a single offence, and satisfied with one forfeiture, though three or four are concerned in doing the act, as the offence cannot be severed so as to make each offender separately liable to the penalty: the meaning of the statute being, that the penalty shall be referred to the offence, not to the person (*e*): thus where three persons distrained a flock of sheep, and severally impounded them in three several pounds, it was held, that they should forfeit but one 5*l.* and one treble damages (*f*).

Non-application of Enactment as to Fee to Impounding on Premises.

The second section does not extend to cases where the goods are impounded on the premises by virtue of the Distress for Rent Act, 1737, 11 Geo. 2, c. 19 (*g*), which is the statute usually resorted to, as it is obviously for the advantage of both landlord and tenant that the distress should remain in a situation equally and easily accessible to both (*h*).

11 Geo. 2, c. 19, s. 10. Impounding on the Premises.

By the Distress for Rent Act, 1737, 11 Geo. 2, c. 19, s. 10, after reciting that "great difficulties frequently arose to landlords and lessors and other persons taking distresses for rent, in removing the goods and chattels or stock distrained off the premises, in cases where by law they may not be impounded and secured thereupon, and also to the tenants themselves many times, by the damage unavoidably done to such goods and chattels or stock in the removal thereof," it is enacted that—

It shall and may be lawful to and for any person lawfully taking any distress for any kind of rent to impound or otherwise secure the distress so made, of what nature or kind soever it may be, *in such place, or on such part of the premises* chargeable with the rent as shall be *most fit and convenient* for the impounding and securing such distress; and to appraise, sell, and dispose of the same *upon the premises*, in like manner, and under the like directions and restraints to all intents and purposes as any person taking a distress for rent may now do off the premises, by virtue of 2 W. & M. sess. 1, c. 5, or 4 Geo. 2, c. 28; and it shall and may be lawful to and for any person whatsoever to come and go to and from such place or part of the said premises, where any distress for rent shall be impounded and secured as aforesaid, in order to view, appraise, and buy, and also in order to carry off or remove the same on account of the purchaser thereof; and if any pound-breach or rescous shall be made of any goods and chattels, or stock distrained for rent, and impounded or otherwise secured by virtue of this act, the person aggrieved thereby shall have the like remedy as in cases of pound-breach or rescous is given and provided by the said statute (*i*).

Remedy for Pound-breach.

The distrainer ought either to put all the goods distrained into one room, and keep possession of that only, or to remove such

(*e*) *Rex* v. *Clarke*, Cowp. 612.
(*f*) *Partridge* v. *Naylor*, Cro. Eliz. 480; Moor, 453.
(*g*) *Child* v. *Chamberlain*, 5 B. & Adol. 1049.
(*h*) Smith L. & T. 237.
(*i*) I.e., by 2 W. & M. sess. 1, c. 5, s. 4, treble damages; see sect. 14 of this chapter, post.

goods out of the house, in the absence of any consent to the contrary; but very slight evidence of such a consent will be sufficient (*k*). Two or three rooms may be used, if necessary, as may appear most fit and convenient (*l*).

Impounding Cattle in Open Field.

An open field is a sufficient pound for cattle (*m*). The agent of a landlord went into a field where the tenant's cattle were feeding, and placing his hands on one of the beasts, said he distrained them all, counted them, and took a note of them, which he left with the tenant, and then went away, doing nothing further with the beasts; the next morning he left with the tenant a notice, stating he had distrained the cattle, and had impounded them in the place or places therein mentioned, and the notice afterwards stated they were impounded "on the premises;" it was held, that this impounding was sufficient to make a tender of the rent and costs afterwards too late (*n*).

Tenant may not be excluded.

It has been ruled, that if necessary to secure a distress in a cottage, it might be locked up so as to exclude the tenant altogether (*o*). But it would rather seem that the landlord is never entitled to lock up the whole of the demised premises, so as to exclude the tenant therefrom, except with his express consent: rather than do that he must remove the goods distrained (*p*).

Corn may not be removed.

Corn loose or in the straw, hay, &c., which is distrained by virtue of 2 W. & M. sess. 1, c. 5 (*q*), cannot be removed from the premises, but must be impounded where found (*r*). And growing corn, &c., distrained under the Distress for Rent Act, 1737, 11 Geo. 2, c. 19, s. 8, must, after it is cut, be placed in a proper place on the premises, and cannot be removed except in default of there being such proper place (*s*).

### (h) *Notice of Distress and Time for Replevy.*

2 W. & M. c. 5, s. 2. Notice and Sale of Distress.

The distress, being considered merely as a pledge, could not at the common law be sold (*t*). But by 2 W. & M. sess. 1, c. 5, s. 2, where any goods shall be distrained for rent reserved and due upon any demise, lease or contract whatsoever, and the tenant or owner of the goods so distrained shall not, *within five* (*u*) *days next after such distress taken, and notice thereof* (with the cause of such taking) left at the chief mansion-house or other most notorious

(*k*) *Washborn* v. *Black*, 11 East, 405; 10 R. R. 538, n.; *Tennant* v. *Field*, 8 E. & B. 336.
(*l*) *Woods* v. *Durrant*, 16 M. & W. 149.
(*m*) *Castleman* v. *Hicks*, 1 C. & M. 266.
(*n*) *Thomas* v. *Harries*, 1 M. & G. 695.
(*o*) *Cox* v. *Painter*, 7 C. & P. 767.
(*p*) *Smith* v. *Ashforth*, 29 L. J., Ex. 259; Bullen, 147.
(*q*) Ante, 470.
(*r*) Sect. 3; Bullen, 141, note (2).
(*s*) Ante, 470.
(*t*) Ante, 443.
(*u*) Or fifteen days, if the tenant or owner so require, in writing, infra.

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place on the premises, replevy the same, in such case, the person distraining "shall and may" *cause the goods so distrained to be appraised* (*x*) *by two appraisers*, and *after such appraisement* "*shall and may*" *sell the same* for the best price that can be gotten for them, towards satisfaction of the rent and charges of the distress, appraisement and sale; leaving the overplus (if any) for the owner's use. This statute also required the appraiser to be sworn, by a sheriff, under-sheriff or constable, on the spot, but the Parish Constables Act, 1872 (35 & 36 Vict. c. 92), s. 13, has repealed that part of it.

Appraisement.

Notice to tenant of place where distress lodged.

The Distress for Rent Act, 1737, 11 Geo. 2, c. 19, s. 9, requires that the tenants have notice of *the place* where the distress is lodged when it is removed.

Amendment of Act of William and Mary by the Act of 1888.

The Law of Distress Amendment Act, 1888, 51 & 52 Vict. c. 21, has by ss. 5 & 6 amended the act of William and Mary in two very important points, in both points, however, still leaving it to the tenant to decide whether the amendments shall take effect or not. By s. 5 appraisement is dispensed with unless the tenant or owner of the goods require it in writing, and by s. 6 the period of 5 days within which to replevy is extended to 15 days if the tenant or owner require it in writing.

Extension of Time to Replevy from Five Days to Fifteen.

We will deal with appraisement and sale presently. The extension of the time to replevy is thus provided for by sect. 6;—

> The period of five days provided in the act of William and Mary, chapter five, within which the tenant or owner of goods and chattels distrained may replevy the same, shall be extended to a period of not more than 15 days if the tenant or such owner make a request in writing in that behalf to the landlord or other person levying the distress, and also give security for any additional cost that may be occasioned by such extension of time: provided that the landlord or person levying the distress may, at the written request, or with the written consent of the tenant, or such owner as aforesaid, sell the goods and chattels distrained or part of them, at any time before the expiration of such extended period as aforesaid.

What is a sufficient Notice of Distress.

The notice of distress must be in writing (*y*), and its object being to enable the distrainer to sell under 2 W. & M. sess. 1, c. 5, s. 2, it ought to inform the tenant or the person whose effects are taken what goods are distrained, and the amount of rent in arrear (*z*). A notice stating that the distrainer had distrained the goods, chattels and things mentioned in the inventory thereunder written,—which inventory was "one clock and weights, &c., &c., *and any other goods and effects that may be found* in and about the said

(*x*) Appraisement is unnecessary, unless the tenant or owner require it in writing, infra.

(*y*) *Wilson* v. *Nightingale*, 8 Q. B. 1034; see Form, Appendix D., No. 4.

(*z*) *Kerby* v. *Harding*, 6 Exch. 234; 20 L. J., Ex. 163.

premises, to pay the said rent and expenses of this distress,"—has been held sufficient in a case where it appeared that the distress was in fact meant to include all the goods on the premises (*a*). But where a notice stated a distress of the several goods specified in the schedule, which, after enumerating certain goods, concluded thus—"and *all other goods that may be required*, in order to satisfy the above rent, together with all necessary expenses;" it was held, that this notice was too vague and uncertain to justify the sale of the goods of a stranger which he had deposited on the premises (*b*). No defect in the notice, nor even the total omission to give any such notice, will render the distress itself invalid or illegal; the notice is only required by the statute to entitle the landlord to *sell* under the distress (*c*). It is only *irregular* to sell without due notice (*d*). The notice need not set forth at what time the rent became due for which the distress is made, nor the correct amount of the arrears really due, as the tenant is supposed to know all this and must tender the proper amount at his peril (*e*). Any defect or mistake in the notice on the above or similar points is immaterial, for a man may distrain for one cause and avow or justify for another (*f*). Notice to the owner of the goods distrained (not being the tenant) is sufficient as against him, unless a replevin has been sued by the tenant (*g*). In all cases personal notice is sufficient, and indeed preferable to notice left at the mansion-house or other notorious place, on account of the difficulty of proof (*g*).

Time of Removing and Selling the Distress.

The landlord cannot sell the goods distrained until after the expiration of the five days, or fifteen days if the owner or tenant has requested, in writing, such extension of time under the statutes (Law of Distress Amendment Act, s. 6, p. 510), for the tenant to replevy, and those days must be calculated exclusively of the day of taking and notice, and also exclusively of the day of sale. Therefore where a distress is taken and notice thereof given on a Saturday, the five or fifteen days as the case may be expire on the following Thursday, and the goods cannot lawfully be sold before Friday (*h*). A distress taken on Monday or Tuesday cannot lawfully be sold until the following Monday (*i*). But no action will lie for selling too soon unless actual damage be shown (*k*). The landlord should

Time for Sale.

(*a*) *Wakeman* v. *Lindsey*, 14 Q. B. 625.
(*b*) *Kerby* v. *Harding*, supra.
(*c*) *Trent* v. *Hunt*, 9 Exch. 14.
(*d*) *Lucas* v. *Tarleton*, 3 H. & N. 116; *Wilson* v. *Nightingale*, 8 Q. B. 1034; *Robinson* v. *Waddington*, 13 Q. B. 753.
(*e*) Ante, 449.
(*f*) *Crowther* v. *Ramsbottom*, 7 T. R. 654; 4 R. R. 540; *Etherton* v. *Popplewell*, 1 East, 139; 6 R. R. 235; *Wootley* v. *Gregory*, 2 Y. & J. 536; *Trent* v. *Hunt*, 9 Exch. 14; 22 L. J., Ex. 318; *Phillips* v. *Whitsed*, 2 E. & E. 804; 29 L. J., Q. B. 164.
(*g*) *Walter* v. *Rumball*, 1 Ld. Raym. 53; 1 Salk. 247.
(*h*) *Robinson* v. *Waddington*, 13 Q. B. 753; overruling *Wallace* v. *King*, 1 H. Blac. 13; and see *Harper* v. *Taswell*, 6 C. & P. 166.
(*i*) *Lucas* v. *Tarleton*, 3 H. & N. 116.
(*k*) *Lucas* v. *Tarleton*, supra; *Rodgers* v. *Parker*, 18 C. B. 112.

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Time for Removal and Sale—*contd.*

remove the goods from the tenant's premises at the end of the five days allowed the tenant to replevy, or within a reasonable time afterwards, otherwise he may be deemed a trespasser for keeping them there (*l*): thus where A. entered under a warrant of distress for rent in arrear, and continued in possession of the goods upon the premises fifteen days, during the last four of which he was removing the goods, which were afterwards sold under the distress; it was held, that he was liable to an action of trespass for continuing on the premises, and disturbing the plaintiff in the occupation of his house, after the time allowed by law (*m*); but a reasonable time after the expiration of the five days from the time of the distress is allowed by law to the landlord to remain on the premises for appraising and selling the goods distrained (*n*).

"Holding over" Order.

It is usual for the tenant to give a consent, commonly called a "holding over" order, for the landlord to remain beyond the five days, as it is for the tenant's advantage that the goods be not sold, or, at all events, not sacrificed by hurrying on the sale; if such consent be given, it is prudent, although not absolutely necessary, to have it in writing (*o*). If a landlord has distrained for rent, but by an arrangement between him and the tenant does not sell immediately after the five days, that is no proof per se of collusion (*p*); and the request of the tenant will justify the landlord in detaining the goods of a lodger upon the premises beyond the proper time of selling, if he did not know which were the goods of the lodger, and which were those of the tenant (*q*).

Crops may not be Sold till Ripe.

Standing corn and growing crops, seized as a distress for rent, cannot be sold before they are ripe, for the tenant may tender the rent before they are ripe (*r*). But no action can be maintained for selling them prematurely, if the jury find that the tenant thereby sustained no damage (*s*).

### (i) *Appraisement and Sale.*

Who may act as Appraisers.

Under 2 W. & M. sess. 1, c. 5, s. 2, before the distress could be sold, it had to be appraised by *two* appraisers (*t*), reasonably competent, but not necessarily professional appraisers (*u*); it could not

(*l*) *Griffin* v. *Scott*, 2 Stra. 716; 2 Ld. Raym. 1424.

(*m*) *Winterbourne* v. *Morgan*, 11 East, 395; 10 R. R. 532; *Etherton* v. *Popplewell*, 1 East, 139; 6 R. R. 235.

(*n*) *Pitt* v. *Shew*, 4 B. & A. 208.

(*o*) See Form, Appendix D., No. 7.

(*p*) *Harrison* v. *Barry*, 7 Price, 690; 21 R. R. 781.

(*q*) *Fisher* v. *Algar*, 2 C. & P. 374.

(*r*) *Owen* v. *Leigh*, 3 B. & A. 470 22 R. R. 455; *Proudlove* v. *Twemlow*, 1 Cr. & M. 326.

(*s*) *Lucas* v. *Tarleton*, 3 H. & N. 116; *Rodgers* v. *Parker*, 18 C. B. 112.

(*t*) 2 W. & M. sess. 1, c. 5, s. 2; ante, 510; *Allen* v. *Flicker*, 10 A. & E. 640; *Bishop* v. *Bryant*, 6 C. & P. 484.

(*u*) *Roden* v. *Eyton*, 6 C. B. 427; *Clark* v. *Holford*, 2 C. & K. 540; *Child* v. *Chamberlain*, 6 C. & P. 213. They need not be sworn; ante, 510.

be appraised by the party making it (*x*), as being interested in the business. A landlord, who was a broker, having distrained goods for rent, was sworn one of the appraisers, and together with another broker valued them to the plaintiff, who became the purchaser according to such valuation; it was held that the sale was irregular (*y*). So the landlord could not sell the goods to himself (*z*). It was held, however, that if the tenant, to save expense, requested that appraisers might not be called in, and in consequence the broker who made the seizure valued the goods, the tenant could not in an action complain of that which was done as an irregularity (*a*).

Abolition of Appraisement except where required by the Tenant in Writing.

But the Law of Distress Amendment Act, 1888, 51 & 52 Vict. c. 21, generalising an enactment applied to agricultural holdings only by the Agricultural Holdings Act, 1883, abolishes appraisement except in cases where it is expressly required in writing by the tenant or owner of the goods, providing by s. 5 that—

Law of Distress Amendment Act, 1888, s. 5.

So much of an act passed in the second year of the reign of their Majesties King William the Third and Mary, chapter five, as requires appraisement before sale of goods distrained is hereby repealed, except in cases where the tenant or owner of the goods and chattels by writing requires such appraisement to be made, and the landlord or other person levying a distress may, except as aforesaid, sell the goods and chattels distrained without causing them to be previously appraised.

Sale in Auction Room.

By the same section, for the purposes of sale the goods "shall," at the request in writing of the tenant or owner, be removed "at the expense of the party requesting removal to a public auction room, or to some other fit and proper place specified in such request, and be there sold," not necessarily, it will be observed, by auction.

Appraisers, if an appraisement be required, will usually write their appraisement upon the inventory (*b*).

Stamp on Appraisement.

By the Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 38, and Sched. tit. "Appraisement or Valuation," the following stamp duties are made payable on appraisements and valuations:—

| Where the amount of the appraisement or valuation | £ | s. | d. |
|---|---|---|---|
| does not exceed 5*l.* . . . . | 0 | 0 | 3 |
| Exceeds 5*l.* and does not exceed 10*l.* . . | 0 | 0 | 6 |
| ,, 10*l.* ,, 20*l.* . . | 0 | 1 | 0 |
| ,, 20*l.* ,, 30*l.* . . | 0 | 1 | 6 |
| ,, 30*l.* ,, 40*l.* . . | 0 | 2 | 0 |
| ,, 40*l.* ,, 50*l.* . . | 0 | 2 | 6 |
| ,, 50*l.* ,, 100*l.* . . | 0 | 5 | 0 |

(*x*) *Westwood* v. *Cowne*, 1 Stark. R. 172.
(*y*) *Lyon* v. *Weldon*, 2 Bing. 334.
(*z*) *King* v. *England*, 4 B. & S. 782; 33 L. J., Q. B. 145; 9 L. T. 645.
(*a*) *Bishop* v. *Bryant*, 6 C. & P. 484.
(*b*) See Form, Appendix D., No. 3.

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| | £ | s. | d. |
|---|---|---|---|
| Exceeds 100*l.* and does not exceed 200*l.* . . | 0 | 10 | 0 |
| ,, 200*l.* ,, 500*l.* . . | 0 | 15 | 0 |
| ,, 500*l.* . . . . . | 1 | 0 | 0 |

Where goods are distrained, and at the end of the five days appraised but not sold, the act of appraisement does not take away the tenant's right to replevy them (*c*). Until they are duly sold, the property in them remains vested in the tenant or other owner (*d*).

A bailiff who seizes goods under a distress warrant, if his authority to sell on behalf of the landlord is afterwards withdrawn, has no right to go on and sell for his expenses (*e*).

Mode of Selling the Goods distrained.

Before any sale takes place, the county court registrar's office should be searched to see if the goods have been replevied; if that is not the case, and the rent and charges remain unpaid at the end of the five days allowed by law, the goods should be sold for the best price which can be got for them. If the distress is for less than 20*l.*, a person selling the goods by auction need not have an auctioneer's licence (*f*). It seems that there is no order required by law to be observed on the sale of goods distrained,—as that beasts of the plough should be postponed to other goods (*g*).

Landlord may not buy.

The landlord cannot sell the goods to himself or take them at the appraised price (*h*). It is not unusual for the appraisers to buy them at their own valuation. A distress sold at the appraised value was taken, when appraisers were sworn, to have been sold at the best price, since the law *relied* upon the appraisers having been sworn (*i*); but it was held, that upon a count for not selling goods distrained at the best prices, the plaintiff might go into evidence to show that the goods were allowed to stand in the rain, and that they were improperly allotted (*k*). Where a tenant is under a covenant not to carry hay and straw off the premises, a distraining landlord is not entitled to sell it too cheap, on the condition that the purchaser shall consume it on the premises (*l*). If goods on the tenant's lands be sold under a distress with a condition, to which the tenant is a party, that they may remain on the land up to a certain day, and that the buyer may enter and take the goods, the tenant cannot

May not sell hay too cheap, for consumption on premises.

(*c*) *Jacob* v. *King*, 5 Taunt. 451; 15 R. R. 550.

(*d*) *Moore* v. *Pyrke*, 11 East, 52, 54; *King* v. *England*, supra, note (*z*).

(*e*) *Harding* v. *Hall*, 14 W. R. 646; 14 L. T., N. S. 410.

(*f*) Auctioneers Act, 1845, Chitty's Statutes, tit. "Auction," 8 & 9 Vict. c. 15, s. 5.

(*g*) *Jenner* v. *Yolland*, 6 Price, 5; 2 Chit. R. 167; 20 R. R. 608.

(*h*) *King* v. *England*, supra, note (*z*).

(*i*) *Walter* v. *Rumball*, 1 Ld. Raym. 53; 1 Salk. 247; Bullen, 160.

(*k*) *Poynter* v. *Buckley*, 5 C. & P. 512.

(*l*) *Ridgway* v. *Ld. Stafford*, 6 Exch. 404; overruling *Abbey* v. *Petch*, 8 M. & W. 419; and followed in *Hawkins* v. *Walrond*, 1 C. P. 480; 45 L. J., C. P. 772; 35 L. T. 210; 24 W. R. 824: see also *Frusher* v. *Lee*, 10 M. & W. 709; *Roden* v. *Eyton*, 6 C. B. 427.

revoke this licence to enter on the land (*m*). But such a licence is not implied by law, though the goods may have remained on the land with the tenant's assent (*n*). The whole produce of the sale may, if necessary, be applied in or towards satisfaction of the rent and expenses of the distress; but if the produce be more than sufficient for that purpose, the residue should be left in the hands of the sheriff, under-sheriff, or constable—usually the latter—for the use of the owner of the goods distrained (*o*). And if the goods have been removed for sale, the surplus thereof remaining unsold (if any) should be returned to the premises from which they were taken (*p*).

### (j) *Surplus Proceeds and Unsold Goods.*

2 W. & M. c. 5, s. 2. Overplus of Distress for Rent to be paid to Tenant.

By 2 W. & M. sess. 1, c. 5, s. 2, landlords are authorized, after giving five days' notice of the distress (*q*), to cause the goods and chattels distrained to be appraised and sold (*r*), "towards satisfaction of the rent for which the said goods and chattels shall be distrained, and of the charges of such distress, appraisement and sale, *leaving the overplus (if any) in the hands* of the said sheriff, under-sheriff or constable, for the owner's use." If the overplus be not so left, and the tenant or owner of the goods thereby sustains actual damage (but not otherwise), a special action on the case is maintainable (*s*), but not an action for money had and received, to recover the amount of such overplus (*t*). The "overplus" means what remains after payment of the rent, and the *reasonable charges* of the distress, which may be questioned in such special action (*u*). Whether the amount deducted for rent can be questioned in such action, is not clear. Although the tenant or owner of the goods has received the balance from the broker, it is a question for the jury whether it was accepted in full satisfaction: and if not, then whether it was sufficient to satisfy the real balance (*x*). And although the distress be insufficient, no action can be maintained for the rent until a sale has been had (*y*), after which the landlord may sue for the balance (*z*). Where goods distrained for rent in arrear have been removed to a convenient place for sale, and sufficient sold to satisfy the distress, including the expenses, the proper course is for the broker to leave the surplus money with the sheriff, under-sheriff or constable (generally

No action for Rent till Sale. *Lehain* v. *Philpott.*

(*m*) *Wood* v. *Manley*, 11 A. & E. 34; *Wood* v. *Leadbitter*, 13 M. & W. 838.
(*n*) *Williams* v. *Morris*, 8 M. & W. 488.
(*o*) Infra (j).
(*p*) *Evans* v. *Wright*, 2 H. & N. 527; 27 L. J., Ex. 50.
(*q*) Ante, 509 (h).
(*r*) Ante, 512 (i).
(*s*) *Lyon* v. *Tomkies*, 1 M. & W. 603.
(*t*) *Yates* v. *Eastwood*, 6 Exch. 805; 29 L. J., Ex. 303; *Evans* v. *Wright*, 2 H. & N. 527; 27 L. J., Ex. 50; 2 Chit. Pl. 544 (7th ed.).
(*u*) *Lyon* v. *Tomkies*, 1 M. & W. 603; *Knight* v. *Egerton*, 7 Exch. 407 (5th issue, and verdict thereon).
(*x*) *Lyon* v. *Tomkies*, supra.
(*y*) *Lehain* v. *Philpott*, L. R., 10 Ex. 242: 44 L. J., Ex. 225; 33 L. T. 98; 23 W. R. 876.
(*z*) *Philpott* v. *Lehain*, 35 L. T. 855.

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the constable), and return the surplus goods to the premises from whence he took them (*a*).

## SECT. 11.—*Costs of Distresses.*

Distress for Rent Rules.

The Distress for Rent Rules, 1888, or other Distress for Rent Rules for the time being, regulate generally the costs of a distress; but the Distress (Costs) Act, 1817, 57 Geo. 3, c. 93, which regulated the costs where the distress is for 20*l.* or less, is still unrepealed (except as to its preamble and formal words of enactment, which are repealed by the Statute Law Revision (No. 2) Act, 1890).

57 Geo. 3, c. 93, s. 1. Fixed Limit to Costs where Distress for 20*l.* or less.

By the Distress (Costs) Act, 1817, 57 Geo. 3, c. 93, after reciting that divers persons acting as brokers and distraining, had of late made excessive charges to the great oppression of poor tenants and others, and that it was expedient to check such practices, it is enacted that no person making any distress for rent, not exceeding 20*l.*, shall receive out of the produce of the goods distrained upon and sold, or from the tenant distrained on, or from the landlord, or from any other person whatsoever, any other costs and charges than those set forth in the schedule to the act, and by s. 2 any person aggrieved by extortion of greater amount than that prescribed by the act may apply to any one justice of the peace for the division where such distress shall have been made, or in any manner proceeded in, for redress, who may adjudge treble the amount of the monies so unlawfully taken to be paid by the offender to the complaining party. By s. 4 the landlord is only liable in case he has personally levied the distress.

Statutory Schedule where Distress for 20*l.* or less.

Treble damages.

The statute does not apply to a case of distress taken for more than 20*l.*, though made upon goods which are appraised at and sold for less than 20*l.* (*b*).

Copy of Broker's Charges for Party Distrained on.

By sect. 6, "every broker or other person who shall make and levy *any distress whatsoever*, shall give a copy of his charges, and of all the costs and charges of any distress whatsoever, signed by him, to the person or persons on whose goods and chattels any distress shall be levied, although the amount of the rent demanded shall exceed the sum of twenty pounds." This section, which, it will have been seen, is of general application, does not apply where the goods have not been sold (*c*), and where it does apply, the landlord, not personally interfering in the distress, is not liable for the omission of the broker to give a copy of his charges (*d*).

Rule 18 under Act of 1888.

(*a*) *Evans* v. *Wright*, 2 H. & N. 527; 27 L. J., Ex. 50.

(*b*) *Child* v. *Chamberlain*, 5 B. & A. 1049; 6 C. & P. 213.

(*c*) *Hills* v. *Street*, 5 Bing. 39.

(*d*) *Hurt* v. *Leach*, 1 M. & W. 560.

By Rule 18 of the Distress for Rent Rules, "every bailiff shall, *on the request*

The statute is still unrepealed. If possible it must be read with the more extensive section, sect. 8, of the Law of Distress Amendment Act, 1888, and the Distress for Rent Rules made thereunder, replacing the 49th section of the Agricultural Holdings Act, 1883, which section provided a scale of charges (*e*)—applicable only to distresses for more than 20*l.*—now replaced by the scales under the rules. There are now two scales, one where the sum demanded and due exceeds 20*l.* and the other where it does not exceed 20*l.* Rule 17 provides that in case of any difference as to charges, the charges shall be taxed by the registrar of the district in which the distress is levied, who may make such order as he thinks fit as to the costs of taxation, and by Scale I. there is an allowance for "reasonable fees, charges, and expenses (subject to Rule 17) where distress is withdrawn or where no sale takes place, and for negotiations between landlord and tenant respecting the distress." These words, which are taken from the superseded but only impliedly repealed schedule to the Agricultural Holdings Act, give the landlord a right to charge which he did not possess before. It is conceived that this right does not arise until a distress has been actually put in, and that negotiations upon the question whether a distress shall be put in or not cannot be charged for under them.

Scales under Distress for Rent Rules.

Taxation.

Charges where Distress withdrawn, and for Negotiations.

The 49th section of the Agricultural Holdings Act above mentioned provided that no person "making" a distress for more than 20*l.* should be entitled to recover more than the sums mentioned in the schedule. The landlord, and not the bailiff, was held, in *Coode* v. *Johns*, entitled to the percentage of 3 per cent. authorized by that act up to 50*l.*, the landlord being the person "making" the distress within the meaning of the section, the percentage being said to be given to the landlord as compensation for his expenses in employing a solicitor (*f*); but in *Phillips* v. *Rees* (*g*) this decision was overruled by the Court of Appeal, and the law there laid down to the effect that the bailiff and not the landlord is entitled to the percentage, though in terms applying only to the repealed 49th section of the Agricultural Holdings Act, seems also to apply to Rule 15 of the Distress for Rent Rules (*h*). This Rule provides that no person shall be entitled to charges for "levying a distress" other than those specified in the table set out in the Appendix to the Rules, *i.e.*, under Scale I.:—

Bailiff's right to Percentage. *Phillips* v. *Rees.*

Percentages under Law of Distress Act and Rules.

*of the tenant*, produce to him a copy of the table" of fees under those Rules. So long as this Rule is in force, it is submitted that it impliedly repeals and replaces s. 6 of 57 Geo. 3, c. 93.

(*e*) This scale was almost identical with that proposed by Mr. Waugh, M.P. for Cockermouth, a solicitor of forty years' experience, to the Select Committee of the House of Commons on the law of distress, which made its report in 1882.

(*f*) *Coode* v. *Johns*, 17 Q. B. D. 714; 55 L. J., Q. B. 475; 55 L. T. 290; 35 W. R. 47.

(*g*) *Phillips* v. *Rees*, 24 Q. B. D. 17; 59 L. J., Q. B. 1; 61 L. T. 713; 38 W. R. 53—C. A.

(*h*) And see per Lopes, L.J., in *Phillips* v. *Rees*, supra.

CH. XI. SEC. 11. *Proceedings in Distress (Costs of).*

"For levying distress. Three per cent. on any sum exceeding 20*l.* and not exceeding 50*l.* Two and a half per cent. on any sum exceeding 50*l.* and not exceeding 200*l.*, and one per cent. on any additional sum."

And under Scale II. :—"For levying distress, 3*s.*"

Under these scales the landlord, unless he personally levies, gets nothing.

Penalty for overcharges.

The Act of 1888, by s. 7, renders a certificated bailiff liable to have his certificate cancelled for extortion, and expressly preserves his liability to "any other penalty or proceeding." It is submitted that where the distress is for 20*l.* or less, the treble amounts under s. 2 of the Distress (Costs) Act, 1817, 57 Geo. 3, c. 93, become payable by the offender (*i*), but the point is doubtful.

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### SECT. 12.—*Practical Directions as to the Mode of Distraining.*

Practical Directions.

The most proper manner of making a distress is for the person distraining, whether the landlord himself or his bailiff (accompanied by a man to be left in possession), to get into the house, or upon any part of the premises out of which the rent issues, and there select and seize articles, *not privileged from distress* (*k*), of sufficient value to raise, on a broker's sale, the amount for which the distress is made, and the expenses of the distress; or, if necessary, to seize the whole, by taking hold of some piece of furniture or other article and saying, "I distrain this in the name of all the goods on the premises" (*l*), or to that effect. There could be no harm in adding, "except those privileged from distress." There need not be an *actual seizure* of the property distrained on (*m*), any expression of intention to distrain being sufficient (*n*). Thus, where a landlord to whom rent was in arrear, on hearing his tenant and a stranger disputing about removing a lathe, entered the house, and laying his hands on the machine, said, "I will not suffer this, or any of the things, to go off the premises till my rent is paid," the distress was held to be sufficiently made (*o*). Where a landlord's agent went upon the tenant's premises, walked round them without touching anything, and gave the usual notice of distress as to certain of the goods (of much more than sufficient value), and then went away without leaving any one in possession, it was held that this was a sufficient seizure to enable

(*i*) The editor has here adopted a suggestion in Oldham and Foster's Law of Distress (2nd ed.), at p. 257.

(*k*) Ante, Sect. 8, p. 468.

(*l*) *Dodd* v. *Morgan*, 6 Mod. 215; *Draper* v. *Thompson*, 4 C. & P. 84; Bullen, 131.

(*m*) Smith L. & T. 224 (2nd ed.).

(*n*) *Cramer* v. *Mott*, L. R., 5 Q. B. 357; 39 L. J., Q. B. 172; 22 L. T. 857; 18 W. R. 947.

(*o*) *Wood* v. *Nunn*, 5 Bing. 10; 6 L. J., C. P. 198; 2 M. & P. 27; 30 R. R. 528.

the tenant to sue the landlord for an excessive distress (*p*). Where a broker went to the tenant's house and pressed for payment of rent alleged to be due, and of a sum for the expense of the levy, but touched nothing and made no inventory, and the tenant then paid the rent and expenses under protest, on which the broker withdrew: it was held in an action against the landlord for an excessive distress, that he could not say there had been no actual distress (*q*). But a declaration by a landlord as against the grantee of a bill of sale that the landlord means not to allow the goods to be removed until his rent be paid, and that he is prepared to use force to prevent their removal, has been held not to be a conversion by the landlord (*r*).

Things privileged, not to be taken.

Nor an excessive Quantity.

In making the seizure care must be taken not to distrain on anything absolutely privileged from distress, ex. gr. things delivered to the tenant in the way of his trade (*s*), or if the holding be agricultural, machinery and breeding stock on hire (*t*), nor anything privileged *sub modo*, i.e. provided there be other sufficient distress on the premises, ex. gr. the tools of a man's trade (*u*), or, if the holding be agricultural, agisted cattle (*x*). Nor must the goods distrained be *excessive* in quantity or value, i.e. much beyond what is necessary to satisfy the actual arrears of rent, and the costs of the distress (*y*). The value of the goods should be estimated at what they will probably produce at a sale, and not according to their value to the tenant (*z*). A broker's appraisement is not evidence against the tenant as to the value (*a*), but the broker who made it should be called. If there be no other distress on the premises, the taking of one entire thing, though of considerably greater value than the rent, is not excessive (*b*). An action lies for an excessive distress of growing crops, the probable produce of which is capable of being estimated at the time of the seizure (*c*): provided the tenant thereby sustains actual loss and damage, but not otherwise (*d*). The distress should not extend to the whole crop, where part would suffice.

(*p*) *Swann* v. *Earl of Falmouth*, 8 B. & C. 456.

(*q*) *Hutchins* v. *Scott*, 2 M. & W. 809.

(*r*) *England* v. *Cowley*, L. R., 8 Ex. 126; 42 L. J., Ex. 80; 28 L. T. 67, diss. Martin, B.

(*s*) For a list of things privileged absolutely and sub modo respectively, see ante, 468.

(*t*) Ante, Sect. 5.

(*u*) See note (*s*).

(*x*) Ante, Sect. 5.

(*y*) 52 Hen. 3, c. 4 (Statute of Marlebridge); *Wells* v. *Moody*, 7 C. & P. 59; *Willoughby* v. *Backhouse*, 2 B. & C. 821; *Biggins* v. *Goode*, 2 C. & J. 364; *Knight* v. *Egerton*, 7 Exch. 407; *Whitworth* v. *Maden*, 2 C. & K. 517; *Smith* v. *Ashforth*, 29 L. J., Ex. 259.

(*z*) *Wells* v. *Moody*, 7 C. & P. 59.

(*a*) *Smith* v. *Ashford*, 29 L. J., Ex. 259.

(*b*) *Avenell* v. *Croker*, Moo. & M. 172; *Sells* v. *Hoare*, 1 Bing. 401; 1 C. & P. 28; explained 11 Exch. 876; *Roden* v. *Eyton*, 6 C. B. 427; *Tancred* v. *Leyland* (in error), 16 Q. B. 667, Maule, J.

(*c*) *Piggott* v. *Birtles*, 1 M. & W. 441.

(*d*) *Proudlove* v. *Twemlow*, 1 Cr. & Mee. 326; *Owen* v. *Legh*, 3 B. & A. 470; 22 R. R. 455; *Rodgers* v. *Parker*, 18 C. B. 112; but see *Chandler* v. *Doulton*, 3 H. & C. 553; 34 L. J., Ex. 89, where nominal damages were held recoverable.

CH.XI.SEC.12. *Proceedings in Distress (Practical Directions).*

The distress should not be made for more rent than is really owing, but if there be any doubt or dispute on that point, and no tender has been made by the tenant, the landlord may, with comparative safety, distrain for all that he claims, although in the result it appears to be more than is really in arrear and unpaid. No action can be maintained against him merely for distraining for *too much rent*, unless it appear by the evidence that the goods seized and sold were excessive with reference to the amount of the actual arrears (*e*); not even where it is alleged that the distress was made maliciously (*f*). The reason is, that the landlord is legally *entitled to distrain* for something, although, perhaps, not for all that he claims; and there is no duty on his part to inform the tenant for what he distrains: on the contrary, it is the duty of the tenant, who is presumed to know what rent he owes, to tender at his peril a sufficient sum to satisfy the amount, with or without expenses as the case may require, and until he has done *that* he has no cause of complaint (*g*). Upon the same principle, when the amount of a simple contract debt is disputed, the debtor must, at his peril, make a sufficient tender; otherwise the creditor, although he claims too much, may recover what is really due to him, with costs.

Amount of Rent to be distrained for.

The broker should show the cause of his making the distress, if required to do so, but if not required, he may distrain generally (*h*). The landlord or his agent or bailiff is not bound by any notice of distress given, but may show that more rent was due than is therein stated (*i*). The tenant must prove that his goods to an excessive amount or value were distrained, but it is not necessary to show that they were sold or actually taken away: the seizure as a distress is a sufficient cause of action (*k*). And it will be no defence that after the excessive distress was made the tenant authorized the defendant to sell, and gave him other powers with regard to the goods seized (*l*).

Impounding.

As soon as possible after the goods have been distrained they should be impounded (*m*); especially where there is any dispute between the parties as to the amount of arrears really due. Until such impounding the tenant may tender what he admits to be due, with expenses, and if such tender be sufficient it will be *illegal* to proceed

(*e*) *Crowder* v. *Self*, 2 Moo. & R. 190; *Tancred* v. *Leyland* (in error), 16 Q. B. 669; *Glynn* v. *Thomas*, 11 Exch. 870; 25 L. J., Ex. 125; *French* v. *Phillips*, 1 H. & N. 564; 26 L. J., Ex. 82; *Loring* v. *Warburton*, E., B. & E. 507; 28 L. J., Q. B. 31; overruling *Taylor* v. *Henniker*, 12 A. & E. 488.

(*f*) *Stevenson* v. *Newnham* (in error), 13 C. B. 285, 297; 22 L. J., C. P. 110.

(*g*) *Glynn* v. *Thomas*, 11 Exch. 873, Erle, J.; *Tancred* v. *Leyland*, 16 Q. B. 669.

(*h*) *Buller's case*, 1 Leon. 50.

(*i*) *Gwinnet* v. *Phillips*, 3 T. R. 643; *Crowther* v. *Ramsbottom*, 7 T. R. 658; 4 R. R. 540; *Gambrell* v. *Earl of Falmouth*, 4 A. & E. 73; *Trent* v. *Hunt*, 9 Exch. 14.

(*k*) *Sells* v. *Hoare*, 1 Bing. 401; 8 Moo. 453; *Baylis* v. *Usher*, 4 M. & P. 790.

(*l*) *Willoughby* v. *Backhouse*, 2 B. & C. 821; 2 L. J., K. B. 174; 26 R. R. 566; *Sells* v. *Hoare*, supra.

(*m*) Ante, 505.

further with the distress (*n*). But when the goods are impounded they are in the custody of the law, and a tender is too late to make the subsequent proceedings illegal (*o*). Nevertheless, if a tender be made after the impounding, but within the five days allowed the tenant to replevy, and the landlord afterwards proceeds to sell the distress, the tenant may maintain a special action on the case founded on the equity of the statute 2 W. & M. sess. 1, c. 5, s. 2 (*p*). To avoid this the landlord should abstain from selling (after such a tender), and leave the tenant to obtain his goods by a replevin (which is the only remedy), in which the tenant will have to pay all that is really due with the costs of and incident to the distress, replevy and action. If no tender be made, the landlord should *not sell* for more than the actual arrears of rent, with expenses, notwithstanding he may have claimed more in his notice of distress. He now has the opportunity of correcting any mistake previously made on that point, although perhaps he may be liable to some damages for having taken an excessive quantity of goods as a distress.

Inventory.

After a seizure has been made, as above pointed out, it is proper for the landlord or his bailiff to make an inventory (*q*) of as many goods as are judged sufficient to cover the rent distrained for, and also the charges of the distress. Although an inventory need not be as exact and minute as a specification, yet it ought to mention the goods taken, in such a manner that the tenant, and others, may know what is intended to be distrained. The following inventory, "one clock and weights, &c., and any other goods and effects that may be found in and about the said premises, to pay the said rent and expenses of this distress," was considered by the court objectionable, and was held sufficient only on the ground that the distress was in fact meant to include all the goods on the premises (*r*). A notice of distress stating that the landlord had distrained the several goods, chattels, and effects specified in the schedule: which schedule, after enumerating certain goods, concluded thus:—"and all other goods, chattels and effects on the said premises, *that may be required in order to satisfy* the above rent, together with all necessary expenses:" was held to be too vague and uncertain to justify the sale of goods of a stranger which he had deposited on the premises (*s*).

(*n*) *Vertue* v. *Beasley*, 1 Moo. & R. 21; *Branscomb* v. *Bridges*, 1 B. & C. 145; 25 R. R. 335; *Holland* v. *Bird*, 10 Bing. 15; *Ladd* v. *Thomas*, 12 A. & E. 117; *Evans* v. *Elliott*, 5 A. & E. 142.

(*o*) *Firth* v. *Purvis*, 5 T. R. 432; 2 R. R. 637; *Thomas* v. *Harries*, 1 M. & G. 695; *Ladd* v. *Thomas*, 12 A. & E. 117; *Ellis* v. *Taylor*, 8 M. & W. 415; *Tennant* v. *Field*, 8 E. & B. 336.

(*p*) *Johnson* v. *Upham*, 2 E. & E. 250; 28 L. J., Q. B. 252; overruling *Ellis* v. *Taylor*, 8 M. & W. 415.

(*q*) See Form, Appendix D., No. 3.

(*r*) *Wakeman* v. *Lindsey*, 14 Q. B. 625.

(*s*) *Kerby* v. *Harding*, 6 Ex. 234; 20 L. J., Ex. 162.

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After the inventory is taken it is necessary to give a notice *in writing* (*t*) to the tenant of the fact of the distress having been made and the time when the rent and charges must be paid or the goods replevied. This is usually done by writing such notice at the bottom of the inventory (*u*). A true copy of the inventory and notice must then be served personally upon the tenant or the owner of the goods, or left at the house, or if there be no house on the premises, upon the most notorious place. There should in all cases be a witness present to prove the regularity of the proceedings.

Notice of Distress, &c.

Removal of Goods.

When the distress has been thus made, it is the safest way to remove the goods immediately, and in the notice to acquaint the tenant where they are removed to. The place to which they are so removed must be mentioned in the notice (*x*), and any written request of the tenant under the Law of Distress Amendment Act, s. 5, ante, p. 513, as to the place of removal must be strictly complied with. In many cases, however, the tenant for his own convenience requests the landlord to permit them to remain on the premises, and consents to allow him to retain possession beyond the five days; and in such cases a written consent should be procured (*y*), and some person left in possession of the goods upon the premises. No stamp is necessary to such written consent, or to a licence to re-enter and resume possession in consideration of the distress being withdrawn for a time (*z*).

## SECT. 13.—*Second Distress.*

17 Car. 2, c. 7, s. 4.

Second Distress in case of Insufficiency on first.

A landlord has a power at common law to make a second distress in case of insufficiency of a first (*a*); and it was enacted by 17 Car. 2, c. 7, s. 4—a Procedure Act—that "in all cases where the value of the cattle distrained shall not be found to be of the full value of the arrears distrained for, the party to whom such arrears are due, his executors or administrators, may from time to time distrain again for the residue of the said arrears." This enactment, together with the other sections of the statute, is wholly repealed by the Statute Law Revision and Civil Procedure Act, 1881, 44 & 45 Vict. c. 59, but the object of that act was to expressly repeal enactments impliedly repealed already, and it is not clear that 17 Car. 2, c. 7, s. 4, has been impliedly repealed. Perhaps the enactment is saved from repeal by sect. 4 (b) of the Act of 1881, which provides that the general

(*t*) *Wilson* v. *Nightingale*, 8 Q. B. 1034, ante, 510; see the Form, Appendix D., No. 4.

(*u*) See Forms, Appendix D., Nos. 4, 5.

(*x*) 11 Geo. 2, c. 19, s. 9.

(*y*) See Form, Appendix C., Sect. 3.

(*z*) *Hill* v. *Ramm*, 5 M. & G. 789; *Fishwick* v. *Milnes*, 4 Exch. 825; *Cox* v. *Bailey*, 6 M. & G. 193.

(*a*) See Bullen on Distress, 111, citing *Hutchins* v. *Chambers*, 1 Burr. at p. 589.

repeal shall not affect any principle or rule of law or equity established or confirmed, or right or privilege acquired by any enactment repealed by the Act of 1881. Even, however, if 17 Car. 2, c. 7, s. 4, is completely repealed, the landlord's common law power of second distress is not extinguished.

Illegality of Second Distress for same rent in case of sufficiency on first.

But a second distress for the same rent cannot be justified where there is enough which might have been taken upon the first distress, if the distrainer had then thought proper; for it was his folly that he did not take sufficient at first (*b*); and a man who has an entire duty (as rent, for example) may not split the entire sum, and distrain for one part of it at one time, and for the other part of it at another time, and so toties quoties for several times; for that is great oppression (*c*).

Distress for rent-charge on one Tenant's holding only. *Owen* v. *Wynne.*

The rule that the distress may not be split applies to the very frequent case of a rent-charge issuing out of a large estate let to many tenants. In such a case the grantee of the rent-charge cannot divide the liability to distress for arrears by distraining first upon one tenant for one portion and then upon another for another portion. If he does, the tenant secondly distrained upon may recover the distress by replevin (*d*); so that if the land be let, he must either distrain upon one tenant, or upon none.

Successive Distresses for successive gales all due at time of first Distress.

It is not illegal, however, in cases where many gales of rent are due, to distrain firstly for gales firstly due, and secondly for gales subsequently due, although the distress firstly made was made at a date when the gales secondly distrained for might have been distrained for by the first distress. That a second distress to be illegal must be *for the same rent* is recognized by all the authorities (*e*).

Action for goods taken on second Distress.

An action will lie against a landlord for the goods taken on a second distress, where he might have taken sufficient on the first, or where he had voluntarily abandoned it (*f*). Where a landlord, having distrained a tenant who had committed an act of bankruptcy, withdrew the distress in consequence of a creditor of the tenant stating that he was proceeding in bankruptcy against the tenant, and warning the landlord not to sell, it was held, that such notice or warning ought not to have been regarded, and that a second distress was illegal (*g*). If a man, however, seize for the whole sum that is due to him, and only mistake the value of the goods seized,

(*b*) Com. Dig. *Distress* (A. 1); *Bagge*, app., *Mawby*, resp., 8 Exch. 641; Smith L. & T. 191, 192 (2nd ed.).

(*c*) *Hutchins* v. *Chambers*, 1 Burr. 589, per Lord Mansfield; *Gambrell* v. *Earl of Falmouth*, 4 A. & E. 73; *Lear* v. *Caldecott*, 4 Q. B. 123.

(*d*) *Owen* v. *Wynne*, 4 E. & B. 579.

(*e*) And see per Brown, J., Moore, 7, pl. 26, cited in *Dawson* v. *Cropp*, 1 C. B. 961. The appropriation of the first distress to the first rent will appear from the distress warrant and notice of distress.

(*f*) *Smith* v. *Goodwin*, 4 B. & Adol. 413; *Dawson* v. *Cropp*, 1 C. B. 961; 3 D. & L. 225; *Lear* v. *Caldecott*, 4 Q. B. 123; *Piggott* v. *Birtles*, 1 M. & W. 441.

(*g*) *Bagge*, app., *Mawby*, resp., 8 Exch. 641.

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which may be of uncertain or imaginary value, as pictures, jewels, race-horses, &c., there is no reason why he should not afterwards complete his execution by making a further seizure (*h*). So if he withdraw the distress at the request of the tenant and for his accommodation (*i*), or is induced to do so by a false statement made by the tenant (*k*). So if he be forcibly prevented by the tenant from selling the goods distrained, or from delivering them to the purchaser, whereby the distress is defeated (*l*). But the re-entry in such cases does not amount to a second distress; it is merely a continuance of the original taking, and it should be confined to the goods previously taken and not extend to any others (*m*).

Second Distress in case of Replevin.

If a plaintiff in replevin be nonsuited, the defendant may again distrain the same goods for rent subsequently accrued, previously to executing his retorno habendo, without waiving his action against the sureties of the bond (*n*). Where to a cognizance for rent in arrear there was a plea in bar, that the defendant, on a former occasion, made a distress for the same rent, and took goods liable to distress sufficient to discharge the rent in arrear and the costs of the distress, and might thereby have paid the arrears of rent, but neglected so to do and wrongfully made a second distress for the same rent; it was held ill on special demurrer, assigning for cause that the plea did not show that the rent was satisfied by the former distress (*o*). And where to an avowry by executors, for rent due in the lifetime of their testator, there was a plea in bar that the testator took as a distress for the same rent goods of a sufficient value to satisfy such rents and the costs of taking the distress; it was held insufficient, as it should have shown that such distress produced a satisfaction of the rent (*p*).

## SECT. 14.—*Rescue and Pound-Breach.*

What amounts to a Rescue.

Rescue is where the owner, or other person, by force takes away a thing distrained from the person distraining, after the latter has been actually in possession; but if he never in fact had possession—as when disturbed in making the distress—it is no rescue (*q*). It is also called rescous, from *recourser* (*recuperare*), to take from or recover. It is defined by Lord Coke to be a taking away and

(*h*) *Hutchins* v. *Chambers*, 1 Burr. 579; 1 Wms. Saund. 201, n. 1.

(*i*) See Form of Request, Appendix D., No. 6.

(*k*) *Woollaston*, app., *Stafford*, resp., 15 C. B. 278.

(*l*) *Lee* v. *Cooke*, 2 H. & N. 584; 3 Id. 203; 27 L. J., Ex. 337.

(*m*) *Smith* v. *Torr*, 3 F. & F. 505; and see Sect. 4.

(*n*) *Hefford* v. *Alger*, 1 Taunt. 218.

(*o*) *Hudd* v. *Ravenor*, 2 Brod. & B. 662; 23 R. R. 528; *Dawson* v. *Cropp*, 1 C. B. 961; 3 D. & L. 225.

(*p*) *Lingham* v. *Warren*, 2 Brod. & B. 36; Bullen, 206.

(*q*) Bullen, N. P. 84.

setting at liberty against law a distress taken, or a person arrested by the process or course of law (*r*). If cattle distrained go on to the premises of the owner while being driven to the pound, and he refuse to deliver them up upon demand by the distrainer, it is a rescue in law (*s*): but where the plaintiff distrained the defendant's cattle damage feasant, and went to apprise the defendant, and during his absence the cattle escaped for half an hour into the defendant's grounds, from whence the plaintiff on his return drove them to his own yard; it was held, that the defendant having taken them from thence, it was no rescue (*t*). Where the landlord employed a sheriff's officer, who took possession under the distress, and then, on receiving a fi. fa. sold the goods under it, this, though done by the same person, was held to be a rescue and pound-breach (*u*). The following facts, however, were held insufficient to enable the plaintiff to maintain an action for a pound-breach or rescue. The plaintiff levied a distress for rent in arrear, and impounded the goods upon the premises; the superior landlord afterwards distrained for rent due to him from the plaintiff: whilst the plaintiff's bailiff was removing the goods, the defendant, a sheriff's officer, came into the house, and said that he had a fi. fa. against the plaintiff, and that he would not allow the goods to be removed: plaintiff's tenant thereupon ejected plaintiff's bailiff, and brought back the goods which had been removed (*x*).

When a Rescue may be made.

If the distress be taken without cause, the party may lawfully make a rescue before it is impounded (*y*); but if it is impounded, he cannot justify a breach of the pound to take it out; because the distress is then in the custody of the law (*z*). Whenever the distrainer abandons and quits possession of the distress, the re-taking of it by the tenant or owner is not a rescue (*a*). So if a distrainer takes the distress out of the place where it was originally impounded, for the purpose of making an unlawful use of it, the owner may interfere and take it out of his possession, without rendering himself liable either for a rescue or for pound-breach (*b*).

Indictment for Rescue or Pound-Breach.

It is said that by the common law, if a man broke the pound, or the lock of it, or any part of it, he greatly offended against the peace, and committed a trespass against the king, and to the lord of the fee, the sheriffs and hundredors in breach of the peace, and to the

(*r*) Co. Lit. 160.
(*s*) Co. Lit. 161 a.
(*t*) *Knowles* v. *Blake*, 5 Bing. 499.
(*u*) *Reddell* v. *Stowey*, 2 Moo. & R. 358; *Turner* v. *Ford*, 15 M. & W. 212.
(*x*) *Story* v. *Finnis*, 6 Exch. 123; 2 L., M. & P. 198.
(*y*) Co. Lit. 47 b, 161 a; *Bevil's case*, 4 Co. R. 11 b; *Case of Avowry*, 9 Co. R. 23 b; *Keen* v. *Priest*, 4 H. & N. 240, Bramwell, B.; Bullen, 207.
(*z*) *Cotsworth* v. *Bettison*, 1 Salk. 247; 1 Ld. Raym. 105.
(*a*) *Dod* v. *Monger*, 6 Mod. 216; Bradley, 282.
(*b*) *Smith* v. *Wright*, 6 H. & N. 821; 30 L. J., Ex. 313.

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party in delay of justice; wherefore hue and cry was levied against him as against those who broke the peace (*c*); and the party who distrained might take the goods again wheresoever he found them, and again impound them (*d*). It is doubtful, however, whether pound-breach is an indictable offence (*e*).

2 W. & M. sess. 1, c. 5, s. 4. Recovery of treble Damages in Case of Pound-Breach.

By 2 W. & M. sess. 1, c. 5, s. 4, on any pound-breach or rescous of goods distrained for rent, the person grieved thereby shall, in a special action upon the case, recover treble damages and costs against the offender, or against the owner of the goods, if they be afterwards found to come into his use or possession. If a distrainer abuse a distress by working it, the owner may interfere and prevent it, and no action is maintainable against him for pound-breach or rescue (*f*). Where goods fraudulently removed and distrained on the premises of a third party are rescued by him, it may be a question whether an action in respect of such rescue can be maintained under this section (*g*). In an action on this statute it has been held that it is no answer that the rent and demand were tendered after the distress and impounding (*h*). Trover is not maintainable by the landlord for goods distrained by him, he having no property in them, nor even the constructive possession of them (*i*).

Costs.

Treble costs as well as treble damages are given by this statute, but treble costs were abolished by the Limitations of Actions and Costs Act, 1842 ("Pollock's Act"), 5 & 6 Vict. c. 97, which substituted "a full and reasonable indemnity as to all costs and charges in and about the action" (*k*).

The Pound-Breach Act, 1843, 6 & 7 Vict. c. 30, does not extend to distress for rent, but applies only to distress of cattle "damage feasant."

Note on Distress Damage Feasant.

NOTE ON DISTRESS DAMAGE FEASANT.—Although the right of distress damage feasant does not arise out of the relation between landlord and tenant, it may be useful to add here a few words respecting that kind of distress, which resembles distress for rent in many of its incidents, but not in all. It is laid down in Bullen on Distress (where the law of the subject is fully discussed (see pp. 227—242)), that a distress damage feasant may be made of any cattle or other things animate or inanimate which are wrongfully upon a man's land or in his house, incumbering it or otherwise doing damage. This right is founded on the principle of recompense, which justifies a person in retaining that which occasions injury to his property till amends be made by the owner. The thing distrained must be taken in the act (*Wormer* v. *Biggs*, 2 C. & K. 31). There is

(*c*) See Bullen on Distress, p. 210.

(*d*) Co. Litt. 47 b.

(*e*) See Russell on Crimes, i. 560. No mention of the offence as indictable is made in Archbold's Criminal Pleading or in Stephen's Digest of the Criminal Law; but in 1893, in *Reg.* v. *Butterfield*, at Bedfordshire Epiphany Quarter Sessions, the defendant was indicted for pound-breach, the jury being discharged as not agreeing.

(*f*) *Smith* v. *Wright*, supra.

(*g*) *Harris* v. *Thirkeld*, 20 L. T. 98.

(*h*) *Firth* v. *Purvis*, 5 T. R. 432; 2 R. R. 637.

(*i*) *Turner* v. *Ford*, 15 M. & W. 212; *Wilbraham* v. *Snow*, 2 Saund. 47 a.

(*k*) Pollock's Act is not repealed by R. S. C. Ord. LXV. See *Hasker* v. *Wood*, 54 L. J., Q. B. 419; 33 W. R. 679.

this difference between a distress for rent and a distress damage feasant, that in the former case a man may distrain any cattle he finds on the premises, but in the other case they must be actually doing damage, and are only distrainable for the damage they are then doing and continuing: for if they have done damage to-day and have gone off, and come again at another time and are doing damage, and are taken for that, and the owner tenders amends for the latter damage, the party cannot justify keeping them for the first damage (*Vaspor* v. *Edwards*, 12 Mod. 658, 660: 1 Ld. Raym. 719; 1 Salk. 248; Co. Lit. 161 a). Each beast taken can be seized and detained for the damage which has actually been done by itself only, and not for the general damage, or any part of it which has been done by the others (Id.). To justify a distress damage feasant it is sufficient, however, that the distrainer entered the locus in quo whilst the cattle were in it (*Clement* v. *Milner*, 3 Esp. 95); but if it appear that the party distraining had not actually got into the locus in quo before the cattle had got out of it, the justification cannot be supported (Id.). The remedy is not confined to the mere owner of the soil upon which they may be found, but extends to all who may receive injury, such as commoners or other persons entitled to the use or produce of the land merely (*Hall* v. *Harding*, 4 Burr. 2432). Where A. demised to B. the milk of twenty-two cows to be provided by A. and to be fed at A.'s expense on certain closes belonging to A.; A. covenanting that B. might turn out a mare, and that no other cattle should be fed there; it was held, that the separate herbage and feeding of those closes passed to B., and that B. might distrain other cattle of A. doing damage there (*Burt* v. *Moore*, 5 T. R. 329; 2 R. R. 611). A tenant holding over after the expiration of his term cannot lawfully distrain the landlord's cattle put upon the premises by way of taking possession (*Taunton* v. *Costar*, 7 T. R. 431; *Butcher* v. *Butcher*, 7 B. & C. 399). No kind of thing which is capable of being damage feasant and not in actual use is exempt from distress for such damage. For damage feasant the party grieved or his agent may distrain in the night, otherwise it may be the beasts will be gone before he can take them (Co. Lit. 142 a). If a sufficient tender be made of damages before the taking, the taking is unlawful; if after the taking, and before the impounding, then although the taking is lawful, the detainer after the tender is unlawful; and in either case replevin may be maintained (*Evans* v. *Elliott*, 5 A. & E. 142; *Gulliver* v. *Cozens*, 1 C. B. 788; *West* v. *Nibbs*, 4 C. B. 172). A distress damage feasant cannot be sold for the damage done (*Layton* v. *Harry*, 8 Q. B. 811). By 6 & 7 Vict. c. 30, power is given to two justices, where cattle are distrained, to convict persons releasing or attempting to release them; and the justices may award any part of the penalty to the person on whose behalf the distress is made. The justices cannot act in cases of disputed title and other cases.

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## Sect. 15.—*Satisfaction of Arrears of Rent by Execution Creditor.*

### (a) *Execution in High Court.*

8 Ann. c. 14, s. 1. No Goods may be taken in Execution till Arrears of Rent (for not more than one Year) be paid.

Goods in the custody of the law under an execution cannot at common law be distrained for rent (*l*). But "for the more easy and effectual recovery of rents reserved on leases for life or lives, term of years, at will, or otherwise," the Landlord and Tenant Act, 1709, 8 Ann. c. 14 [c. 18 in the Statutes Revised], s. 1, enacts that—

No goods or chattels whatsoever lying or being in or upon any messuage, lands or tenements which are or shall be leased for life or lives, term of years, at will or otherwise, shall be *liable to be taken* by virtue of any execution on any pretence whatsoever, *unless the party at whose suit* the said execution is sued out, shall, *before the removal* of such goods from off the said premises, by virtue of such execution, or extent, pay to the land-

(*l*) Ante, 476; Co. Lit. 47 a; *Wharton* v. *Naylor*, 12 Q. B. 673; 6 D. & L. 136.

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lord of the said premises or his bailiff all such sum or sums of money as are or shall be due for rent for the said premises at the time of the taking such goods or chattels by virtue of such execution, provided the said arrears of rent do not amount to more than one year's rent; and in case the said arrears shall exceed one year's rent, then the said party at whose suit such execution is sued out, paying the said landlord or his bailiff one year's rent, may proceed to execute his judgment as he might have done before the making of this act; and the sheriff or other officer is hereby empowered and required to levy and pay to the plaintiff as well the money so paid for rent as the execution money.

Year's rent by Stat. of Anne.

Saving for Crown Debts.

Sect. 8 provides, that nothing in the act shall extend to prejudice her Majesty, her heirs or successors, in recovering or seizing any debts, fines, penalties, or forfeitures due to her.

Tenancies, 4 weeks' rent on weekly, by Exec. Act, 1844.

On Tenancies otherwise less than yearly.

By the Execution Act, 1844, 7 & 8 Vict. c. 96, s. 67, "no landlord of any tenement let at a weekly rent shall have any claim or lien upon any goods taken in execution under the process of any court of law for more than four weeks' arrears of rent; and if such tenement shall be let for any other term less than a year, the landlord shall not have any claim or lien on such goods for more than the arrears of rent accruing during four such terms or times of payment."

County Court Executions.

County Court executions are specially exempted from 8 Ann. c. 14, s. 1, by s. 160 of the County Courts Act, 1888 (sub-s. (b), infra).

Application of Statute of Anne

It has been said that 8 Ann. c. 14, s. 1, is to be construed liberally (*m*), i.e. in favour of landlords. It does not, however, apply to executions at the suit of the landlord (*n*). The words "party at whose suit the execution is sued out" are not confined to plaintiffs, but have been held to apply where a defendant sued out execution for his costs of defence (*o*), and to a seizure under an outlawry in a civil suit (*p*), or under a sequestration from the Court of Chancery (*q*). Where there are two or more executions the landlord cannot have a year's rent on each (*r*). If the goods remain on the demised premises after a fictitious bill of sale made of them under an execution, they are liable to be distrained (*s*). Notwithstanding a fraudulent bill of sale by the tenant the property remains vested in him, so as to be liable to an execution against *his* goods, or a distress (*t*). The act applies to all goods and chattels whatsoever upon the demised premises, whether belonging to the tenant or not (*u*): and whether liable to a distress or not (*x*).

to all Goods.

(*m*) *Henchett* v. *Kimpson*, 2 Wils. 141.

(*n*) *Taylor* v. *Lanyon*, 6 Bing. 536; 4 Moore & Payne, 316; 8 L. J., C. P. 180; 31 R. R. 485.

(*o*) *Henchett* v. *Kimpson*, supra.

(*p*) *St. John's College, Oxford* v. *Murcott*, 7 T. R. 259.

(*q*) *Dixon* v. *Smith*, 1 Swanst. 457.

(*r*) *Dod* v. *Saxby*, 2 Stra. 1024.

(*s*) *Smith* v. *Russell*, 3 Taunt. 400.

(*t*) *Reed* v. *Thoyts*, 6 M. & W. 410; 8 Dowl. 410.

(*u*) *Forster* v. *Cookson*, 1 Q. B. 419; *Duck* v. *Braddyll*, M'Clel. 217; 13 Price, 455; and compare *Hughes* v. *Smallwood*, 25 Q. B. D. 306, and infra (b), as to the County Courts Act.

(*x*) *Riseley* v. *Ryle*, 11 M. & W. 16, 22.

8 Ann. c. 14, s. 1—*contd.*

None of the goods may be *removed* from off the demised premises until the rent is paid, otherwise the sheriff will be personally liable to an action founded on the statute (*y*) ; or to a summary application to the Division of the High Court out of which the execution issued, or to a judge, to compel him to pay the arrears of rent (not exceeding one year's rent) and the cost of the application (*z*), but an actual removal is necessary (*a*) : the mere execution of a bill of sale by the sheriff to a purchaser is not sufficient (*b*).

There must be an actual removal and subsisting Tenancy.

The act only applies to a subsisting tenancy, and the landlord's statutory right to be paid arrears of rent ceases on determination of the lease (*c*). Where in an agreement for the sale of certain premises there was a stipulation that "in the mean time and until the assignment was made, the purchaser should pay and allow to the vendor at the rate of 100*l.* per annum, from the time of taking possession of the premises until the completion of the purchase, in equal half-yearly payments ;" the purchaser having taken possession, and one half-yearly payment being due, it was held that it was due *as rent*, and that the vendor was entitled to it, under the statute of Anne, before the removal of any of the goods which had been seized under an execution after it became due (*d*).

*Cox* v. *Leigh.*

Forehand Rents.

The act applies to forehand rents, payable in advance (*e*), even when reserved in a mortgage deed by way of further security for the interest (*f*).

Ground Rents, &c.

It was held in an early case (*g*) that the act does not apply to ground rents, but in a later one (*h*) that it applies to the case of a sub-tenancy of apartments.

Executors and Administrators.

The executor or administrator of a deceased landlord who might, but for the execution, distrain for arrears of rent, is entitled to claim such rent (not exceeding one year's rent) from the sheriff (*i*) ; but not an administrator who first obtains letters of administration after

(*y*) *Calvert* v. *Joliffe*, 2 B. & Adol. 418 ; *Wintle* v. *Freeman*, 11 A. & E. 547 ; *Riseley* v. *Ryle*, 1 Dowl., N. S. 660 ; 10 M. & W. 101 ; 11 Id. 16 ; *Forster* v. *Cookson*, 1 Q. B. 419 ; *Bible* v. *Hussey*, 2 Ir. Com. L. R. 308 ; 16 W. R. 710.

(*z*) *West* v. *Hodges*, Barnes, 211 ; 6 M. & G. 1004, note ; *Henchett* v. *Kimpson*, 2 Wils. 140 ; *Arnitt* v. *Garnett*, 3 B. & A. 440 ; 22 R. R. 453 ; *Yates* v. *Ratledge*, 5 H. & N. 249.

(*a*) *White* v. *Binstead*, 13 C. B. 304.

(*b*) *Smallman* v. *Pollard*, 6 M. & G. 1001 ; 1 D. & L. 901.

(*c*) *Cox* v. *Leigh*, L. R., 9 Q. B. 333 ; 43 L. J., Q. B. 123 ; 30 L. T. 494 ; 22 W. R. 730. See too *Cook* v. *Cook*, Andrews, 219 ; *Hodgson* v. *Gascoigne*, 5 B. & Ald. 88 ; 24 R. R. 295 ; *Riseley* v. *Ryle*, 10 M. & W. 101 ; 11 Id. 16.

(*d*) *Saunders* v. *Musgrave*, 6 B. & C. 524 ; 9 D. & R. 529 ; 5 L. J., K. B. 192 ; 30 R. R. 414 ; 2 C. & P. 294 ; *Anderson* v. *Midland R. Co.*, 3 E. & E. 614 ; 30 L. J., Q. B. 94.

(*e*) *Harrison* v. *Barry*, 7 Price, 690 ; 21 R. R. 781 ; *Duck* v. *Braddyll*, M'Clel. 217 ; 13 Price, 455.

(*f*) *Yates* v. *Ratledge*, 5 H. & N. 249.

(*g*) *Bennett's case*, 2 Stra. 787.

(*h*) *Thurgood* v. *Richardson*, 7 Bing. 428 ; 4 C. & P. 481, in which *Bennett's case* was not cited. It is submitted that the two cases are clearly in conflict ; that the question is still open on authority ; and that on the construction of the act it applies to an *immediate* landlord only.

(*i*) *Palgrave* v. *Windham*, 1 Stra. 212.

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the goods have been removed and sold, and the proceeds paid over to the execution creditor (*k*).

The execution creditor is not liable to an action on the statute; it is the sheriff who is liable (*l*).

8 Ann. c. 14, s. 1—*contd.*

Non-liability of Execution Creditor.

Liability of Sheriff.

The sheriff is liable to an action at the suit of the landlord, for not paying a year's rent, though the sheriff ought not to have seized the goods on account of the tenant having become bankrupt, and may therefore be liable also to an action at the suit of the assignees (*m*). Where a sheriff seized and sold goods under a fi. fa., he was held to be liable to pay the whole of the proceeds to the assignees of the tenant, though he had paid a year's rent to the landlord (*n*). In order to enforce a landlord's claim for a year's rent against trustees of a bankrupt tenant, after a seizure under a fieri facias which is illegal as against them, there must be an actual distress: unless perhaps the sheriff has paid the amount before he had notice of the bankruptcy (*o*). Where the sheriff seizes and removes, under a fi. fa., goods which are not the property of the judgment debtor, and afterwards pays the whole of the proceeds of the sale to the real owner, he is still liable under the statute for not paying a year's rent to the landlord (*p*). Under a fi. fa. against A., the sheriff seized the goods of B.; B. claiming them, the sheriff obtained an order under the Interpleader Act, and C., the landlord, claimed 25*l.* for a quarter's rent. The goods were sold under the order, and the amount, after deducting the 25*l.*, was paid by the sheriff into court. On the trial of the issue, B. established his claim; it was held, that, under the circumstances, the sheriff was not justified in paying the rent (*q*).

Landlord entitled to full Year's Rent.

The landlord is entitled to a full year's rent (if so much is in arrear) notwithstanding he has usually remitted some portion of it to the tenant (*r*). But he can only claim from the sheriff the rent which was due at the time of the taking the goods in execution, and not that which accrued after the taking and during the continuance of the sheriff in possession (*s*), and although the measure of damages is primâ facie the amount of rent due, it is competent to the sheriff to prove, in mitigation of damages, that the value of the goods removed was less than the amount of rent due (*t*). This used to be so where growing crops were seized under an execution and remained in the custody of the sheriff or his vendee until they

Sheriff may prove that value of Goods was less than Rent.

(*k*) *Waring* v. *Dewberry*, 1 Stra. 97.
(*l*) *Palgrave* v. *Windham*, 1 Stra. 212; *Risdey* v. *Ryle*, 11 M. & W. 16, 20; *Cocker* v. *Musgrove*, 9 Q. B. 230.
(*m*) *Duck* v. *Braddyll*, M'Clel. 217; 13 Price, 455.
(*n*) *Lee* v. *Lopes*, *Bart.*, 15 East, 230.
(*o*) *Gethin* v. *Wilks*, 2 Dowl. 189.
(*p*) *Forster* v. *Cookson*, 1 Q. B. 419.
(*q*) *White* v. *Binstead*, 13 C. B. 304.
(*r*) *Williams* v. *Lousey*, 8 Bing. 28.
(*s*) *Hoskins* v. *Knight*, 1 M. & S. 245; 14 R. R. 424; *Reynolds* v. *Barford*, 7 M. & G. 449; 2 D. & L. 327; *Davis*, *In re*, *Pollen Trustees*, *Ex parte*, 55 L. J., Q. B. 217; 54 L. T. 304; 34 W. R. 442.
(*t*) *Thomas* v. *Mirchouse*, 19 Q. B. D. 563; 56 L. J., Q. B. 653; 36 W. R. 104.

became ripe and were cut and carried within a reasonable time in that behalf (*u*). But by the Landlord and Tenant Act, 1851, 14 & 15 Vict. c. 25, s. 2, "in case all or any part of the growing crops of the tenant of any farm or lands shall be seized and sold by any sheriff or other officer by virtue of any writ of fieri facias or writ of execution, such crops, so long as the same shall remain on the farms or lands, shall, in default of sufficient distress of the goods and chattels of the tenant, be liable to the rent which may accrue and become due to the landlord after any such seizure and sale, and to the remedies by distress for recovery of such rent, and that notwithstanding any bargain and sale or assignment which may have been made or executed of such growing crops by any such sheriff or other officer." In consequence of this enactment, the execution creditor can only make sure of being able to sell the crops, under an execution for their value, *minus the accruing rent;* and the landlord may afterwards favour the purchaser to the detriment of the tenant by abstaining from distraining upon the crops so sold, and suing the tenant for such rent, or distraining for it on other goods.

14 & 15 Vict. c. 25, s. 2.

Growing Crops seized under Fi. fa. liable to Distress for Rent due after Seizure.

It is not clear whether the Landlord and Tenant Act, 1709, 8 Ann. c. 14 [or 18], requires notice to be given to the sheriff of the arrears of rent due and claimed by the landlord. Such notice is not required in express terms; and it has been held that knowledge by the sheriff of the arrears due is equivalent to actual notice thereof (*x*). In more recent acts in pari materiâ notice is expressly required (*y*). And under the statute of Anne it has been held that the landlord must demand, or the sheriff is not bound to secure, the rent, for he cannot take notice what the arrears are; but if the landlord comes and acquaints him with them, then and not till then is he obliged to see the year's rent satisfied before removal of the goods (*z*). Where an action was brought against the sheriff by the execution debtor for seizing and selling more goods than were necessary to satisfy two executions, the court decided against the sheriff expressly on the ground that he had no right to levy for rent without a claim being first made by the landlord (*a*). In an action against the sheriff, founded on the statute, notice is always alleged, and should not be omitted (*b*). But after verdict, an allegation that the sheriff, "well knowing the premises," removed the goods without

Whether actual Notice to the Sheriff is necessary.

(*u*) *Wharton* v. *Naylor*, 12 Q. B. 673; 6 D. & L. 136.

(*x*) *Andrews* v. *Dixon*, 3 B. & A. 645; 22 R. R. 518; *Riseley* v. *Ryle*, 11 M. & W. 20; *Bible* v. *Hussey*, 2 Ir. Com. L. R. 308; 16 W. R. 710.

(*y*) See County Courts Act, 1888, s 160, p. 534, post.

(*z*) *Waring* v. *Dewberry*, 1 Stra. 97; and see *Colyer* v. *Speer*, 2 Brod. & B. 67; *Smith* v. *Russell*, 3 Taunt. 400; 12 R. R. 674.

(*a*) *Gawler* v. *Chaplin*, 2 Exch. 503, 507.

(*b*) See *Thurgood* v. *Richardson*, 7 Bing. 428; 4 C. & P. 481; *Reed* v. *Thoyts*, 6 M. & W. 410; 8 Dowl. 410.

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paying the rent, seems to be sufficient upon motion in arrest of judgment or on appeal (*c*). Notice from the landlord to the execution creditor is clearly unnecessary (*d*). The notice to the sheriff is only for the purpose of establishing beyond all doubt his knowledge of the landlord's claim (*e*), and should always be given by or on behalf of the landlord (*f*). As the statute has not specified any particular form, there can be no dispute about the terms (*g*). A notice to the sheriff stating that the rent is due to J. S. and the mortgagees of his estate, and signed by a person who is not the receiver appointed by the mortgage deed, is sufficient (*h*). The notice may be given before or after the goods have been removed from the demised premises, and even after they have been sold, but before the proceeds have been actually paid over to the execution creditor (*i*).

Such Notice should always be given.

Sheriff's Duty on receiving Notice of Claim for Rent.

When the sheriff has notice or knowledge of rent due to the landlord, he should endeavour to secure legal evidence on that point, and if possible inspect the lease (*k*). He should also forthwith give notice to the execution creditor or his solicitor of the rent in arrear, and request him to pay the same to the landlord or his bailiff pursuant to the statute, in default whereof the sheriff will withdraw from possession of the goods seized (*l*). In case of non-compliance with this notice, within a reasonable time, the sheriff should withdraw from possession and make a return of nulla bona (*m*); unless, indeed, there are other goods within his bailiwick, in which case the levy should be confined to them. "The sheriff," it is observed, in *Cocker* v. *Musgrove*, "is not called upon by law to advance money to pay the rent; it is plain that such advance must be made by the execution creditor; and if he neglects to make it, after notice of the rent being due at all events (and it is not necessary now to say whether notice be requisite), the sheriff cannot be called upon to sell the goods *let their value be what it will*. Until the rent be paid, there are *no goods out of which the sheriff is bound to levy*, that is, which he is bound to sell" (*n*). The statute says that the goods shall not be "liable to be taken," i.e. taken and sold under the execution, "unless the party at whose suit the said execution is sued out, shall before the removal" pay the rent (*o*). "It is clear the statute does not mean the original taking, but that there shall

Advance.

(*c*) See *Lane* v. *Crockett*, 7 Price, 566; *Palgrave* v. *Windham*, 1 Stra. 212, 214.
(*d*) *Palgrave* v. *Windham*, supra.
(*e*) *Andrews* v. *Dixon*, 3 B. & A. 645; 22 R. R. 518.
(*f*) See Form, Appendix D., No. 9.
(*g*) *Colyer* v. *Speer*, 2 Brod. & B. 67.
(*h*) *Colyer* v. *Speer*, ante.
(*i*) *Arnitt* v. *Garnett*, 3 B. & A. 440; 22 R. R. 453; *Yates* v. *Ratledge*, 5 H. & N. 249; *Bible* v. *Hussey*, 2 Ir. Com. L. R. 308; 16 W. R. 710.
(*k*) See *Augustein* v. *Challis*, 1 Exch. 279.
(*l*) See Form, Appendix D., No. 10.
(*m*) *Cocker* v. *Musgrove*, 9 Q. B. 223.
(*n*) *Cocker* v. *Musgrove*, 9 Q. B. 235; *Calvert* v. *Joliffe*, 2 B. & Adol. 421.
(*o*) Ante, 527.

not be a substantial taking for the satisfaction of the debt, that is, by the removal and sale of the goods, without payment of the rent" (*p*). Prior to the decision in *Cocker* v. *Musgrove* (*q*), the usual practice was for the sheriff to sell the goods under the execution and out of the proceeds to pay the landlord's rent, and to apply the surplus (minus expenses) in or towards satisfaction of the debt or damages and interest, with costs of the execution, &c., as indorsed on the writ (*r*) : and he may still adopt that course if he thinks fit, and so secure his poundage fees, &c. He is entitled to poundage upon the amount of rent levied and paid (*s*) ; but not to deduct it from the landlord's rent (*t*). By proceeding to sell and remove with notice or knowledge that rent is due, he sometimes runs considerable risk : for instance, the property seized may belong to a third person (*u*) ; or to the trustees of the tenant who has become a bankrupt (*x*), or the goods when sold may not produce sufficient to satisfy the rent (*y*). The amount of rent claimed may be disputed, especially where a large sum is claimed for a penal rent of so much per acre (*z*). Moreover, when the landlord makes a claim for rent, the sheriff cannot obtain any relief against such claim under the Interpleader Rules (*a*). And it was held, before the Judicature Act, that the tenant could not sustain a bill of interpleader in equity against his landlord, unless the title was affected by some act done by the landlord subsequently to the lease (*b*). All these difficulties may generally be avoided by the sheriff giving notice to the execution creditor, and proceeding as before suggested (*c*). But in such case he should carefully abstain from a *removal* of any of the goods from off the premises until the rent has been actually paid (*d*). He should also secure legal evidence of the tenancy, and of the arrears of rent due (*e*).

Sheriff's Duty on receiving Notice of Claim for Rent—*contd*

The remedy which a landlord has in cases where the sheriff proceeds to levy the execution and remove the goods without payment of the rent, is by a summary application to the court or to a judge at chambers, founded upon affidavits, to compel the sheriff to pay

Remedy against Sheriff.

(*p*) Per Parke, B., in *Risely* v. *Ryle*, 11 M. & W. 21.

(*q*) *Cocker* v. *Musgrove*, 9 Q. B. 223, 235.

(*r*) 1 Chit. Arch. 640 (11th ed.).

(*s*) *Davies* v. *Edmonds*, 12 M. & W. 31 ; 1 D. & L. 395.

(*t*) *Gore* v. *Gofton*, 1 Stra. 643.

(*u*) *Forster* v. *Cookson*, 1 Q. B. 419 ; *Beard* v. *Knight*, 8 E. & B. 865 ; 27 L. J., Q. B. 359 ; *Foulger* v. *Taylor*, 5 H. & N. 202 ; *White* v. *Binstead*, 13 C. B. 304.

(*x*) *Duck* v. *Braddyll*, M'Clel. 217 ; 13 Price, 455 ; *Lee* v. *Lopes*, *Bart.*, 15 East, 230.

(*y*) *Henchett* v. *Kimpson*, 2 Wils. 141 ; *Calvert* v. *Joliffe*, 2 B. & Adol. 418 ; *Groombridge* v. *Fletcher*, 2 Dowl. 353.

(*z*) *Bateman* v. *Farnsworth*, 29 L. J., Ex. 365.

(*a*) R. S. C. 1883, Ord. LVII. See *Haythorn* v. *Bush*, 2 Cr. & M. 869 ; 2 Dowl. 641 ; *Bateman* v. *Farnsworth*, 29 L. J., Ex. 365.

(*b*) *Cook* v. *Earl Rosslyn*, 1 Giff. 167 ; 28 L. J., Ch. 833.

(*c*) Ante, 532.

(*d*) *Smallman* v. *Pollard*, M. & G. 1001 ; 1 D. & L. 901 ; *White* v. *Binstead*, 13 C. B. 304.

(*e*) *Augustein* v. *Challis*, 1 Exch. 279 ; *Keightley* v. *Birch*, 3 Camp. 521 ; 14 R. R. 837.

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the rent due (not exceeding one year's rent) and the costs of the application (*f*); or by a special action on the case against the sheriff, founded on the statute (*g*); but not an action for money had and received (*h*).

Purchaser from Sheriff must remove Goods within reasonable Time.

A person purchasing goods from a sheriff must remove them within a reasonable time; otherwise the landlord may distrain upon them (*i*).

(b) *Under County Court Process.*

Where Goods seized under County Court Warrant. Rent may be claimed in 5 Days by Notice to Bailiff.

If goods be taken in execution under a County Court Warrant, the Landlord and Tenant Act, 1709, 8 Ann. c. 14, s. 1, does not apply. A special procedure was substituted for it by the County Court Act, 1856, 19 & 20 Vict. c. 108, s. 75, re-enacted by s. 160 of the County Courts Act, 1888, 51 & 52 Vict. c. 43, under which the landlord may claim rent within five days from the execution, and so get the county court bailiff to distrain for him. The amount of rent which may be claimed is:—

Four weeks' rent, if tenancy be weekly:

Rent of two terms of payment, if tenancy be for any other term less than a year:

One year's rent in any other case.

The words of s. 160 of the County Courts Act, 1888, are these:—

> Section one of the act of the eighth year of the reign of Queen Anne, chapter fourteen, shall not apply to goods taken in execution under the warrant of the court [*i. e.*, the county court], but the landlord of any tenement in which any such goods shall be so taken may claim the rent thereof at any time within five clear days from the date of such taking, or before the removal of the goods, by delivering to the bailiff or officer making the levy any writing signed by himself or his agent, which shall state the amount of rent claimed to be in arrear, and the time for and in respect of which such rent is due (*k*); and if such claim be made, the bailiff or officer making the levy shall, *in addition thereto, distrain for the rent so claimed and the costs of such distress*, and shall not within five days next after such distress sell any part of the goods taken unless they be of a perishable nature, or upon the request in writing of the party whose goods shall have been taken; and the bailiff shall afterwards sell such of the goods under the execution and distress as shall satisfy, first, the costs of and incident to the sale, next, the claim of such landlord, not exceeding the rent of four weeks where the tenement is let by the week (*l*), the rent of two terms of payment where the tenement is let for any other term less than a year, and the rent of one year in any other case, and lastly, the amount for which the warrant was issued; and if any replevin be made of the goods so taken, the bailiff shall, notwithstanding, sell such portion thereof as will satisfy the costs of and incident to the sale under

Distress by County Court Bailiff.

What Rent recoverable.

(*f*) Ante, 533.
(*g*) Ante, 534.
(*h*) *Green* v. *Austin*, 3 Camp. 260.
(*i*) *Pollen Trustees, Ex parte, Davis, In re*, 55 L. J., Q. B. 217; 54 L. T. 304.
(*k*) See Form, Appendix D., No. 11.
(*l*) Compare s. 67 of the Execution Act, 1844, p. 528, supra.

the execution, and the amount for which the warrant issued; and in either event the overplus of the sale, if any, and the residue of the goods, shall be returned to the defendant, and the poundage of the high bailiff and broker for keeping possession, appraisement, and sale under such distress shall be the same as would have been payable if the distress had been an execution of the court, and no other fees shall be demanded or taken in respect thereof.

County Court Process under s. 160 of County Courts Act, 1888—*contd.*

If the bailiff seize under a warrant of the county court, on the defendant's premises, goods belonging to a stranger, he cannot distrain such goods under this enactment for the rent of the landlord; and if he does so the true owner is entitled to have his goods back (*m*). So it was decided on s. 75 of the County Courts Act, 1856 (of which s. 160 of the County Courts Act, 1888, is an exact reproduction); but it was pointed out in a case arising on s. 160 of the County Courts Act, 1888, that in those cases the bailiff was a trespasser and the execution wrongful; and that in a case where the execution is rightful, the Act applies, although the goods seized are not those of the tenant, but of a third party (*n*).

Goods of Third Party.

The notice to the bailiff does not constitute him the landlord's agent to distrain: but in doing so he acts as an officer of the court pursuant to the statute (*o*).

Bailiff distrains as Officer of Court.

It seems that the Interpleader Rules apply to a landlord's claim for rent; and that where the landlord appears upon the hearing of an interpleader summons in a county court, he as well as the execution creditor and the claimant, has a right of appeal (*p*).

Appeal in Interpleader.

### (c) *Under Admiralty Process.*

If a claim for rent be made upon goods seized under Admiralty process, the judges of the Probate, Divorce and Admiralty Division will adjudicate upon the claim. It was enacted by the Admiralty Court Act, 1861 (24 Vict. c. 10), s. 16, that "if any claim shall be made to any goods taken in execution under any process of the High Court of Admiralty, *by any landlord for rent*, the registrar of the said court may, upon application of the officer charged with the execution of the process, whether before or after any action brought against such officer, issue a summons calling before the said court both the party issuing such process and the party making the claim, whereupon any action in respect of such claim shall be stayed, and the judge of the said Admiralty Court shall adjudicate upon the

Notice of Rent to Sheriff on execution on Admiralty Process.

24 Vict. c. 10, s. 16.

(*m*) *Beard* v. *Knight*, 8 E. & B. 865; 27 L. J., Q. B. 359; *Foulger* v. *Taylor*, 5 H. & N. 202; *White* v. *Binstead*, 13 C. B. 304.

(*n*) *Hughes* v. *Smallwood*, 25 Q. B. D. 306; 59 L. J., Q. B. 503; 63 L. T. 198.

(*o*) *Gage* v. *Collins*, L. R., 2 C. P. 381; 36 L. J., C. P. 144.

(*p*) *Wilcoxon* v. *Scarby*, 6 H. & N. 202; 29 L. J., Ex. 154; *Gage* v. *Collins*, supra.

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Admiralty Process—*contd.*

claim, and make such order between the parties in respect thereof and of the costs of the proceedings as to him shall seem fit." It is also provided that where any such claim be made the claimant may deposit with the officer charged with the execution of the process either the amount or value of the goods claimed, to be by the officer paid into court to abide the decision of the judge upon the claim. And by the Judicature Act of 1873, sect. 34, matters within the exclusive cognizance of the High Court of Admiralty before the passing of that act are assigned to the Probate, Divorce and Admiralty Division of the High Court of Justice.

SECT. 16.—*Charge on Proceeds of Distress of Salaries and other Preferential Claims in case of Tenant's Bankruptcy, Winding-up, or Death of Insolvent.*

Preferential Payments in Bankruptcy, &c.

If a tenant distrained upon be a bankrupt or become so within three months, or being a company is being wound up, or shall be wound up within three months, or if the tenant die insolvent within three months, certain preferential claims for rates, taxes, salaries and wages are constituted a first charge on the goods distrained, or the proceeds of the sale. For sect. 1, sub-sect. 1, of the Preferential Payments in Bankruptcy Act, 1888, 51 & 52 Vict. c. 62, enacts as follows :—

Priority of Debts.

1.—(1.) In the distribution of the property of a bankrupt, and in the distribution of the assets of any company being wound up under the Companies Act, 1862, and the acts amending the same, there shall be paid in priority to all other debts—

Rates and Taxes.

(*a*) All parochial or other local rates due from the bankrupt or the company at the date of the receiving order or, as the case may be, the commencement of the winding-up, and having become due and payable within twelve months next before that time, and all assessed taxes, land tax, property or income tax assessed on the bankrupt or the company up to the fifth day of April next before the date of the receiving order, or, as the case may be, the commencement of the winding-up, and not exceeding in the whole one year's assessment ;

Wages or salary of Clerk.

(*b*) All wages or salary of any clerk or servant in respect of services rendered to the bankrupt or the company during four months before the date of the receiving order, or, as the case may be, the commencement of the winding up, not exceeding fifty pounds ; and

Wages of Labourer or Workman.

(*c*) All wages of any labourer or workman not exceeding twenty-five pounds, whether payable for time or for piece work, in respect of services rendered to the bankrupt or the company during two months before the date of the receiving order or, as the case may be, the commencement of the winding-up ; Provided that where any

> labourer in husbandry has entered into a contract for the payment of a portion of his wages in a lump sum at the end of the year of hiring, he shall have priority in respect of the whole of such sum, or a part thereof, as the court may decide to be due under the contract, proportionate to the time of service up to the date of the receiving order, or, as the case may be, the commencement of the winding-up.

The Preferential Debts a first charge on Goods distrained.

By sub-sect. 2 these debts rank equally between themselves and are to be paid in full; and by sub-sect. 3 they are to be discharged forthwith so far as the assets will meet them. By sub-sect. 4—

> In the event of a landlord or other person distraining or having distrained on any goods or effects of a bankrupt, or a company being wound up within three months next before the date of the receiving order or the winding-up order respectively, the debts to which priority is given by this section shall be a first charge on the goods or effects so distrained on, or the proceeds of the sale thereof.
>
> Provided, that in respect of any money paid under any such charge the landlord or other person shall have the same rights of priority as the person to whom such payment is made.

Death of Tenant insolvent.

By sub-sect. 5 the section has effect as part of section 40 of the Bankruptcy Act, 1883; and by sub-sect. 6, "this section shall apply, in the case of a deceased person who dies insolvent, as if he were a bankrupt, and as if the date of his death were substituted for the date of the receiving order."

First charge.

The 4th sub-section of this section (which in other parts re-enacts with amendments the Companies Act, 1883, and the Bankruptcy Acts of 1883 and 1886) is entirely new. It seems to render the hastening of a distress more desirable in the landlord's interest and more likely than before, and it presents many difficulties of construction. The preferential debts are made a "first charge" upon the distress and its proceeds. In whom does the right to enforce the first charge rest, and how long does the right to enforce it continue? It is submitted that only the receiver or trustee in bankruptcy, or liquidator or administrator, as the case may be, can enforce the charge, and that the several preferential creditors have no separate right of action. By s. 62 of the Bankruptcy Act, 1883, non-claiming creditors are barred in bankruptcy, and by s. 63 no action lies against a trustee in bankruptcy for a *dividend*, the Court of Bankruptcy having the power to order a dividend withheld to be paid.

Mode of enforcement of first charge.

The first charge would seem to be enforceable by action in the Chancery Division by the liquidator or administrator, or by summons, in the Bankruptcy Court by the receiver or trustee.

Period within which first charge may be enforced.

The period of enforcement would seem to be in the case of bankruptcy, that fixed by the Bankruptcy Act and Rules (see ss. 39, 58,

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60, 61 and 62 of the Act, and Rules 219—231), by which no specific time is limited, but the period appears to depend upon the speed with which the bankrupt's estate can be realized and distributed in dividends.

As to time for proving against a company being wound up, see Rule 20 of the General Order of November, 1862.

Tenant dying insolvent.

It is conceived that the section cannot operate in favour of the preferential creditors of a tenant dying insolvent until an administration order has been obtained, but that such administration order need not, though it may, be obtained under s. 125 of the Bankruptcy Act, 1883.

Funeral and Testamentary expenses.

Funeral and testamentary expenses constitute pre-preferential debts by s. 125, sub-s. 7 of the Bankruptcy Act, 1883, and s. 2 of the above Preferential Payments Act, 1888, but are not comprehended in s. 1 of the latter act.

Preferential Payments in Bankruptcy Act, 1897.

The Preferential Payments in Bankruptcy Act, 1897, 60 & 61 Vict. c. 19, merely amends the Act of 1888 by giving the preferential debts mentioned in the Act of 1888 a priority over the claims of holders of debentures or debenture stock under any floating created by a company which is being wound up.

# CHAPTER XII.

## REMEDIES FOR WRONGFUL DISTRESS.


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## Sect. 1.—*Replevin.*

### (a) *Nature of a Replevin, and in what Cases applicable.*

Nature of a Replevin.

Replevin is a remedy for the owner of goods or cattle which have been *wrongfully taken* under a distress for rent (*a*), whereby he obtains them back in a summary manner, through the registrar of the County Court of the district within which they were taken, *upon giving security to try the validity of the distress*, in an action of replevin to be forthwith commenced by him against the distrainer and prosecuted with effect (*b*), and without delay (*c*), either in the County Court or in the High Court at the option of the owner of the goods or cattle seized (the jurisdiction of the High Court, however, being practically excluded unless title to land be in question or the rent exceed 20*l.*), and to return the goods or cattle, if such return be awarded (*d*).

Replevin an optional and unusual remedy.

Replevin is only an optional remedy: the tenant may in any case where replevin lies, waive his right to replevy and bring his action for damages for illegal distress instead (see sect. 2 of this Chapter, post). And as a matter of fact, replevins are believed to have fallen off in number very much in recent years.

When Replevin lies.

The essence of proceedings in replevin is, that the tenant enjoys the subject-matter of the distress in specie pending the trial of the action, and it may be said briefly that replevin lies in case of a distress which is wholly illegal, and not merely irregular or excessive.

(*a*) Replevin has been said not to be confined strictly to distresses, but to extend to all wrongful takings of goods or cattle; *Mellor* v. *Leather*, 1 E. & B. 619.

(*b*) This is to say "with success;" *Tummons* v. *Ogle*, 6 E. & B. 571; 25 L. J., Q. B. 403.

(*c*) That is to say "with diligence;" as to what is improper delay, see *Gent* v. *Cutts*, 11 Q. B. 288; *Harrison* v. *Wardle*, 5 B. & Adol. 146; *Axford* v. *Perrett*, 4 Bing. 586.

(*d*) County Courts Act, 1888, ss. 133—136.

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Thus, it lies where no rent is due, or where the rent was tendered in time, or where goods exempt by law from distress are seized (with the exceptions, however, of animals feræ naturæ (*e*), and perhaps fixtures (*f*)). The proceeding consists of two distinct parts, viz.: 1. The replevy, whereby the goods or cattle are obtained back: 2. The subsequent action of replevin to try the legality of the distress or taking. But it is in effect no remedy where the distress was originally lawful (*g*).

Replevin only an optional Remedy.

Within what time Replevin must be.

The tenant may avail himself of the right to replevy at any time, notwithstanding the goods have been removed after the five days allowed by the Act of William and Mary (ante, p. 509), or fifteen, if the tenant has availed himself of the 6th section of the Law of Distress Amendment Act (ante, p. 510), so long as they remain unsold (*h*).

Replevy made *per incuriam*.

If the replevy be made *per incuriam* or mistake of the officer, it by no means follows that the subsequent action of replevin cannot be maintained (*i*). *Quod fieri non debet, factum valet.* The remedy for such mistake is by a summary application to the court to set aside the replevy, or to attach the officer, or the party, or both, for the contempt (*k*).

Action against Registrar.

Where a replevin cannot legally be made, the registrar should on that ground refuse to act, but an action will lie against him for refusing to replevy in a proper case (*l*).

### (b) *Mode of Proceeding to Replevy.*

Preliminary Matters—
1. Whether Distress illegal
2. Whether a Tender should be made.
3. Whether it is worth while to Replevy

Before proceeding to replevy the following points should be considered, viz.: 1. Whether the distress was wholly illegal, and not merely excessive or irregular, or taken for the wrong cause (as stated in the notice of distress) instead of the right one. 2. Whether it is practicable and expedient to make a tender of the rent or damage, with costs of the distress, which tender cannot be made after the impounding. 3. Whether, considering the value of the goods taken with reference to the amount of the rent claimed, it is worth while to replevy, seeing that whatever may be the value of the goods, security must be given for such an amount as the registrar shall deem sufficient to cover the alleged rent or damage in respect of which the distress was taken, and the probable costs of the cause in the County Court, or in the High Court, as the case may be.

4. In what Court the Action should be brought.

4. Whether the action of replevin should be brought in the County Court for the district within which the distress was taken, or in the

(*e*) Bac. Abr. tit. *Replevin* (F.).
(*f*) *Niblet* v. *Smith*, 4 T. R. 504.
(*g*) See per Lord Campbell, C.J., in *Johnson* v. *Upham*, 28 L. J., Q. B. 256.
(*h*) *Jacob* v. *King*, 5 Taunt. 451; 15 R. R. 550; *Griffiths* v. *Stephens*, 1 Chit. R. 196.
(*i*) *Allen* v. *Sharp*, 2 Exch. 361; 17 L. J., Ex. 209.
(*k*) As to attachment, see *Rex* v. *Monkhouse*, 2 Stra. 1184; and as to setting aside proceedings, *Rhymney R. Co.* v. *Price*, 16 L. T. 394.
(*l*) *Sabourin* v. *Marshall*, 3 B. & Ad. 440.

High Court. If the rent or damage claimed exceeds 20*l.*, or the title to some corporeal or incorporeal hereditament, or to some toll, market, fair or franchise is in question, the replevin may be brought either in the High Court or the County Court, at the option of the party bringing it. In all other cases the action must be brought in the County Court. Even where any title is in question the action *may* be brought in the County Court, subject to the power of removal by the defendant under sect. 137 of the County Court Act, 1888 (*m*); and to an appeal as of right where the rent claimed exceeds 20*l.*, and by leave of the County Court judge if it does not. 5. By whom the replevy should be made and the action brought. It should be brought by the party whose goods have been distrained (*n*); i.e. by him who has *the property*, absolute or qualified, in the goods (*o*), a mere possessory right having been said to be not sufficient (*p*). It was, in the case of *Fenton* v. *Logan* (*q*), apparently assumed that replevin would lie at the instance of the real owner of the goods seized, although he was a person other than the tenant distrained upon; and if the point, whether replevin was a remedy open to others than tenants, were distinctly raised, it would be probably so decided. If goods of A. and B., the separate property of each, be unlawfully distrained, they cannot join in a replevin, but each may replevy his own goods (*r*). Joint owners and tenants in common may and should join in a replevin (*s*). Coparceners are joint owners (*s*). Executors may maintain replevin for goods of their testator wrongfully taken in his lifetime (*t*). 6. Against whom the proceedings should be adopted. It may be against him who took or commanded the taking or both (*u*). The landlord or person who caused the distress to be made is generally best able to pay damages and costs; but to fix him with liability his authority to make the distress must be proved (*x*); and if only some of the goods or cattle were illegally taken (being privileged from distress), and the replevin is confined to them, it must be proved not merely that he signed a distress warrant in the usual form, but that he authorized the taking of those goods or cattle which were so illegally taken; or that, knowing what had been done in his behalf, he ratified and adopted such illegal act (*y*). He should always be made a defendant where

5. By whom Proceedings should be taken.

6. Against whom.

(*m*) *Re Fordham* v. *Ackers*, 4 B. & S. 578; 33 L. J., Q. B. 67; *S. C.*, nom. *Reg.* v. *Gurdon*, 12 W. R. 201.

(*n*) See s. 134 of the County Courts Act, 1888, p. 542, post.

(*o*) Com. Dig. tit. *Pleader* (3 K. 1); Co. Lit. 145 b.

(*p*) *Templeman* v. *Case*, 10 Mod. 25. But see *Fell* v. *Whittaker*, L. R., 7 Q. B. 120, and post, p. 560.

(*q*) 9 Bing. 676.

(*r*) Co. Lit. 145 b; Bro. Abr. tit. *Replevin*, pl. 12; Gilb. Repl. 152.

(*s*) Year Bk. 3 Hen. 4, 16 a; Co. Lit. 145 b; Bull. N. P. 53; 1 Chit. Pl. 183 (7th ed.); 2 Selw. N. P. 1150 (13th ed.).

(*t*) Bro. Abr. tit. *Replevin*, pl. 59; *Arundell* v. *Trevill*, Sid. 82; Bull. N. P. 53; Gilb. Repl. 156.

(*u*) Com. Dig. tit. *Pleader* (3 K. 1); 2 Roll. Abr. 431, 1, 5; Gilb. Repl. 152; *Jones* v. *Johnson*, 5 Exch. 862.

(*x*) Ante, 494.

(*y*) Ante, 495.

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the plaintiff intends to pay money into court (*z*). The agent who signed the distress warrant, or who directed the distress, may be made a defendant; as may also the broker (*a*). But although they *may* be made defendants, it does not follow that they *should be*, in any particular case: that is matter of discretion, with reference to the acts done, and other incidental facts, including the evidence and the pecuniary ability of the parties. The pound-keeper, it seems, is not liable (*b*). It has been said that replevin cannot be maintained against a corporation aggregate, but only against their bailiff or agent (*c*), but this seems inconsistent with several recent cases (*d*). It has been long since decided that a corporation may appoint a bailiff to distrain, without a warrant under their common seal (*e*); and there seems no reason why they should not be responsible for acts so authorized; for otherwise they might, by appointing a pauper to act for them, avoid all liability direct or indirect. 7. It should further be considered whether *all* the goods or cattle should be replevied, or only some of them, on the ground that they were legally exempt from the distress (*f*). 8. Whether a bond with two sufficient sureties shall be given pursuant to sect. 136 of the County Courts Act, 1888 (*g*), and who are competent and willing to become such sureties; or whether a deposit, with a memorandum, shall be made pursuant to sect. 109 of that act (*h*).

7. Whether all or Part only should be replevied.

8. Whether the required Security shall be by Bond or Deposit.

Replevy made by Registrar of County Court.

Formerly replevies were made by the sheriff of the county within which the distress was taken, or by his under-sheriff or deputy (*i*); and the sheriff of each county was bound to appoint four deputies at least, dwelling not above twelve miles from each other, for the purpose of making replevies (*k*). But by the County Courts Act, 1856, 19 & 20 Vict. c. 108, s. 63, the powers of the sheriff with respect to replevin were abolished, and the County Court registrars obtained a jurisdiction in replevin, which is continued by sect. 134 of the County Courts Act, 1888, 51 & 52 Vict. c. 43, as follows:—

County Courts Act, 1888, s. 134.

The registrar of the County Court of the district in which *any goods subject to replevin shall be taken* shall be empowered, subject to the regulations hereinafter contained, to approve of replevin bonds, and to grant

(*z*) The C. L. P. Act, 1860, 23 & 24 Vict. c. 126, s. 23, which specially allowed payment into Court by a plaintiff in replevin, is repealed by the Statute Law Revision and Civil Procedure Act, 1883, 46 & 47 Vict. c. 49, apparently being superseded by R. S. C. Order XXII. rule 9.

(*a*) Gilb. Repl. 152.

(*b*) *Budkin* v. *Powell*, 2 Cowp. 476.

(*c*) 1 Kyd on Corporations, 223; Bac. Abr. tit. *Corporations* (E. 2).

(*d*) See *Eastern Counties R. Co.* v. *Broom* (in error), 6 Exch. 314, which decides that *trespass* lies against a corporation aggregate for an act done by their agent within the scope of his authority; and see *Green* v. *London General Omnibus Co.*, 7 C. B., N. S. 290; 29 L. J., C. P. 13.

(*e*) *Cary* v. *Matthews*, cited 1 Salk. 191; 6 Vin. Abr. 287.

(*f*) Ante, 468.

(*g*) Infra, 543.

(*h*) Infra, 543.

(*i*) 52 Hen. 3, c. 21; 2 Inst. 138.

(*k*) 1 P. & M. c. 12, s. 3; see *Faulkner* v. *Johnson*, 11 M. & W. 581; *Plumer* v. *Brisco*, 11 Q. B. 46.

replevins, and to issue all necessary process in relation thereto, and such process shall be executed by the high bailiff. Such registrar shall, at the instance of the party whose goods shall have been seized (*l*), cause the same to be replevied to such party, on his giving one or other of such securities as are mentioned in the next two succeeding sections.

In the next two sections, sect. 135 and sect. 136 of the act, provision is made, firstly by sect. 135 for bringing the action of replevin in the High Court if title be in question, or the rent exceed 20*l*., and secondly by sect. 136 for bringing the action in the County Court. In either case security must be given, conditioned to commence an action against the distrainer—within one week in the High Court or within one month in the County Court, and the tenant has always an option to sue in either court, though unless he obtains judgment by default *or* title be in question, or the rent exceed 20*l*., an action in the High Court will probably fail.

Sect. 135. Replevins in High Court Conditions of Security to be given in such Cases.

By sect. 135, where a replevisor wishes to proceed in the High Court, he must, at the time of replevying, give security, to be approved of by the registrar, for such amount as such registrar shall deem sufficient to cover the alleged rent or damage "in respect of which the distress shall have been made," and the probable costs of the action in the High Court, conditioned to commence an action of replevin against the seizor in the High Court *within one week* from the date thereof, and to prosecute such action with effect (*m*), and without delay (*n*); and, unless judgment therein be obtained by default, to prove before the High Court that he had good ground for believing either that the title to some hereditament, the rent or value whereof exceeded twenty pounds by the year, or to some toll, &c., was in question, *or that such rent or damage, or the value of the goods seized, exceeded twenty pounds*, and to make return of the goods, if a return thereof shall be adjudged" (*o*).

Sect. 136. Replevin in County Court. Security.

As to replevin in the County Court, it is enacted by sect. 136 of the County Courts Act, 1888, that "if a replevisor shall wish to commence proceedings in a County Court, he shall at the time of replevying give security, to be approved of by the registrar, for such an amount as such registrar shall deem sufficient to cover the alleged rent or damage in respect of which the distress shall have been made, and the probable costs of the action in the County Court, conditioned to commence an action of replevin against the seizor in the County Court of the district in which the goods shall have been seized, *within one month* (*p*) from the date of the

(*l*) A replevin can be had only by or on behalf of the actual or constructive owner of the goods; see *Fell* v. *Whittaker*, post, 560.

(*m*) I.e. with success; ante, 539 (*b*).

(*n*) Ante 539 (*c*).

(*o*) See Form of Bond, Appendix E., Sect. 1, No. 5; of Memorandum of Deposit in lieu of Bond, Id., No. 6.

(*p*) I.e. one calendar month; Interpretation Act, 1889, s. 3.

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security, and to prosecute such action with effect (*q*) and without delay (*r*), and to make return of the goods, if a return thereof shall be adjudged" (*s*).

Sect. 108. Security by Bond with Sureties.

By sect. 108 of the County Courts Act, 1888, the security is to be at the cost of the party giving it, and in the form of a bond (*t*), with sureties, to the other party or intended party in the action "provided always, that the court in which any action on the bond shall be brought, may, by order, give such relief to the obligors as may be just, and such order shall have the effect of a defeasance of such bond."

Joint-Stock Companies and Infants may give such Bonds.

It seems that a bond of the above nature may be entered into by a joint-stock company, or even by an infant, with sufficient sureties, and that the registrar cannot refuse to receive such bond, on the ground that the principal obligor is disqualified to execute it; for otherwise such parties would lose the benefit of the statute (*u*), and be thereby deprived of the right to replevy.

Sect. 109. Security by Deposit with a Memorandum.

By sect. 109, replacing sect. 71 of the Act of 1856, the party required to give security may in lieu thereof deposit with the registrar, if the security is required to be given in a County Court, or with a master of the Supreme Court if the security is required to be given in the High Court, a sum equal in amount to the sum for which he would be required to give security, *together with a memorandum* signed by such party, his solicitor or agent, setting forth the conditions on which such money is deposited.

The County Court Rules, as to Notices of Sureties, &c.

The County Court Rules, 1889, made under the authority of s. 164 of the Act, provide by Order XXIX. with reference to notices of proposed sureties and other matters, as follows :—

ORDER XXIX.

SECURITY.

Order XXIX. Security by bond.

Form 120.

1. In all cases where a party proposes to give a bond by way of security, he shall serve, by post or otherwise, on the opposite party and upon the registrar, at his office, notice of the proposed sureties according to the form in the Appendix (*x*), and the registrar shall forthwith give notice (*y*) to both parties of the day and hour on which he proposes that the bond shall be executed, and shall state in the notice to the obligee that any valid objection which he may have to make to the sureties or either of them must be made on such day.

Affidavit of sufficiency.

2. The sureties shall make an affidavit of their sufficiency according to the form in the Appendix (*z*), unless the opposite party shall dispense with such affidavit.

Execution of Bond.

3. The bond shall be executed in the presence of the judge or registrar, or of a commissioner to administer oaths, or of the clerk to the registrar authorized to take affidavits.

(*q*) With success; *Tummons* v. *Ogle*, 6 E. & B. 571.

(*r*) With due diligence; see *Gent* v. *Cutts*, 11 Q. B. 288.

(*s*) See Form of Bond, Appendix E., Sect. 1, No. 7; of Memorandum of Deposit in lieu of Bond, Id., No. 8.

(*t*) See Forms.

(*u*) See *Young* v. *Brompton, Chatham and Gillingham Waterworks Co.*, 1 B. & S. 675; 31 L. J., Q. B. 14; and dicta therein.

(*x*) Form 120; and see Appendix E. to this book, Sect. 1.

(*y*) Form 122; and see Appendix E. to this book, Sect. 1.

(*z*) Form 121; and see Appendix E. to this book, Sect. 1.

4. Where a party makes a deposit of money in lieu of giving a bond, he shall forthwith give notice to the opposite party, by post or otherwise, of such deposit having been made.

Deposit in lieu of Bond.

5. In all cases where the security is by bond, the bond shall be given to the party or persons requiring the security, and shall be deposited with the registrar until the action is finally disposed of.

Officers not to be Surety.

6. No registrar, deputy registrar, registrar's clerk, high bailiff, bailiff, broker, or other officer of the court, shall become surety in any case where, by the practice of the court, security is required.

The sureties should be two freeholders or housekeepers.

The opposite party should make inquiries as to the sufficiency of the proposed sureties, and if he has reason to think them insufficient, he should attend before the registrar at the time and place appointed, and object to them, and, if necessary, examine them before the registrar, who, after hearing all parties, will decide whether or not the sureties are sufficient. It seems that the registrar is not liable (as the sheriff formerly was) to an action for taking insufficient sureties on a replevy (*a*). Therefore the distrainer must, at his peril, avail himself of this opportunity to make any objections to them.

Where Action may be brought.

It is to be observed, with reference to the foregoing enactments and rules, that *all* actions of replevin, without any exception, may be commenced and prosecuted to final judgment and execution in the County Court of the district within which the distress was taken, whatever may be the amount of rent or damage claimed, and notwithstanding the title to some corporeal or incorporeal hereditament, or to some toll, market, fair or franchise is in question (*b*). In many cases it may be expedient for the replevisor to sue in the County Court, rather than in the High Court, even where he has the option of suing in either court, and especially where there is any doubt whether he has such option; or where he expects to fail in the action, and to have to pay all the costs (which are much less in the County Court than in the High Court). It seems, however, that if successful in the County Court he will only recover costs as in an action for less than 5*l.* (*c*), notwithstanding the distress was taken for more than 20*l.* (or even 50*l.* or 500*l.*), and the value of the goods replevied was more than sufficient to satisfy the distress; or however important or difficult may be the question of law or fact involved, the damages recoverable in the action being always under 5*l.* (*d*), unless indeed the judge award costs on the higher scale, under s. 119 of the County Courts Act,

Costs in County Court.

(*a*) Even the sheriff was not liable where the sureties were apparently responsible, and he exercised a reasonable discretion in accepting them; *Hindle* v. *Blades*, 5 Taunt. 225; *Jeffery* v. *Bastard*, 4 A. & E. 823.

(*b*) *Reg.* v. *Raines*, 1 E. & B. 855; 22 L. J., Q. B. 223; *Re Fordham* v. *Ackers*, 4 B. & S. 578; 33 L. J., Q. B. 67.

(*c*) As to what costs are included in such cases, see the County Courts Act and Rules.

(*d*) *Pease* v. *Chaytor*, 3 B. & S. 634.

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1888 (51 & 52 Vict. c. 43). But it does not appear to be finally settled in the County Courts whether the value of the goods replevied ought not to be taken into consideration, as part of the damages recovered, with a view to costs.

When Action should be in High Court.

Supposing the distress to have been wholly illegal, the replevisor cannot safely bring replevin in the High Court, unless he can prove before such court that he has good ground for believing either that the title to some corporeal or incorporeal hereditament, or to some toll, market, fair or franchise is in question, or, that the rent or damage in respect of which the distress was made exceeded twenty pounds. In some cases, where the replevisor has good ground for so believing, he may not be able to prove it to the satisfaction of the High Court (*e*), and where there is any doubt on this point, it is safer to sue in the County Court. In many cases, where the replevisor clearly has the option to sue in either court, it may be expedient for him to sue in the County Court rather than in the High Court. But the point above mentioned as to costs should not be overlooked, as it may make a great difference.

Replevisor may not remove to High Court.

After the replevisor (that is, the tenant or owner of the goods distrained) has once elected to sue in a County Court, he cannot afterwards remove the action into the High Court. He might have done so under the County Courts Act, 1846, 9 & 10 Vict. c. 95, s. 121, but that section was repealed by the County Courts Act, 1856, 19 & 20 Vict. c. 108, s. 2, and is not re-enacted by the County Courts Act, 1888.

Removal to High Court by certiorari by defendant.

The defendant in replevin (that is, the landlord or other person distraining), however, has a special power of removing the action from the County Court into the High Court by certiorari, if he can prove before the High Court that he has good ground for believing, either that title is in question, or that the rent in respect of which the distress was taken exceeded twenty pounds (*f*); but even in such cases, he must give security for such amount not exceeding 150*l.*, as the master shall think fit, conditioned to defend such action with effect (*g*).

Probably nearly all actions of replevin would be commenced and determined in the County Courts, but for the objection as to costs before mentioned (*h*). That however is so serious a drawback, as to render it generally unadvisable for the plaintiff to bring his action of replevin in the County Court where he can possibly avoid doing so, except where he knows that he is in the wrong, and will have to pay all the costs of the action.

(*e*) See the declaration in *Tummons* v. *Ogle*, 6 E. & B. 571, 575; 25 L. J., Q. B. 403.

(*f*) *Tummons* v. *Ogle*, supra.

(*g*) County Courts Act, 1888, s. 137.

(*h*) Ante, 545.

The fees payable at the County Court, on making a replevy, are as follows (*i*) :

Fees payable on Replevy.

| | £ | s. | d. |
|---|---|---|---|
| For a warrant to replevy . . . . . | 0 | 2 | 6 |
| For a replevin bond or deposit where the alleged rent or damage (*k*) does not exceed 20*l*. . . | 0 | 10 | 6 |
| For a replevin bond or deposit where the alleged rent or damage (*k*) exceeds 20*l*. . . . . | 1 | 1 | 0 |
| For notice to distrainor . . . . . | 0 | 2 | 6 |
| For delivering the goods on completion of a replevin bond . . . . . | 1 | 1 | 0 |
| Together with 6*d*. a mile from the court-house to the place where the goods are. | | | |

### (c) *Action of Replevin in the County Court.*

By sect. 133 of the County Courts Act, 1888, 51 & 52 Vict. c. 43, replacing ss. 119, 120 of the County Courts Act, 1846 (9 & 10 Vict. c. 95), all actions of replevin in the County Court are to be brought by plaint, entered in the court of the district where the goods were seized.

Replevin by Plaint.

As we have seen (ante, p. 543), the action must be brought within one [calendar] month from the date of the security (whether by bond or memorandum of deposit), and must be prosecuted with effect (*l*), and without delay (*m*).

Within one Month.

The action is commenced by entering a plaint in the usual form at the office of the registrar of the County Court, which is generally open from ten till four, except on *Saturday* (*n*), when the office closes at one o'clock.

Entry of Plaint.

The County Court Rules, 1889, by Order XXXIV., thus regulate actions of replevin :

Order XXXIV.

ORDER XXXIV.

REPLEVIN.

No other Cause to be joined.

1. In actions of replevin no other cause of action shall be joined in the summons.

Particulars.

2. On entering a plaint in replevin, the plaintiff must specify and describe in a statement of particulars, the cattle, or the several goods and chattels taken, and the distress or other taking of which he complains.

Mode of Trial.

3. All actions of replevin shall be tried in the same way as other actions in the courts holden under the authority of the act, and the judgment therein, in ordinary cases, whether for plaintiff or defendant, shall be, unless otherwise ordered, according to the forms in the Appendix (*o*).

Forms 34, 247, 248.

(*i*) County Court Rules, 1889, Schedules A. and B. ; and see further Heywood's Annual County Court Practice, Vol. I. As to stamp on replevin bond, see post, App. E., s. 2, Form 7, and note thereto.

(*k*) The words "or damage" apply to a claim for damage feasant.

(*l*) I.e. with success ; ante, 539.

(*m*) I.e. with due diligence ; ante, 539.

(*n*) When Saturday is the market-day of the town in which the court is held some other day is fixed by order of the judge.

(*o*) See Forms 34, 247, and 248 in the Appendix to the County Court Rules which are printed in Appendix E., Sect. 1, to this book.

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Where defendant succeeds. Form 247.

4. Where the distress is for rent, or for any other claim for which a distress may be lawfully taken, and the defendant succeeds in the action, if the defendant shall so require, the court shall, if the action is tried without a jury, and the jury shall, if the action is tried with a jury, find the value of the goods distrained, and if the value is less than the amount of rent or otherwise of money in arrear, judgment shall be given for the amount of such value, but if the amount of the rent or such other sum of money in arrear be less than the value so found judgment shall be given for the amount of such rent or other sum of money, and may be enforced in the same manner as any other judgment of the court (*p*).

Damage feasant. Form 248.

5. Where the distress is for damage feasant, and the defendant is entitled to judgment for a return, if the plaintiff shall so require, the court shall, if the action is tried without a jury, and the jury shall, if the action is tried with a jury, find the amount of the damage sustained by the defendant, and judgment shall then be given in favour of the defendant, in the alternative, for a return, or for the amount of the damage so found.

In other Cases.

6. In all cases of replevin, other than those arising out of a seizure by way of distress where the defendant justifies the taking and proves his case, the judgment for the defendant shall be for a return of the goods with or without costs.

Right to Jury.

By Order XXII., Rule 3, cases of replevin may, at the instance of either party, be tried by jury.

Evidence for the Plaintiff.

The plaintiff must prove the distress or taking of which he complains, and that the defendant was the person who took it or caused it to be taken (*q*); and that the defendant or his bailiff or agent, took or had the goods or cattle at the place within the jurisdiction of the court mentioned in the plaint. In replevin the alleged place at which the goods were taken is material (*r*); but the plaint may be amended, by leave of the judge, whenever it can be done without prejudice to the real question intended to be tried upon the merits (*s*). The plaintiff must prove that at the time of the taking he had an absolute or qualified property in the cattle or goods taken (*t*). He should also state the amount of expenses incurred in making the replevy; but where no evidence on that point is given, the usual amount will be awarded if the plaintiff obtain the verdict. No special damage can be recovered unless it be expressly mentioned in the plaint, and sufficiently proved. The plaintiff may either anticipate by evidence and negative the defendant's right to distrain, or he may reserve his evidence on that point until after the defendant has adduced his evidence (*u*).

Evidence for the Defendant.

The defendant may contend that the plaintiff's evidence is insufficient on some material point; ex. gr.—1. That he, the defendant, was the person who took or caused to be taken the goods or cattle. He may dispute or deny any alleged authority given by him for the distress. If a distress warrant be put in evidence by or on behalf of the plaintiff, the landlord may contend that it was not signed by him,

(*p*) See Form 247; printed in Appendix E., Sect. 1, post.
(*q*) Ante, 541.
(*r*) *Potter* v. *North*, 1 Wms. Saund. 347; *Potter* v. *Bradley*, 2 Moo. & Payne, 78.
(*s*) County Courts Act, 1888, s. 87.
(*t*) Ante, 541.
(*u*) See evidence in reply, post.

nor by any person authorized to sign it as his agent—and that he has never adopted or ratified it in any manner. He may contend (if the fact be so) that the warrant was expressly confined to the goods of the tenant, and did not extend to the goods of any other person (where a sub-tenant or lodger or third person sues)—or that the warrant expressly prohibited the taking of anything not legally liable to be taken as a distress for rent (where the replevin is for cattle or goods legally exempt from such a distress). 2. That he neither took nor had the goods or cattle at the place, within the jurisdiction of the court, mentioned in the plaint; although this may sometimes be cured by an amendment, where the defendant took or had the goods at some other place within the jurisdiction. 3. That the goods or cattle were not at the time of the taking the property of the plaintiff (*x*). Upon any of these points he may produce contradictory evidence. He may also prove a right to distrain, either on his own behalf or as the bailiff or agent of any other person (*y*), for all or any part of the rent claimed (*z*), or for damage feasant, or for any other lawful cause. He need not prove a right to distrain for the particular cause alleged at the time of the taking; because as we have seen, a man may distrain for one thing and afterwards avow or justify for another (*a*). It is therefore sufficient if he prove a legal right to distrain for any cause whatever. The amount of rent in arrear, and the value of goods distrained, should also be proved (*b*).

The plaintiff may in reply dispute and disprove anything attempted to be proved by the defendant in justification of the act complained of, but the usual practice (where the lease or agreement is duly stamped) is for the plaintiff to produce all his evidence in the first instance, rather than as evidence in reply.

The Judgment in ordinary Cases.

The judgment in replevin in ordinary cases, whether for plaintiff or defendant, is in the usual form, as in other actions. Where the plaintiff succeeds he is only entitled to a verdict for the expenses of the replevy as proved or estimated on the usual scale. His solicitor's charges (if any) connected with the replevy must be proved, otherwise nothing will be allowed in respect of them, but only the fees paid to the registrar (*c*). As to the plaintiff's costs of the action, it is provided by County Court Rules, Order L., Rule 19, that "costs in actions of replevin may, where the Court Fees are paid on 5*l.* and upwards, be allowed to solicitors upon the

Costs.

(*x*) Ante, 541.

(*y*) See *Trevillian* v. *Pine*, 11 Mod. 112; 1 Wms. Saund. 347 d, note; *Trent* v. *Hunt*, 9 Exch. 14; 22 L. J., Ex. 318; *Snell* v. *Finch*, 13 C. B., N. S. 651; 32 L. J., C. P. 117.

(*z*) See *Roskruge* v. *Caddy*, 7 Exch. 840; 22 L. J., Ex. 16; *White* v. *Greenish*, 11 C. B., N. S. 209; 8 Jur., N. S. 563.

(*a*) Ante, 511.

(*b*) See *Sheape* v. *Culpepper*, 1 Lev. 255.

(*c*) Ante, 545.

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higher scale in the Appendix applicable to actions on contract where the amount claimed exceeds 20*l.*, if the judge shall so order."

As to judgment for defendant, see Order XXXIV., Rule 4, *ante*.

Judgment for Defendant.

A judgment for either party in replevin is enforced in the same manner as in other actions (*d*).

Execution.

Appeal on Question of Law to High Court.

By sect. 120 of the County Courts Act, 1888, 51 & 52 Vict. c. 43, either party to an action of replevin, who is dissatisfied with the determination or direction of the judge, "in point of law, or upon the admission or rejection of any evidence" (but not on any question of fact), may appeal from the same to the High Court in such manner and subject to such conditions as may be provided by the Rules of the Supreme Court; but it is provided that there shall be no appeal where the amount of the rent or the damage or value of the goods seized does not exceed twenty pounds, "unless the judge shall think it reasonable and proper that such appeal should be allowed, and shall grant leave to appeal;" and it is enacted by the same section that "at the trial or hearing of any action, *in which there is a right of appeal*, the judge, at the request of either party shall make a note of any question of law raised at such trial or hearing, and of the facts in evidence in relation thereto, and of his decision thereon, and of his decision of the action."

Appeal by Leave.

Note by Judge.

(d) *Action of Replevin commenced in the High Court.*

Commencement of Action within one Week.

The action, which (see p. 543, ante) must be brought within one week from the date of security, is commenced by writ of summons as in other cases, which will be indorsed thus—"The plaintiff's claim is in replevin for goods wrongfully distrained" (*e*).

Writ.

Joinder of other Causes of Action.

Under the Common Law Procedure Acts no other cause of action could be joined with replevin, but this restriction is no longer in force, although separate trials may be ordered if the court or a judge think the various causes of action cannot conveniently be disposed of together (*f*).

Old Declaration.

The declaration used to be, as a rule, in a technical form, which, after alleging the taking of the goods, &c., in a certain place by the defendant, went on to allege that he "unjustly detained the same against sureties and pledges, until, &c., whereby the plaintiff has sustained damage." This form has been used by some practitioners since the Judicature Acts, but it would seem very doubtful whether a statement of claim in such form would be held good on a summons to set it aside or amend it, as the statement ought to be a narrative of facts and not a mere technical form (*g*).

Statement of Claim.

(*d*) See County Court Rules, Order XXV.
(*e*) R. S. C. Appendix A., Part II., s. 4.
(*f*) R. S. C. Order XVIII., Rule 1.
(*g*) See R. S. C. Order XIX., Rule 4.

The only damages recoverable in this action are the expenses to which the plaintiff has been put to replevy his goods (*h*).

What Damages recoverable.

The defences to an action of replevin were formerly distinguished as pleas, avowries, and cognizances, the two latter of which terms were used when the defendant justified the taking of the goods, &c., under a right to distrain, and also claimed their return and damages; the former being used when the person having such right was the defendant, the latter when the defendant was bailiff or agent of the person having the right. These terms no longer exist as technicalities, a defence now being a statement of facts, and the defendant being able to counter-claim the return and damages; but they will perhaps be still occasionally used for the sake of convenience.

Defences, Avowry and Cognizance.

In the 10th and other prior editions of this work will be found a full account of the law, statutory and otherwise, upon the subject of avowry and cognizance. Such account is now wholly omitted, inasmuch as the statutes upon the subject, 13 Edw. 1, c. 2 (West. 2), 21 Hen. 8, c. 19, 17 Car. 2, c. 7, and 11 Geo. 2, c. 19, ss. 22, 23, are now repealed by the Civil Procedure Acts Repeal Act, 1879, 42 & 43 Vict. c. 59, and the Statute Law Revision Act, 1881, 44 & 45 Vict. c. 59, as being inconsistent with or superseded by the practice under the Rules of the Supreme Court made in pursuance of the Judicature Acts.

Former Law of Avowry.

These rules make no distinction between replevins and ordinary actions. The following special points, however, should still be mentioned:—

Judgment for Plaintiff—Damages recoverable.

If a verdict be found for the plaintiff he is not entitled to damages for the value of the goods or cattle taken, if they were returned to him when the replevin was made (as is usually the case); nor to any special damage for their wrongful taking or detention; nor to any compensation for the insult, annoyance and inconvenience to the plaintiff and his family by the distress; nor for any injury thereby occasioned to his trade or business, credit or reputation; but only the costs and expenses incurred by him on obtaining the replevy, including the fees paid at the County Court (*i*). Now, however, as other causes of action may be joined with replevin (*k*), the plaintiff should claim further damages in the first instance as for a substantive cause of action. The expenses of the replevin were formerly 2*l*. 2*s*. in London and Middlesex, and in some other places, and 2*l*. 10*s*. elsewhere, being the supposed expense of the replevin bond; but now the amount varies according to the sum

(*h*) *Pease* v. *Chaytor*, 3 B. & S. 634; 32 L. J., M. C. 121; *Connor* v. *Bentley*, 1 Jebb. & S. 246. See, too, Wilkinson on Replevin, 85.

(*i*) Wilk. Repl. 85; *Gibbs* v. *Cruikshank*, L. R., 8 C. P. 454.

(*k*) R. S. C. Order XVIII., Rule 1.

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distrained for. And if the plaintiff incurred further expenses than the fees paid at the County Court (his own solicitor's charges for instance) he should prove them and also the fees so paid; otherwise the lowest usual amount will be awarded.

If the goods or cattle have not been delivered to the plaintiff on the replevy, he is entitled to recover the value of the goods or cattle distrained, and also his damages for their detention, &c. (as in an action of detinue), together with the costs and expenses of the replevy; and perhaps also any special damage occasioned by the distress, which is properly alleged in the statement of claim and sufficiently proved. In such case the jury should by their verdict separate the damages, and find so much for the value of the goods or cattle, and so much for the detention, &c. (*l*). The jury may find a special verdict in an action of replevin (*m*).

Proof of special Reason for suing in the High Court.

By the condition of the replevin bond, where the action is brought in the High Court, unless judgment is obtained by default, the plaintiff must "prove before such court that he had good ground for believing either that the title to the same corporeal or incorporeal hereditaments, or some toll, market, fair or franchise was in question, or that such rent or damage exceeded 20*l*." (*n*). It would seem that the plaintiff should apply upon affidavit to the court or a judge in chambers (*o*) for leave to enter a suggestion on the roll, that the plaintiff has proved before this court that, &c. And when the rule absolute or order for such leave is obtained, to make an entry accordingly on the roll; otherwise, perhaps, the plaintiff and his sureties may be troubled with an action on the replevin bond, notwithstanding he obtained a verdict and judgment in his favour.

When Judgment a bar to other Action. *Gibbs* v. *Cruikshank.*

A judgment for the plaintiff in replevin is a bar to an action for damages for the same taking of the goods in respect of which the replevin was brought (*p*).

Costs of Defendant.

Under the Distress for Rent Act, 1737, 11 Geo. 2, c. 19, s. 22, where a defendant in replevin avowed or made cognizance upon any distress for rent, &c., and the plaintiff became nonsuit, discontinued, or had judgment against him, the defendant recovered *double costs*. But by the Limitation of Actions and Costs Act, 1842, 5 & 6 Vict. c. 97, s. 2, in lieu of such double costs he became entitled to receive

(*l*) *Ash* v. *Wood*, Cro. Eliz. 59.

(*m*) See the case of *Jones* v. *Johnson*, 5 Exch. 862; 7 Exch. 452.

(*n*) County Courts Act, 1888, s. 135; ante, 543.

(*o*) Not to the judge at Nisi Prius; *Tunnicliffe* v. *Wilmot*, 2 C. & K. 626, but in this case a certificate was refused because the plaintiff had not obtained the verdict.

(*p*) *Gibbs* v. *Cruikshank*, L. R., 8 C. P. 454; 42 L. J., C. P. 273; 28 L. T. 735; 21 W. R. 734.

such full and reasonable indemnity as to all costs, charges and expenses incurred in and about the suit as should be taxed by the proper officer; and the right to this indemnity seems to be unaffected by Order LXV. of the Rules of the Supreme Court which gives a discretion as to costs to the judge (*q*).

"Full and Reasonable Indemnity."

If the defendant have judgment, he has execution by a writ de retorno habendo, to have a return of the goods distrained, and a fi. fa. for his costs (*r*). It seems that the writ of retorno habendo and a fi. fa. for damages and costs may be included in one writ (*r*).

Execution for Defendant.

The sheriff, under the writ of retorno habendo, might, under the old practice (which would seem to be still in force, if the proceedings should be carried so far), cause the goods or cattle which were replevied to be taken from the plaintiff and re-delivered to the defendant; but this was seldom done. The usual practice was for the sheriff to return *elongata*, viz., that the goods or cattle were eloigned and removed to places unknown. Upon this return being filed the defendant might have a "capias in withernam," by which the sheriff was commanded to take the cattle, goods, and chattels of the plaintiff, to the value of the cattle, goods, and chattels before taken, to be delivered to the defendant, to be kept by him till the sheriff can cause to be returned the cattle, goods, and chattels before taken, &c. (*s*). If this was returned nihil the defendant might sue out an alias, and after that a pluries (*t*): but if these all proved unsuccessful he had to sue the plaintiff and his sureties on the replevin bond.

Writ de Retorno Habendo—how executed.

Capias in Withernam.

The sheriff was not bound to execute a writ de retorno habendo by actually delivering the goods or cattle therein mentioned to the defendant, unless the defendant or some person on his behalf attended to point out the particular goods or cattle and to receive the same. If that were not done the sheriff might make a return to the writ that no person did so attend (*u*).

The writ of retorno habendo was generally sued out for the purpose of founding proceedings on the replevin bond; but this is unnecessary, for as such bond is conditioned to prosecute the suit "with effect," and also to make a return, if return be awarded, the bond is forfeited by the plaintiff not prosecuting his suit *with success* (*x*). The bond is considered as a further and better security for such return, &c. (*y*).

(*q*) See per Lord Blackburn in *Garnett* v. *Bradley*, L. R., 3 App. Cas. 944; *Hasker* v. *Wood*, 54 L. J., Q. B. 419.

(*r*) See Chit. Forms, 12th ed., p. 625 et seq.

(*s*) The meaning of "in withernam" seems to be "by way of reprisal." See Steph. Com. (7th. ed.), Vol. III., p. 423, and for form, see Chit. Forms (12th ed.), p. 627.

(*t*) 2 Chit. Arch. 1265 (11th ed.).

(*u*) 2 Wms. Saund. 74 b, c. 4.

(*x*) Watson, Sheriff, 421.

(*y*) *Turnor* v. *Turner*, 2 Brod. & B. 107.

CH. XII. S. 1.
*Replevin (in High Court).*

In replevin, where the verdict is for the plaintiff, the court will not in general grant a new trial, even on payment of costs, without very clear grounds; for the landlord has other remedies for his rent, and a new trial would renew the liability of the sureties, and the plaintiff's risk of paying full costs, charges and expenses (*z*); though the rule that a new trial will not be granted for either party where the sum given or recoverable does not exceed 20*l.* does not apply to replevin (*a*).

New Trial.

(e) *Action of Replevin removed by Certiorari from County Court into the High Court.*

A plaintiff who has elected to bring an action of replevin in the County Court cannot afterwards remove it into the High Court; but the defendant is entitled to remove such action into the High Court by writ of certiorari on applying to the High Court, or a judge, pursuant to s. 137 of the County Courts Act, 1888, 51 & 52 Vict. c. 43, on giving security as therein mentioned (*b*).

By Defendant only.

The application for the writ of certiorari should generally be made to a judge at chambers, and not to the court except under special circumstances (*c*). It should be supported by an affidavit entitled in the High Court of Justice (Queen's Bench Division); but not in any cause or matter (*d*), and must show good ground for believing either that the title to some corporeal or incorporeal hereditament is in question, or that the rent *exceeded* 20*l.* (*e*). The judge may in his discretion order the writ to issue upon an ex parte application; but more frequently only a summons to show cause is granted in the first instance (*f*). The court or judge may direct that the rule nisi or summons shall operate as a stay of proceedings (*g*). It should be drawn forthwith and served without delay on the opposite party and on the registrar of the County Court. If not so served two clear days before the day fixed for the hearing of the cause the judge of the County Court may, in his discretion, order the party who obtained the rule or summons to pay all the costs of the day, or so much thereof as he shall think fit, unless the High Court or a judge thereof shall have made some order respecting such costs (*h*). Where the writ has been granted on an ex parte application, and the party who obtained it does not lodge it with the registrar, and give notice to the opposite party, two clear days before the day fixed for hearing the cause to which it relates,

Application for Certiorari.

Affidavit in support.

Order or Summons,

with a stay of Proceedings.

Service thereof.

(*z*) *Parry* v. *Duncan*, 7 Bing. 243.
(*a*) *Edgson* v. *Cardwell*, L. R., 8 C. P. 647; 28 L. T. 819 (new trial not granted).
(*b*) See *Mungean* v. *Wheatley*, 6 Ex. 88; 20 L. J., Ex. 106.
(*c*) *Bowen* v. *Evans*, 3 Exch. 111; 6 D. & L. 193.
(*d*) 2 Chit. Arch. 1088 (11th ed.).
(*e*) See forms of affidavit, Chit Forms (12th ed.), p. 629; and see Oldham & Foster's Law of Distress (2nd ed.), p. 436.
(*f*) 2 Chit. Arch. 1088.
(*g*) County Courts Act, 1888, s. 129.
(*h*) Ib.

the judge of the County Court may order the party who obtained the writ to pay the costs of the day (*i*).

By sect. 132 of the County Courts Act, 1888, "when the High Court or a judge thereof shall have refused to grant a writ of certiorari" [&c.] "no other court or judge shall grant such writ" [&c.]: "but nothing herein shall affect the right of appealing from the decision of the judge of the High Court to the court itself, or prevent a second application being made for such a writ" [&c.] "to the High Court or a judge thereof, on grounds different from those on which the first application was founded."

No renewed Application: unless on Appeal; or on different grounds.

### (f) *Proceedings on the Replevin Bond.*

The condition of a replevin bond varies according to the court in which the action of replevin is to be commenced and prosecuted (*k*).

An action on the bond may be brought immediately on the condition being broken (*l*). It must be brought in the name of the obligee, his executors or administrators. It may be brought against all the obligors jointly, or against any one of them separately; but not against any two, unless the other be dead. The court in which the action is brought may by rule or order give such relief to the obligors as may be just, and such rule or order shall have the effect of a defeasance of such bond (*m*). The obligees are only liable to the amount of the penalty on the bond and the costs of the action thereon (*n*). Therefore proceedings in such suit may be stayed on payment of the penalty and costs, though the plaintiff's costs in the replevin suit much exceed the penalty (*o*). A judge at chambers may order the stay of proceedings (*o*). The sureties are liable only to the amount of the rent in arrear at the time of the distress, and the costs of the action of replevin and of the action on the bond; but not for any subsequent rent.

### (g) *Proceedings to obtain Sum deposited in lieu of a Bond.*

Where a sum of money has been deposited with a memorandum pursuant to sect. 109 of the County Courts Act, 1888, "the judge of the County Court, when the money shall have been deposited in such court, or a judge of the High Court, when the money shall have been deposited in the High Court, may, on the same evidence as would be required to enforce or avoid such bond, order such sum so deposited to be paid out to such party or parties as to him shall seem just" (*p*).

(*i*) Ib. s. 41.
(*k*) Ante, 542.
(*l*) Gilb. Repl. 225; see *Waterman* v. *Yea*, 2 Wils. 41; *Turner* v. *Turner*, 2 Brod. & B. 107.
(*m*) County Courts Act, 1888, s. 108.
(*n*) *Hefford* v. *Alger*, 1 Taunt. 218; *Branscombe* v. *Scarborough*, 6 Q. B. 13.
(*o*) *Ward* v. *Henley*, 1 Y. & J. 285.
(*p*) Ante, 544.

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The application should be founded on a sufficient affidavit or affidavits of the facts, showing a breach or breaches of the condition or full performance thereof, as the case may be.

## SECT. 2.—*Damages for Wrongful Distress.*

### (a) *Summary Remedy within the Metropolitan Police District.*

2 & 3 Vict. c. 71, s. 39. Summary Remedy for unlawful, excessive and irregular Distresses within the Metropolitan Police District.

By the Metropolitan Police Courts Act, 1839, 2 & 3 Vict. c. 71, "An Act regulating the Police Courts in the Metropolis," it is enacted (sect. 39), "That on complaint made to any of the said magistrates by any person who shall, *within the metropolitan police district*, have occupied any house or lodging *by the week or month*, or whereof the rent does not exceed the rate of *fifteen pounds by the year*, that his goods have been taken from him by an unlawful distress, or that the landlord, or his broker or agent, has been guilty of an irregularity or excess in respect of such distress, it shall be lawful for such magistrate to summon the party complained against; and if upon the hearing of the matter it shall appear to the magistrate that such distress was improperly taken, or unfairly disposed of, or that the charges made by the party having distrained, or having attempted to distrain, are contrary to law, or that the proceeds of the sale of such distress have not been duly accounted for to the owner thereof, it shall be lawful for the magistrate to order the distress so taken, if not sold, to be returned to the tenant on payment of the rent which shall appear to be due at such time as the magistrate shall appoint; or if the distress shall have been sold, then to order payment to the said tenant of the value thereof, deducting thereout the rent which shall so appear to be due, such value to be determined by the magistrate; and such landlord or party complained against, in default of compliance with any such order, shall forfeit to the party aggrieved the value of such distress, not being greater than fifteen pounds, such value to be determined by the magistrate."

This enactment (which is permissive only, and does not prevent a tenant suing for double value where he can) is confined to distresses for rent made within the metropolitan police district, the limits whereof are defined in the schedule to the Metropolitan Police Act, 1829, 10 Geo. 4, c. 44, as amended by the Metropolitan Police Act, 1839, and by Order in Council of 3rd January, 1840 (*p*); also to cases where the rent does not exceed 15*l.* per annum, *or* the tenancy was by the week or month. It would seem that it might be very beneficially extended to the whole kingdom, and to larger tenancies, and also to be made applicable to distresses for damage feasant, &c.

(*p*) *See* Metropolitan Police Guide, 2nd ed., at p. 28.

(b) *Action for Double Value under* 2 *Will. & Mary, sess.* 1, *c.* 5.

In cases where no rent was owing, and the distress has been sold, the owner may recover double the value of the goods distrained. This very full remedy is given by 2 Will. & Mary, sess. 1, c. 5, s. 5 (*q*); which provides that "in case any such distress and sale as aforesaid [i.e. sale after five days, failing a replevy] shall be made by virtue and colour of this present act for rent pretended to be in arrear and due, where in truth no rent is in arrear and due to the person or persons distraining, or to him or them in whose name or names or right such distress shall be taken as aforesaid, then the owner of such goods or chattels distrained and sold as aforesaid, his executors or administrators, shall and may, by action of trespass, or upon the case, to be brought against the person or persons so distraining, any or either of them, his executors or administrators, recover double of the value of the goods or chattels so distrained and sold, together with full costs of suit" (*r*).

Double Damages in case of Sale where no Rent owing.

Double Value of Goods Sold.

If such an action be brought, the jury must be directed to give double value as damages, and cannot give nominal damages (*s*).

Nominal Damages cannot be given.

(c) *Ordinary Action for Damages.*

Upon the system of procedure in the superior courts of law under the Common Law Procedure Acts, the action differed according as the act of the landlord in distraining was (1) wrongful and illegal, or (2) excessive only, or (3) merely irregular. In the first case the tenant might have recourse to an action of trespass or trover or detinue; in the second to an action on the case for damages under the statute of Marlebridge, 52 Hen. 3, c. 4, unless the distress was plainly excessive on the face of it, in which case it was illegal, and the tenant might bring an action of trespass (*t*); or in the third case the tenant might maintain an action on the case against the landlord, or trover against a purchaser of the goods. But it must be remembered that, where the distress is only irregular and does not amount to a trespass, and is not excessive, the right of action depends upon the fact of the tenant having suffered actual damage, and he cannot maintain any action answering to the old actions of trespass or trover (*u*).

Ordinary Action for Wrongful Distress.

By the Judicature Acts and the Rules of the Supreme Court these distinctions are for the most part swept away. There is now one

One Form of Indorsement of Writ for all Claims.

(*q*) Mere distress is not enough; there must be a *sale* for the statute to operate.

(*r*) As to costs, see now R. S. C. 1883, Order LXV., and *Hasker* v. *Wood*, 54 L. J., Q. B. 419.

(*s*) *Masters* v. *Farris*, 1 C. B. 715.

(*t*) *Moir* v. *Munday*, cited in 1 Burr. 582, 590.

(*u*) *Robinson* v. *Waddington*, 13 Q. B. 753; *Lucas* v. *Tarleton*, 3 H. & N. 116; 37 L. J., Ex. 246; *Whitworth* v. *Smith*, 5 C. & P. 250; *Carter* v. *Carter*, 5 Bing. 406; 7 L. J. C. P. 141; 30 R. R. 677.

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form of indorsement of writ provided for all claims for damages arising from wrongful distress, whether illegal, excessive, or only irregular (*x*). The statements of claim and defence must set out the facts so far as they are necessary to show that the plaintiff has a good cause of action and that the defendant has a good defence respectively, care being taken to set out such circumstances as will make the distress wrongful in some of the ways pointed out in the earlier part of this chapter. There is, however, no technical distinction between the forms of action. There is no specimen statement given in the Appendix to the Rules of the Supreme Court.

Against whom Action should be brought.

It is, however, still material to distinguish the various kinds of wrongful distress in relation to the question against what persons a tenant can proceed. In the case of an illegal distress, the action should be brought against the person actually committing the illegal act, and not against the landlord, unless it can be shown that he expressly authorized the act or adopted and ratified it afterwards (*y*), of which his presence on the premises immediately after the committal of the wrongful act is evidence (*z*), though the mere receipt of the proceeds without proof of knowledge of the illegal act is not so (*a*).

Damages.

When the distress is illegal and therefore void from the commencement, the tenant is entitled to recover the full value of the goods distrained (or of such part of them as were not subject to distress (*b*)), and any damages sustained by him, nor need any deduction be made for the rent due from him (*c*). If, however, the landlord seize, among others, things not liable to distress, and on payment of rent and costs withdraws, the tenant can only recover the actual damage sustained by him by the seizure of the particular privileged goods (*d*). If no rent be in arrear and the goods have been sold, the tenant may recover double the value of the goods and full costs of suit (*e*).

Double Value.

Action of Trover, &c.

In addition to proceeding for damages for the illegal distress, the tenant may, if he prefer it, proceed in what may still be called an action of trover or detinue against the person who has by purchase or otherwise come into possession of the goods; for which cases forms

(*x*) R. S. C. App. A., Part II., s. 4; post, App. D.

(*y*) *Lewis* v. *Read*, 13 M. & W. 834; *Freeman* v. *Rosher*, 13 Q. B. 780; 6 D. & L. 517; *Gauntlett* v. *King*, 3 C. B., N. S. 59; *Haseler* v. *Lemoyne*, 5 C. B., N. S. 530; but see *Hurry* v. *Rickman*, 1 Mood. & Rob. 126.

(*z*) *Moore* v. *Drinkwater*, 1 F. & F. 134.

(*a*) *Green* v. *Wise*, W. N. 1877, p. 130.

(*b*) *Keen* v. *Priest*, 4 H. & N. 236; 28 L. J., Ex. 157; *Swire* v. *Leech*, 18 C. B., N. S. 479; 34 L. J., C. P. 150.

(*c*) *Attack* v. *Bramwell*, 3 B. & S. 520; 32 L. J., Q. B. 156; *Edmondson* v. *Nuttall*, 17 C. B., N. S. 280. See, too, *Tutton* v. *Darke* and *Nixon* v. *Freeman*, 5 H. & N. 647.

(*d*) *Hurry* v. *Pocock*, 11 M. & W. 740; 12 L. J., Ex. 434.

(*e*) Supra, 557.

of indorsement of writs are provided (*f*). The tenant will have the same rights as to the amount of damages he may recover as in the former mode of action (*g*).

Similar actions may be maintained by others whose goods are taken who are not tenants of the landlord purporting to distrain, but those cases would not be properly noticed here, as, in regard to them, there could be no relation of landlord and tenant.

Action for Overplus.

Where the only complaint against the landlord is that the sale has produced more than the amount due, and the overplus has not been left in the hands of the sheriff, under-sheriff or constable, as directed by 2 Will. & Mary, sess. 1, c. 5, the tenant should sue in tort, as for a breach of the statute, and not for a return of the balance as money received to his use (*h*).

Excessive or Irregular Distress.

11 Geo. 2, c. 19, s. 19.

Prior to 11 Geo. 2, c. 19, any irregularity in a distress made the distress unlawful, so that the full value of the rent for which the distress was taken might be recovered by action (*i*). But this hardship upon landlords was remedied by sect. 19 of that statute, which enacts that, "where any distress shall be made for any kind of rent justly due, and any irregularity or unlawful act shall be afterwards done by the party or parties distraining, or by his, her or their agents, the distress itself shall not be deemed to be unlawful, nor the party or parties so making it be therefore deemed a trespasser or trespassers ab initio; but the party or parties aggrieved by such unlawful act or irregularity shall or may recover full satisfaction for the special damage he, she or they shall have sustained thereby, and no more, in any action of trespass, or on the case at the election of the plaintiff or plaintiffs; provided always, that where the plaintiff or plaintiffs shall recover in such action, he, she or they shall be paid his or their full costs of suit, and shall have all the like remedies for the same as in other cases of costs."

By sect. 20 of the same statute, "no tenant," &c. "shall recover in any action for any such unlawful act or irregularity, if tender of amends hath been made by the party distraining, or his agent, before action brought." If amends be tendered under this section, the landlord need not in the case of action pay the money into court (*k*). Nor can the person in possession of the goods be sued for a conversion of them (*l*). Whether the distress was excessive is for the jury (*m*).

(*f*) R. S. C. App. A., Part II., s. 2.
(*g*) Supra, 558.
(*h*) *Yates* v. *Eastwood*, 6 Exch. 805; 20 L. J., Ex. 303; *Evans* v. *Wright*, 2 H. & N. 527.
(*i*) See preamble of Distress for Rent Act, 1737, 11 Geo. 2, c. 19, s. 19; *Six Carpenters' case*, 1 Sm. L. C.
(*k*) See *Jones* v. *Gooday*, 9 M. & W. 736 (decided on a local act).
(*l*) *Whitworth* v. *Smith*, 5 C. & P. 250; 1 Moo. & R. 194.
(*m*) See *Smith* v. *Ashforth*, 29 L. J., Ex. 259.

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*Recovery of Damages for Wrongful Distress.*

A right of action for an excessive distress will not be defeated by a subsequent arrangement made by the tenant with the landlord to prevent a sale of the goods (*n*); but a recovery in replevin is a bar to any subsequent action for an excessive distress (*o*).

Property of Plaintiff.
*Fell* v. *Whitaker.*

The plaintiff must of course show that he has such a property in the goods as will allow him to maintain an action, and it has been held that the mere enjoyment of the use of the goods by a person who is neither legal nor equitable owner will entitle him to sue (*p*).

"Not Guilty by Statute."

With regard to the defences to actions for illegal, excessive or irregular distresses, the statement of defence must contain such matters as will show the defendant's action to have been lawful, and the only matter to be particularly noticed is that by the Distress for Rent Act, 1737, 11 Geo. 2, c. 19, s. 21, the defendant was allowed to plead not guilty by statute, and give the special matter in evidence (*q*), a right in all cases in which it existed, preserved under the Judicature Acts (*r*), subject only to the conditions that no other defence can be pleaded with it except by leave of the court or a judge, and that the defendant must state the statute in the margin of his pleading (*r*); and it may be as well to point out that in one case at least a plea of not guilty by statute, together with a special plea of justification, under a right to distrain, was, under the old practice, disallowed, as setting up matters which could be disposed of under the one defence of the general issue (*s*).

Section 21 of the Distress for Rent Act, 1737, 11 Geo. 2, c. 19, gives double costs to a defendant on nonsuit, as follows :—

Double costs for defendant on nonsuit or discontinuance.

In all actions of trespass, or upon the case, to be brought against any person or persons entitled to rents or services of any kind, his, her or their bailiff or receiver, or other person, relating to any entry by virtue of this act, or otherwise, upon the premises chargeable with such rents or services, or to any distress or seizure, sale or disposal, of any goods or chattels thereupon, it shall and may be lawful to and for the defendant or defendants in such actions to plead the general issue and give the special matter in evidence, or law or usage to the contrary notwithstanding: and in case the plaintiff or plaintiffs shall become nonsuited, discontinue his or their action, or have judgment against him, her or them, the defendant or defendants shall recover double costs of suit.

(*n*) *Willoughby* v. *Backhouse*, 2 B & C. 821; *Peles* v. *Hoare*, 1 Bing. 401; 1 C. & P. 28; and see this case commented on in *Glynn* v. *Thomas*, 11 Exch. 870, 876.

(*o*) *Phillips* v. *Berryman*, 3 Doug. 286; *White* v. *Willis*, 2 Wils. 87; *Pease* v. *Chaytor*, 1 B. & S. 658, 662; 3 B. & S. 620; 32 L. J., M. C. 121.

(*p*) *Fell* v. *Whittaker*, L. R., 7 Q. B. 120; 41 L. J., Q. B. 73; 25 L. T. 880; 20 W. R. 317.

(*q*) 11 Geo. 2, c. 19, s. 21. See *Nash* v. *Lucas*, L. R., 2 Q. B. 590.

(*r*) R. S. C. Order XIX., Rule 12; Order XXII., Rule 19.

(*s*) *Neale* v. *Mackenzie*, 1 C., M. & R. 61; 2 Dowl. 702.

This section is very wide, but it would seem to include cases of irregular and excessive distress only, and not to apply to unlawful distress.

The defendant is not bound to avail himself of the section, but may, it is conceived, without leave enter a defence in the ordinary form. If the defendant has not previously so tendered and pays money into court, the plaintiff is entitled only to his ordinary costs of suit, and not to the full costs, &c., which are given by the Limitations of Actions and Costs Act, 1842, 5 & 6 Vict. c. 97, s. 1, in lieu of the double costs given by the Distress for Rent Act, 1737, 11 Geo. 2, c. 19, s. 21 (*t*), the two statutes being unaffected by R. S. C. 1883, Order LXV. (*u*).

Under the defence of "not guilty by statute" the tenancy and ownership of the goods, as well as other matter of justification, is put in issue (*x*).

Measure of Damages.

The measure of damages appears to be, in cases of excessive distress, the fair value of the goods (not merely what they would have fetched at a broker's sale), minus, however, the rent due and the cost of the distress (*y*); and although the plaintiff fail to prove that he has sustained actual damage, yet on proof only that the distress was excessive he is entitled to recover some damages (*z*). If, however, the distress be merely irregular the defendant must succeed, unless actual damage be proved (*a*).

## Sect. 3.—*Remedy by Proceedings before Justices or County Court, under Agricultural Holdings Act.*

Summary determination of dispute under s. 46 of Agricultural Holdings Act.

If a distress has been made upon a holding to which the Agricultural Holdings Act applies (*b*), a special and summary mode of determining any dispute arising out of such distress may, but need not of necessity, be resorted to. For it is provided by sect. 46 of that act that "where any dispute arises," either (a) as to a distress having been levied contrary to the act (*c*), or (b) as to the ownership of live stock distrained or as to the price for feeding (*d*), or (c) as to any other matter or thing relating to a holding to which the act applies, "such dispute may be heard and determined by the county

(*t*) *Handcock* v. *Foulkes*, 9 M. & W. 431; 1 Dowl. N. S. 658.

(*u*) See *Hasker* v. *Wood*, 54 L. J., Q. B. 419; 33 W. R. 697—C. A.; *Reeve* v. *Gibson*, [1891] 60 L. J., Q. B. 451; 39 W. R. 420—C. A.

(*x*) *Williams* v. *Jones*, 11 A. & E. 643; *Ross* v. *Clifton*, Id. 631.

(*y*) See *Biggins* v. *Goode*, 2 C. & J. 364; *Knight* v. *Egerton*, 7 Exch. 407; *Piggott* v. *Birtles*, 1 M. & W. 441; and at nisi prins, *Knotts* v. *Curtis*, 5 C. & P. 322; *Wells* v. *Moody*, 7 C. & P. 59; *Whitworth* v. *Madden*, 2 C. & K. 517.

(*z*) *Chandler* v. *Doulton*, 3 H. & C. 553; 34 L. J., Ex. 89.

(*a*) *Lucas* v. *Tarleton*, 3 H. & N. 116; 27 L. J., Ex. 246; *Rodgers* v. *Parker*, 18 C. B. 112; 25 L. J., C. P. 220.

(*b*) See Chap. XI., Sect. 5, ante.

(*c*) See s. 44 of the act, ante, 490.

(*d*) See s. 45 of the act, ante, 486.

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court (*e*), or a court of summary jurisdiction" (*f*), either of which courts may make an order for restoration, &c., "or may make any other order which justice requires." By the same section there is an express appeal from the court of summary jurisdiction, but none from the county court. It has been held, however, that there was an appeal from the county court to the High Court by virtue of sect. 13 of the County Courts Act, 1867 (*g*), and the 120th section of the County Courts Act, 1888, 51 & 52 Vict. c. 43, appears to have the same effect. It is further provided by sect. 49 that no order of the county court or a court of summary jurisdiction shall be removed by certiorari.

Appeal.

Application of s. 46 of Agricultural Holdings Act.

This section appears to be open to any party, whether landlord, tenant or other, to a dispute within its meaning. It gives a cumulative remedy, and no party is bound to have recourse to it. By having recourse to it, a party would not be legally bound to carry his complaint through up to decision, but would, it is conceived, be bound by any decision arrived at. The words "*may* be heard and determined" would seem to have a compulsory force, so as not to admit of the courts named declining jurisdiction (*h*).

(*e*) That is by s. 61 the county court within the district within which the larger part thereof is situate.

(*f*) That is by justices of the peace, presumably of the petty sessional division, but the act is silent as to this.

(*g*) *Hammer* v. *King*, 57 L. T. 367.

(*h*) See Maxwell on Statutes, 3rd ed., citing *Reg.* v. *Adamson*, 1 Q. B. D. 201, and other cases.

# CHAPTER XIII.

## RECOVERY OF RENT BY ACTION.


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WE have now fully considered the landlord's peculiar remedy to recover rent by distress; but rent, like other debts, can be recovered by ordinary process of law, if the landlord prefer that to a distress. Formerly the process was distinguished according as it was based upon covenant or simple contract, express or implied, but these distinctions, weakened by the Common Law Procedure Acts, have (as technicalities) ceased to exist since the Judicature Acts have come into operation. It will, however, be convenient to maintain the distinctions (as regards terminology), as the terms may still be popularly used, and also because they are necessary to some extent when considering who are the persons who can sue and be sued, and how the right of action is affected by the Statute of Limitations. Rent, then, may be recovered by proceedings based on—

(1) Some express covenant in the instrument of demise, if under seal;

(2) Some express agreement contained in an instrument not under seal, or made by parol only;

(3) An agreement which the law will imply from the conduct of the parties.

### SECT. 1.—*Recovery of Rent on the Covenant to pay it.*

Early Law.

Previous to the year 1845, no one could sue on a covenant unless he was a party thereto, or, at furthest, a legal representative or assign of a party (*a*); but by the Real Property Act, 1845, 8 & 9 Vict. c. 106, s. 5, it was enacted, that "under an indenture executed after the 1st day of October, 1845, an immediate estate or interest in any tenements or hereditaments, *and the benefit of a condition or*

(*a*) *Green* v. *Horne*, 1 Salk. 197; *Berkeley* v. *Hardy*, 5 B. & C. 355; 4 L. J., K. B. 184; 29 R. R. 261; *Ld. Southampton* v. *Brown*, 6 B. & C. 718; 5 L. J., K. B. 252; 30 R. R. 511; *Bushell* v. *Beavan*, 1 Bing. N. C. 103, 120.

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*covenant respecting any tenements or hereditaments*, may be taken, although the taker thereof be not named a party to the same indenture" (*b*). The law, however, remains the same as before with regard to a deed poll (*c*).

Early Law.

And even before the act an action might have been (and still may be) maintained by a party to an indenture against one who was not a party, but executed the deed (*d*); and where B. assigned the lease of a house to A. by deed subject to certain covenants, and A. took possession, it was doubted whether B.'s remedy for a breach of the covenants was not by an action of covenant, although A. never executed the deed (*e*).

On Covenants in a void or voidable Deed.

Where a deed is *void*, any covenant therein contained is void also, and no action can be maintained for its infraction (*f*); but if the deed be merely *voidable*, an action may be maintained for any breaches of covenant which happened before the deed was avoided (*g*). And we have already seen that the rule for construing leases is, that a proviso that the lease shall be void on breach of the covenants means that the lease shall be void at the election of the lessor (*h*).

We have also seen that if the right to take legal proceedings on a covenant depends on the performance of a condition precedent, such condition must be shown to have been performed (*i*).

By or against whom the Action may be maintained generally.

An action for breach of covenant may be maintained by or against the parties to the contract or their personal representatives, whether the covenant be one which runs with the land or be merely a personal covenant. With regard to the position of assignees, we have already seen to what extent they have privity of contract or estate such as will enable them to sue (*k*). And it is only necessary to note this, that when there is a right of action against both the lessee and his assignee, he can proceed to execution only against one (*l*).

Proper Parties in case of joint Covenants.

When there are two or more persons binding or bound by the covenant it must not be forgotten that where the words of a covenant are clearly joint, and not several, it will be so construed, although the interest may be several: and so vice versâ (*m*); but where the words admit of two constructions, they will be construed to be joint or several, according to the interest (*n*); and joinder or non-joinder of parties to any proceeding must be regulated accord-

(*b*) *Reeves* v. *Watts*, 7 B. & S. 523; L. R., 1 Q. B. 412; 35 L. J., Q. B. 171.
(*c*) *Green* v. *Horne*, supra.
(*d*) *Salter* v. *Kidgley*, Carth. 76; Holt, R. 211; Shower, 58; 2 Prest. Conv. 396.
(*e*) *Hawkins* v. *Sherman*, 3 C. & P. 459; but see *Burnett* v. *Lynch*, 5 B. & C. 589, 602; 4 L. J., K. B. 274; 29 R. R. 343.
(*f*) *Smith* v. *White*, L. R., 1 Eq. 626; 35 L. J., Ch. 454.
(*g*) *Hartshorne* v. *Watson*, 4 Bing. N. C. 178; *Selby* v. *Browne*, 7 Q. B. 620; *Load* v. *Green*, 15 M. & W. 216, 223.
(*h*) See ante, Chap. V., Sect. 18.
(*i*) Ante, Chap. V., Sect. 8 (c).
(*k*) Ante, Chap. VII., Sect. 3.
(*l*) Cro. Jac. 423.
(*m*) Ante, 169; Ros. Ev. 683 (16th ed.); and see *Levy* v. *Sale*, 37 L. T. 709.
(*n*) Ante, 169, 170; Bac. Abr. tit. *Covenant* (D); 1 Lush. Prac. 29 (3rd ed.).

ingly. Thus tenants in common and their representatives ought to join in an action for a covenant to pay rent (*o*), and to be so sued (*o*). Where the interest of the covenantees is joint, although the covenant is in terms joint and several, the action follows the nature of the contract, and must be brought in the names of all the covenantees (*p*). For example, in a lease of a colliery the two lessees covenanted "jointly and severally in manner following," viz. that, &c.; then followed several covenants, after which was a covenant that monies due should be accounted for and paid by the lessees, their executors, &c. (not saying and each of them): this and the former covenants were held to be several as well as joint (*q*). But the legal niceties to be found in the decisions are now of little importance, as by the Rules of the Supreme Court, Order XVI., Rule 13, ample means are provided for amendments in regard to parties.

And the same remark will apply to the representatives in case of decease, unless, of course, the covenant be specially made as a several covenant also (*r*).

Proper Parties in case of Death of Landlord or Tenant.

As to the persons who may sue or be sued if the landlord or tenant die, the matter has been sufficiently discussed already (*s*); and it may suffice to notice that when the landlord has died, if the rent was due before his death, his legal personal representative, and not his heir or devisee, has a right to sue on a covenant to pay rent, although such personal representative is not named in the covenant (*t*); but if the rent became due after the landlord's death the action must be brought by his heir or devisee (*u*), that is, if the landlord was seised in fee; for if he had only a chattel interest, of course in all cases the rent must be recovered by his personal representative. And it must also be remembered that where the breach is after the death of landlord or tenant, the executor or administrator may be sued either as representative or assignee upon any covenant which runs with the land (*x*).

The subject of the right of parties to sue on a covenant in the case of assignment has been fully treated already (*y*).

Indorsement of Writ.

The plaintiff in an action for rent based upon a covenant may indorse his writ specially under Order III., Rule 6, of the Rules of the Supreme Court, with the benefit of the various advantages in

(*o*) *Thompson* v. *Hakewill*, 19 C. B., N. S. 713; 35 L. J., C. P. 18.

(*p*) *Pugh* v. *Stringfield*, 3 C. B., N. S. 2; 27 L. J., C. P. 34.

(*q*) *Duke of Northumberland* v. *Errington*, 5 T. R. 524; 2 R. R. 666; *Copland* v. *Laporte*, 3 A. & E. 517.

(*r*) *Thompson* v. *Hakewill*, 19 C. B., N. S. 713; 35 L. J., C. P. 18; *Foley* v. *Addenbrooke*, 4 Q. B. 107; Bullen, 49.

(*s*) Ante, Chap. VII., Sect. 10.

(*t*) Esp. N. P. 295; *Lucy* v. *Levington*, Ventr. 175; 2 Lev. 26; *Dollen* v. *Batt*, 4 C. B., N. S. 760; 27 L. J., C. P. 281.

(*u*) Bac. Abr. tit. *Covenant* (E. 2).

(*x*) See ante, Chap. V., Sect. 8; Chap. VII., Sect. 10; and see *Gorton* v. *Gregory*, 3 B. & S. 90; 31 L. J., Q. B. 302.

(*y*) Ante, Chap. VII., Sects. 2, 3.

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regard to speedy judgment on such a form of writ given by Order XIV. of those Rules: if that is not done, the indorsement "the plaintiff's claim if for £ for arrears of rent" will probably cover all claims for rent, strictly so called, however reserved or payable (*z*).

The statements of claim and other pleadings will be subject to the same rules as in other actions, and must, to speak generally, set out such facts as will give the plaintiff a clear right of action. The action will be tried where the plaintiff proposes or where the preponderance of convenience suggests, as all local venues are abolished by the Rules of the Supreme Court under the Judicature Acts (*a*).

Pleadings.

By the Common Law Procedure Act of 1852 (15 & 16 Vict. c. 76), Sched. B, No. 23, a short form of declaration was provided for actions on covenants in a lease. The Rules of the Supreme Court under the Judicature Act provide a specimen statement of claim applicable to a simple case of non-repair, to which a claim for rent may be added (*b*).

It is sufficient to "state the effect" of the covenant "as briefly as possible, without setting out the whole or any part thereof, unless the precise words" of the covenant "or any part thereof are material" (*c*). The defendant may easily obtain inspection of the whole lease if he choose (*d*).

Setting out Lessor's Title.

The lessor need not set out his title, for the lessee cannot deny it if he set it out (*e*), although if the plaintiff's title be a derivative one only, he must show how he derives his title and from whom (*f*), and in the case of an executor or administrator suing those arrears of rent only which accrued due during the lifetime of the deceased can be recovered without showing the plaintiff's title (*g*).

If the statement of claim omits to state the lessor's title where that *ought* to be stated, the defendant may get it struck out or amended under R. S. C., Order XXVIII., Rule 1 (*h*); otherwise it will be sufficient, at least after verdict (*i*).

Statement of derivative Title of Defendant.

Where the action is against an assignee of the lessee, it has never been necessary for the plaintiff to set out the several mesne assignments to the defendant, for they do not lie within his knowledge, provided that he state the original demise, and that all the estate and interest of the lessee came to and vested in him (the defendant)

(*z*) R. S. C. App. A., Part III., sect. 2.
(*a*) R. S. C. Order XXXVI., Rule 1.
(*b*) See Appendix C., No. 9.
(*c*) R. S. C. Order XIX., Rule 24.
(*d*) R. S. C. Order XXXI., Rule 14.
(*e*) *Beckett* v. *Bradley*, 7 M. & G. 994; 2 D. & L. 586; 4 Doug. 213.
(*f*) See Bullen & L. Pl. (4th ed.), Part I., p. 246.
(*g*) *Dollen* v. *Batt*, 4 C. B., N. S. 760, 771.
(*h*) See *Cuthbertson* v. *Irving*, 4 H. & N. 742; 6 Id. 135.
(*i*) *Hartis* v. *Beavan*, 4 Bing. 646.

by assignment (*k*). It must, however, be shown that the defendant is the assignee of the term as well as of the premises, for otherwise it might be an assignment of another estate than the term of the lessee. And if the defendant be assignee of part only of the demised premises he should be charged accordingly, and not as assignee of the whole (*l*).

Defences of Tenant.

With regard to any defence which the tenant may set up, it must be borne in mind that he cannot deny that his landlord had a good title at the time of the demise (*m*), but he may show that his landlord's title has ceased since the demise (*n*), and may dispute the title of a plaintiff whose claim is derivative only, as in such a case there is no estoppel operating against the tenant (*o*). Any set-off or counterclaim may be pleaded as in ordinary actions. Entry and eviction may be set up in answer to an action for rent due under a covenant (*p*); provided there be really an eviction (*q*), for which (it may be remarked) no physical expulsion is required (*r*), and eviction by a stranger, if lawful, may also be set up as a defence (*s*). Any tender of the rent must, to be an answer to the action, be made on the day when it is due (*t*). It appears to have been formerly held that a plea that the demand had been satisfied by distress was a bad plea when the action was on a covenant (*u*), but it would now be in any case probably upheld under the equitable jurisdiction possessed by all courts (*x*).

Statute of Limitations. *Paget* v. *Foley.*

By the Civil Procedure Act, 1833, 3 & 4 Will. 4, c. 42, s. 3, "all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, shall be commenced and sued within twenty years after the cause of such actions or suits, but not after." The Real Property Limitation Act, 1833, 3 & 4 Will. 4, c. 27, s. 42, takes away from an incumbrancer upon land in all cases the right of recovery as against the land for more than six years' arrears of rent or interest. The Civil Procedure Act, 1833, 3 & 4 Will. 4, c. 42, s. 3, however, restores the

(*k*) Bullen & L. Pl. (4th ed.), Part I., p. 250.

(*l*) *Grattan* v. *Wall*, 2 I. R. Com. L. 484, Exch.

(*m*) See Chap. V., Sect. 22, ante.

(*n*) *Delaney* v. *Fox*, 2 C. B., N. S. 768, and other cases, Chap. V., Sect. 22, ante.

(*o*) *Carrick* v. *Blagrove*, 1 B. & B. 531; *Weld* v. *Baxter*, 11 Exch. 816; 1 H. & N. 568; 26 L. J., Ex. 112; *Dollen* v. *Batt*, 4 C. B., N. S. 76; *Cuthbertson* v. *Irving*, 4 H. & N. 742; 6 Id. 135; 1 Wms. Saund. 233 a; 2 Bing. N. C. 420, n. (2).

(*p*) *Dalston* v. *Reeve*, 1 Ld. Raym. 77; *Walker's case*, 3 Co. R. 22 b; *Morrison* v. *Chadwick*, 7 C. B. 266; 13 L. J., C. P. 189.

(*q*) *Dunn* v. *Di Nuovo*, 3 M. & W. 105; 3 Sc. N. R. 487.

(*r*) *Upton* v. *Townend*, 17 C. B. 30, 64; 25 L. J., C. P. 44.

(*s*) *Cuthbertson* v. *Irving*, supra; *Jordan* v. *Twells*, Cas. temp. Hard. 172; see, too, 1 Wms. Saund. (ed. 1871) 208, n. (2); *Hill* v. *Saunders*, 4 B. & C. 529; 28 R. R. 375.

(*t*) *Brownlow* v. *Hewley*, 1 Ld. Raym. 83; *Hume* v. *Peploe*, 8 East, 168; 9 R. R. 399; *Poole* v. *Tunbridge*, 2 M. & W. 223; *Dobie* v. *Larkin*, 10 Exch. 776.

(*u*) *Aldridge* v. *Howard*, 4 M. & G. 921.

(*x*) Judicature Act, 1873, sect. 24.

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Defence of Statute of Limitations —*contd.*

personal remedy against the debtor on the covenant (*y*). Therefore, an action on a covenant for rent may be brought within twenty years, and is not limited to six years (*z*).

It is now well established that so long as the relation of landlord and tenant subsists as a legal relation the landlord's right to rent is not barred by non-payment of rent for any length of time (*a*), although there be a limit on the amount of arrears recoverable.

Defence of illegality.

Any illegality in the contract will be an answer to the action, as, for instance, that the premises were knowingly let contrary to the Public Health Act, or for the purpose of carrying on a trade prohibited by statute (*b*), or for a brothel (*c*), or for purposes of prostitution (*d*), or for blasphemous lectures (*e*).

Interest.

Interest may be recovered on rent due on a fixed day as damages (*f*).

Specialty Debt ranks with Simple Contract Debts.

The importance formerly attaching to debts due under covenant, by reason of their priority over simple contract debts, in ranking against the assets of deceased persons, has been put an end to as regards the estates of all persons dying after the 1st of January, 1870, by the Administration of Estates Act, 1869, 32 & 33 Vict. c. 46, popularly called "Hinde Palmer's Act."

## SECT. 2.—*Action on Simple Contract for Rent.*

Where the rent is payable under an express contract to pay it, but not under seal, the principles governing ordinary actions for the recovery of money under a simple contract will apply, as will most of the rules already noticed in reference to covenants to pay rent, except in so far as they are peculiar to matters of specialty.

Limitation of Time.

But it must be particularly noticed that by the effect of the Limitation Act, 1623, 21 Jac. 1, c. 16, no rent under a simple contract promise to pay it can be recovered except within six years next after it has become due or has been acknowledged in writing.

Defence of Satisfaction by Distress.

It is undoubtedly a good defence that the landlord has distrained, and from the distress has *satisfied* his claim for rent (*g*).

A mere oral agreement to reduce the rent reserved will not create a new demise, and the full rent will still be recoverable (*h*).

(*y*) *Hunter* v. *Nockold*, 1 Mac. & Gord. 640; 1 Hall & Tw. 644; *Humfrey* v. *Gery*, 7 C. B. 567.

(*z*) *Paget* v. *Foley*, 2 Bing. N. C. 679; *Strachan* v. *Thomas*, 12 A. & E. 536; *Manning* v. *Phelps*, 10 Exch. 59.

(*a*) *Archbold* v. *Scully*, 9 H. L. Cas. 360; 7 Jur., N. S. 1169; see, too, *Re Turner*, 11 Irish Ch. Rep. 304.

(*b*) *Gaslight Co.* v. *Turner*, 6 Bing. N. C. 324; *Flight* v. *Clarke*, 13 M. & W. 155.

(*c*) *Smith* v. *White*, L. R., 1 Eq. 626.

(*d*) *Pearce* v. *Brooks*, L. R., 1 Ex. 213; 4 H. & C. 358; 35 L. J., Ex. 134.

(*e*) *Coran* v. *Milbourn*, L. R., 2 Ex. 230; 36 L. J., Ex. 124.

(*f*) See *Skerry* v. *Preston*, 2 Chit. R. 245; 23 R. R. 747; 3 & 4 Will. 4, c. 42, s. 28.

(*g*) *Lear* v. *Edmonds*, 1 B. & Ald. 157; 18 R. R. 448; *Lees* v. *Wright*, 1 D. & R. 391; see also *Efford* v. *Burgess*, 1 Moo. & R. 23.

(*h*) *Crowley* v. *Vitty*, 7 Exch. 319; 21 L. J., Ex. 135; see *Kelly* v. *Patterson*, L. R., 9 C. P. 681.

## Sect. 3.—*Implied Contract for Rent.*



An action may also be maintained for the recovery of rent where there is no express contract to pay it, but the law will imply such a contract from some privity either of contract or of estate between the parties in relation to the subject-matter of the demise (*i*), and it is immaterial whether, if there be a demise, it be by deed, written contract not under seal, or parol only. It will be convenient in treating of this implied contract to distinguish between that which arises where there has been an actual demise in some form, and that which arises from use and occupation only, as in the latter case it is not strictly rent which is recovered, and the subject therefore is best treated separately.

Any words in a demise which are sufficient to create a privity of contract between the parties will enable the landlord to maintain an action on an implied contract to pay the rent named, as, for example, where the words "yielding and paying" so much occur (*k*), and as between lessor and lessee an action can be maintained before any entry (*l*). The rules with regard to the necessity of setting out the titles of the parties (*m*) and other matters in the pleadings will be the same as in an action for rent due under a covenant. The limitation on actions on a contract implied from the demise will be twenty or six years according as the demise is under seal or not (*n*).

(*i*) *Ward* v. *Lumley*, 5 H. & N. 87, 656; 29 L. J., Ex. 322.

(*k*) See *Bowen* v. *Hughes*, 13 C. B. 765; and see ante, Chap. IV., Sect. 5, and Chap. IX., Sect. 2.

(*l*) *Bellasis* v. *Burbrick*, 1 Salk. 209; 1 Ld. Raym. 170; *Bull* v. *Sibbs*, 8 T. R. 327; and per Willes, J., in *Smith* v. *Scott*, 6 C. B., N. S. 781.

(*m*) Ante, 566.

(*n*) Civil Procedure Act, 1833, 3 & 4 Will. 4, c. 42, s. 3; Limitation Act, 1623, 21 Jac. 1, c. 16.

# CHAPTER XIV.

## COMPENSATION FOR USE AND OCCUPATION.


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### Sect. 1.—*What it is, and when it arises.*

Definition.

We have now to consider the case of a relation of landlord and tenant existing without any arrangement at all for the payment of rent properly so called, and the case in which the law implies from the conduct of the parties a promise to compensate the landlord for his loss by reason of the tenant's occupation of his premises. The action which can in such case be maintained is not to recover rent, but for damages due on an implied agreement to pay for the use of the landlord's property (*a*), and arises rather out of what may be called a quasi-tenancy than from the strict relation of landlord and tenant. To quote the words of Lord Ellenborough in *The Dean and Chapter of Rochester* v. *Pierce* (*b*), "The action for use and occupation does not necessarily suppose any demise; it is enough that the defendant used and occupied the premises by the permission of the plaintiff." This form of action is at common law admissible where there has been an actual demise (*c*), but by virtue of the Distress for Rent Act, 1737, 11 Geo. 2, c. 19, s. 14, the proof at the trial of a demise does not nonsuit the plaintiff, unless it be by deed (*d*), the rent reserved being used as a measure of the *quantum* of damages payable to the plaintiff (*e*); and now the *form* of action is of little importance, especially as the powers of amendment at all stages of an action are now very large (*f*). It is, however, of importance to consider in what cases this compensation is payable when there is no contract of demise. It has been not uncommonly said that an action for use and occupation is always founded on some contract or

May be recovered, though special Contract.

(*a*) See *Smith* v. *Eldridge*, 15 C. B. 236; *Smith* v. *Twoart*, 2 M. & G. 841.

(*b*) *Rochester* (*Dean*) v. *Pierce*, 1 Camp. 466.

(*c*) See per Bramwell, B., in *Churchward* v. *Ford*, 2 H. & N. 446; see, too, *Reade* v. *Johnson*, Cro. Eliz. 242; *Clerk* v. *Polady*, Id. 809.

(*d*) See also *Dungay* v. *Angove*, 2 Ves. 307; 2 R. R. 217.

(*e*) See 6 A. & E. 839, n. (*a*).

(*f*) R. S. C. Ord. XXVIII. See *Lord Hanmer* v. *Flight*, 24 W. R. 346 (C. P.).

promise, express or implied (*g*), but this is not strictly correct, as all that the law says is, that the proof of an express contract of demise is not to put an end to an action for use and occupation. It may be more correct to say that the defendant must have held or occupied the premises as tenant thereof to the plaintiff, or by his permission or sufferance (*h*). In the absence of an express lease or agreement for a lease at a fixed rent, where the premises have been used or occupied by the defendant by the permission or sufferance of the plaintiff, the law will imply a contract or promise by the defendant to pay to the plaintiff a reasonable sum for such use and occupation (*i*). This is so notwithstanding there is a lease in writing containing a condition precedent which has not been performed by the plaintiff (*k*).

Not strictly founded on Contract proper.

Although not properly based on a demise, the claim for this compensation may be based on a mere agreement for a lease, coupled with proof of possession thereunder (*l*), notwithstanding such agreement be under seal; for, as was pointed out in *Elliott* v. *Rogers* (*m*), the tenancy is created by the entry with the plaintiff's permission, and not by the deed (*m*). The Distress for Rent Act, 1737, 11 Geo. 2, c. 19, s. 14, already referred to, is at first sight somewhat ambiguous. The words of the section are as follows: "To obviate some difficulties that many times occur in the recovery of rents where the demises are *not by deed*, be it enacted that it shall and may be lawful to and for the landlord or landlords, where the agreement is *not by deed*, to recover *a reasonable satisfaction* for the lands, tenements or hereditaments *held or occupied* by the defendant or defendants, in an action *on the case*, for the use and occupation of what was *so held or enjoyed;* and if in evidence on the trial of such action any parol demise or any agreement (not being by deed) whereon a certain rent was reserved shall appear, the plaintiff in such action shall not therefore be nonsuited, but may make use thereof as an evidence of the *quantum* of the damages to be recovered." It is clear after the decision in *Elliott* v. *Rogers*, that "agreement" here must be read as equivalent to "instrument of demise," and not to an agreement for a demise as the term would

11 Geo. 2, c. 19, s. 14. Plaintiff not to be nonsuited although Special Contract appear.

(*g*) See *Birch* v. *Wright*, 1 T. R. 378, 387; 1 R. R. 223; see, too, the judgment in *Beverley* v. *Lincoln Gaslight and Coke Co.*, 6 A. & E. 829, p. 839, n.; and *Gibson* v. *Kirk*, 1 Q. B. 850. 855; *Churchward* v. *Ford*, 2 H. & N. 446; 26 L. J., Ex. 354.

(*h*) See *Marquis of Camden* v. *Batterbury*, 5 C. B., N. S. 808; 7 Id. 864; 28 L. J., C. P. 335; *Levi* v. *Lewis*, 6 C. B., N. S. 766; 9 Id. 872.

(*i*) *Hellier* v. *Silleox*, 19 L. J., Q. B. 295, explained in *Churchward* v. *Ford*, 2 H. & N. 446, 449, 450; see also *Holford* v. *Hatch*, 1 Dougl. 183; *Marwood* v. *Waters*, 13 C. B. 280; *Hall* v. *Burgess*, 5 B. & C. 332.

(*k*) *Smith* v. *Eldridge*, 15 C. B. 236; *Smith* v. *Tweart*, 2 M. & G. 841.

(*l*) See, for example, *Hickman* v. *Machin*, 4 H. & N. 716.

(*m*) *Elliott* v. *Rogers*, 4 Esp. 59; see, too, *Bannister* v. *Usborne*, Peake Ev. 242.

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now be used. A landlord will also be entitled to sue for compensation for the use and occupation of his property where a lease is not executed by the lessor, but the lessee enters and enjoys the property during the term, as there is in such a case in truth no demise (*n*). Even a lease under seal, delivered formally as a deed but not intended to operate as such until the tenant pays 100*l.* for fixtures, &c., or performs some other condition, will be considered only as an escrow, and will not prevent an action for use and occupation (*o*).

Action not maintainable where Defendant occupied as Tenant to another Person, or as Wrongdoer.

To entitle a man to this compensation there must have been some tenancy, express or implied, between the plaintiff and the defendant during the period in respect whereof the compensation is claimed, and it is not enough that the plaintiff was really entitled to the property (*p*). For example, where the defendant occupied as tenant to another person, from whom he obtained the possession (*q*), or as a mere wrongdoer or wilful trespasser (*r*), no such action could be maintained.

Nor before Entry by the Lessee or Assignee.

A lessee who has never entered to take possession as tenant (*s*), or an assignee of the term who has never entered to take possession as such, will not be liable to an action for use and occupation (*t*), as the tenant in such cases has a mere interesse termini. Entry, however, by one of several persons jointly entitled will suffice to render all liable (*u*). So a husband is not liable to an action for use and occupation to pay for the enjoyment of a house by his wife *dum sola;* such occupation not having been by him, nor at his request (*x*).

When the Title is in dispute.

It has once been held, that an action for use and occupation will not lie where the title is in dispute, ejectment being the proper remedy. This was decided in a case before the Court of King's Bench by Lord Kenyon, C.J., wherein the action was brought against the tenant for rent, while the heir at law and a devisee were contesting their right to the premises (*y*). But it is to be observed that the ejectment could not be maintained in such case, either by the heir or the devisee, because the outstanding term in the defendant would afford a complete defence to such action, and it may be now

(*n*) See *Pitman* v. *Woodbury*, 3 Exch. 4; *Swatman* v. *Ambler*, 8 Exch. 72; *How* v. *Greek*, 3 H. & C. 391; 34 L. J., Ex. 4.

(*o*) *Gudgeon* v. *Bessett*, 6 E. & B. 986; *Millership* v. *Brookes*, 5 H. & N. 797.

(*p*) *Marquis of Camden* v. *Batterbury*, supra (*h*) and infra (*q*).

(*q*) *Cripps* v. *Blank*, 9 D. & R. 480; *Marquis of Camden* v. *Batterbury*, 5 C. B., N. S. 808: Id. 864; 28 L. J., C. P. 335; *Churchward* v. *Ford*, 2 H. & N. 446.

(*r*) *Tew* v. *Jones*, 13 M. & W. 12; *Turner* v. *Cameron's Coalbrook Steam Coal Co.*, 5 Exch. 932; *Churchward* v. *Ford*, supra. See, too, *Levi* v. *Lewis*, 6 C. B., N. S. 706; 9 Id. 872.

(*s*) *Edge* v. *Strafford*, 1 C. & J. 391, 398; *Lowe* v. *Ross*, 5 Exch. 553. See, also, *Towne* v. *D'Heinrich*, 13 C. B. 892; 22 L. J., C. P. 219; *Woolley* v. *Watling*, 7 C. & P. 610; *Jones* v. *Reynolds*, Id. 335 4 A. & E. 805.

(*t*) *How* v. *Kennett*, 3 A. & E. 659 *Lowe* v. *Ross*, 5 Exch. 556; *Jones* v. *Reynolds*, 7 C. & P. 335.

(*u*) *Electric Telegraph Co.* v. *Moore*, 2 F. & F. 363. See, too, *Glen* v. *Dungey and Another*, 4 Ex. 61.

(*x*) *Richardson* v. *Hall*, 1 Brod. & B. 50.

(*y*) MS. Hil. T. 27 Geo. 3.

taken to be the law that the proper remedy is by distress (*z*), or by action for rent, or for use and occupation (according to the nature of the demise) for the rent (*a*). Indeed it not unfrequently happens in actions for use and occupation that the plaintiff's title to the rent, as reversioner or otherwise, is the very point to be decided (*b*).

## Sect. 2.—*By whom an Action is maintainable.*

By "the Landlord or Landlords."

The Distress for Rent Act, 1737, 11 Geo. 2, c. 19, s. 14, authorized "the landlord or landlords" to maintain an action on the case for use and occupation (*c*), and this agrees with the common law in actions of debt, and now applies to all actions for use and occupation. In order, therefore, to recover this compensation the plaintiff must show that he is landlord of the defendant in respect of the premises held or occupied by him. It is not sufficient that the plaintiff has a good legal title to the property which would enable him to maintain ejectment; but some possession or enjoyment, such as to amount to a letting at least by implication, must be proved (*d*). Therefore the owner of land cannot recover this compensation against a mere wrongful trespasser (*e*), nor against a person who occupied as tenant to another person from whom he obtained the possession (*e*). But any tenancy, or agreement for a tenancy, as between the plaintiff and the defendant (coupled with entry or possession thereunder) is sufficient, ex. gr. a mere tenancy at will (*f*), or even a tenancy on sufferance (*g*). But a mortgagor who remains in possession by the permission or sufferance of the mortgagee is not a tenant to the mortgagee (even at will or at sufferance), so as to render him liable to an action for use and occupation (*h*). A mere agreement for a lease, whether oral or in writing, coupled with proof of an entry thereunder by the defendant, is sufficient (*i*), notwithstanding it may be void and inoperative as a lease in regard to the term of years therein mentioned (*k*).

Any Tenancy sufficient.

(*z*) *Lloyd* v. *Davies*, 2 Exch. 103; *Moss* v. *Gallimore*, 1 Doug. 279; 1 Sm. L. C.

(*a*) See, for instance, *Rawson* v. *Eicke*, 7 A. & E. 451; *Voller* v. *Carter*, 4 E. & B. 173.

(*b*) See *Hickman* v. *Machin*, 4 H. & N. 716; *Fursdon* v. *Clogg*, 10 M. & W. 572; *Cornish* v. *Searell*, 8 B. & C. 471; 32 R. R. 445; *Phillips* v. *Pearce*, 5 B. & C. 433; 29 R. R. 284; *Steele* v. *Mart*, 4 B. & C. 272; 28 R. R. 256; *Rawson* v. *Eicke*, 7 A. & E. 451; *Selby* v. *Browne*, 7 Q. B. 620.

(*c*) Ante, 571.

(*d*) *Cripps* v. *Blank*, 9 D. & R. 480; *Marquis of Camden* v. *Batterbury*, 5 C. B., N. S., 808; 7 Id. 864; 28 L. J., C. P. 335; *Turner* v. *Cameron's Coalbrook Steam Coal Co.*, 5 Exch. 932; *Churchward* v. *Ford*, 2 H. & N. 446.

(*e*) *Tew* v. *Jones*, 13 M. & W. 12; *Turner* v. *Cameron's Coalbrook Steam Coal Co.*, and *Churchward* v. *Ford*, supra.

(*f*) *Howard* v. *Shaw*, 8 M. & W. 118.

(*g*) *Alford* v. *Vickery*, 1 Car. & M. 280; per Parke, J., *Jenner* v. *Clegg*, 1 Moo. & Rob. 213; *Bayley* v. *Bradley*, 5 C. B. 396.

(*h*) *Moss* v. *Gallimore*, 1 Doug. 283; 1 Smith, L. C.; *Trent* v. *Hunt*, 9 Exch. 14, 22; *Jolly* v. *Arbuthnot*, 28 L. J., Ch. 547, 550.

(*i*) See *Walsh* v. *Lonsdale*, ante, 91.

(*k*) *De Medina* v. *Polson*, Holt, N. P. C. 47.

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A surviving lessor may sue in his own name for use and occupation had subsequent to the death of his co-lessor (*l*), and to recover any rent which became due in the lifetime of his co-lessor he may sue as survivor (*m*).

By a surviving Lessor.

By Lessee who has sub-let for his whole Term.

We have seen that rent is strictly incident to a reversion, but where a tenant has sub-let at a rent for his whole term, and therefore has in effect, though not in words, assigned his term, he may still recover the amount agreed as rent from the sub-tenant as a compensation for the use and occupation of the premises (*n*), as may also his legal personal representative (*o*). And this was extended in *Levi* v. *Lewis* (*p*) to a case where the tenant sub-letting was himself only liable to his landlord for use and occupation. In that case a lessee had sub-let for his whole term, and upon the expiration of both demises, the sub-lessee applied to the superior landlord to become his tenant, but such landlord declined and referred him to the lessee as being his tenant; and the sub-lessee continued to occupy as before. It was held, in an action by lessee against sub-tenant for the subsequent use and occupation, that there was evidence to go to the jury from which they might infer an agreement by the defendant to pay the plaintiff for such use and occupation; especially as after the commencement of such action the superior landlord had received rent from the plaintiff for the occupation subsequent to the expiration of his lease (*p*). And a similar decision was come to in the case of *Green* v. *London Cemetery Co.*(*q*). There, a person having an agreement for a lease to himself, sub-let part of the premises, and then agreed that the lease should be granted to another person, instead of himself, which was accordingly done: it was held, that the substituted lessee might maintain an action for use and occupation against the sub-tenant for the current quarter's rent which afterwards became due.

By substituted Lessee.

Effect of subsequent Mortgage by Landlord.

The right to compensation will not be defeated by a subsequent mortgage of the landlord's interest (*r*), nor by the existence of a previous mortgage, unless the mortgagee has compelled the tenant under threat of ejectment to pay to him the sum which would have been due (*s*), in which case, however, he still remains tenant to the mortgagor (*t*).

Effect of Landlord having ejected.

If a landlord has taken proceedings to eject his tenant and recovered judgment, the after attornment creates a new relation of landlord

(*l*) *Wheatley* v. *Boyd*, 7 Exch. 20.

(*m*) *Israel* v. *Simmons*, 2 Stark. R. 356; see also *Cox* v. *Knight*, 18 C. B. 645; 25 L. J., C. P. 314.

(*n*) *Baker* v. *Gostling*, 1 Bing. N. C. 19; *Pollock* v. *Stacey*, 9 Q. B. 1033: *Levi* v. *Lewis*, 6 C. B., N. S. 766: and see *Beardmore* v. *Wilson*, L. R., 4 C. P. 57, and 269, ante.

(*o*) *Baker* v. *Gostling*, supra.

(*p*) *Levi* v. *Lewis*, 6 C. B., N. S. 766; 28 L. J., C. P. 304; 9 C. B., N. S. 872.

(*q*) *Green* v. *London Cemetery Co.*, 9 C. & P. 6.

(*r*) See ante, 54.

(*s*) Id.

(*t*) See *Wheeler* v. *Branscombe*, 5 Q. B. 373.

and tenant between the parties, and the landlord will thenceforth be entitled to compensation for the use and occupation of the premises (*u*).

Where a corporation aggregate has demised by parol or by instrument not under seal, it cannot recover rent on the demise, as it has no power to demise except by deed; but if the tenant has entered into possession of the property, the corporation may recover compensation for the use and occupation of the same (*x*).

Corporations aggregate.

An incumbent whose living has been duly sequestered cannot recover anything for the subsequent use and occupation of the glebe lands, because such occupation is not by his permission or sufferance, but by that of the bishop (*y*). The sequestrator holds merely as bailiff of the bishop (*z*).

Incumbent.

Churchwardens and overseers may recover compensation for the use and occupation of parish property demised by their predecessors, but vested in them as a quasi body corporate by 59 Geo. 3, c. 12, s. 17 (*a*), unless the property be vested in trustees (*b*); and this will apply to all the buildings, lands and hereditaments *belonging to the parish*, not merely where the rents and profits are applicable to the relief of the poor, but where they are applicable to those purposes for which church rates are levied (*c*). It does not extend to copyholds (*d*).

By Churchwardens and Overseers.

If the occupation took place partly in the time of the plaintiff's predecessors in office, and by their permission, the statement of claim should be framed accordingly (*e*).

Prior to the Judicature Act, it was clear that a *cestui que trust* who did not actually demise, or let the tenant into possession, could not maintain an action for use and occupation, as no tenancy would be *implied* under a party who has not the legal estate (*f*).

By Trustees or Cestui que Trust.

Now, however, when all equitable interests are recognized, a cestui que trust could sue, but it is not likely that it is a course that will be often followed, as it is specially provided (*g*) that trustees represent their beneficiaries.

If the original lessor be dead, but the tenant has recognized the title of a cestui que trust named in his will, and paid rent to him, the tenant cannot afterwards dispute the title of the cestui que trust,

By Cestui que Trust.

(*u*) *Newport* v. *Hardy*, 2 D. & L. 291.
(*x*) Per Lord Ellenborough, in *Dean and C. of Westminster* v. *Pierce*, 1 Camp. 466; 1 R. R. 235; and see *Ecclesiastical Commissioners* v. *Merral*, L. R., 4 Ex. 162.
(*y*) *Powell* v. *Hibbert*, 15 Q. B. 129.
(*z*) *Harding* v. *Hall*, 10 M. & W. 42.
(*a*) *Ward* v. *Clarke*, 12 M. & W. 747; 1 D. & L. 1027; see also *Hardon* v. *Hesketh*, 4 H. & N. 175; 28 L. J., Ex. 137.
(*b*) See *Doe* d. *Jackson* v. *Hiley*, 10 B. & C. 885; explained in *Allason* v. *Stark*, 2 A. & E. 255; see, too, *Cantrell* v. *The Windsor Union*, 4 Bing. N. C. 348.
(*c*) *Doe* d. *Jackson* v. *Hiley*, supra.
(*d*) *Doe* d. *Bailey* v. *Foster*, 3 C. B. 215; *In re Paddington Charities*, 8 Sim. 629.
(*e*) *Hardon* v. *Hesketh*, 4 H. & N. 175.
(*f*) *Howe* v. *Scarrott*, and *Sharp* v. *Scarrott*, 4 H. & N. 723; 29 L. J., Ex. 275.
(*g*) R. S. C., Ord. XVI., Rule 8.

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supposing the attornment not to have been procured by any fraud (*h*).

By an Auctioneer.

An auctioneer cannot generally maintain an action for the use and occupation of lands let by auction on behalf of the owner, but the action should be brought in the name of the owner (*i*), although if a contract of letting be made with him individually, he may sue for the rent as agreed (*k*).

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SECT. 3.—*Against whom Action of Use and Occupation maintainable.*

Lessee who has ceased to occupy during the Term.

The words of the Distress for Rent Act, 1737, 11 Geo. 2, c. 19, s. 14, are in the alternative "held *or* occupied"—"held *or* enjoyed" (*l*). This has frequently been specially noticed (*m*). If, therefore, the lessee has once *entered to take possession as tenant*, and the term has commenced, he will be deemed "to hold" during the continuance of the term, and until it be *legally determined* by effluxion of time, notice to quit, surrender, merger or otherwise, whether he continue "to occupy" by himself or his sub-tenants, or not (*n*). The principle is, that a *constructive holding or occupation as tenant is sufficient after entry*, without actual occupation, or enjoyment (*o*). For example, where a tenant from year to year under a parol demise assigned all his term and interest, but the landlord did not accept such assignee as his tenant: held, that the tenant might be sued for use and occupation (*p*). But it would be a misdirection to tell the jury that a constructive occupation is sufficient, before an actual entry to take possession, and without explaining the meaning of a "constructive occupation" (*q*).

Lessee who has sub-let.

In accordance therefore with this principle of constructive occupation, it has been decided that a lessee who has sub-let the demised premises may be sued for use and occupation, for he holds the premises as tenant, and occupies them by his sub-tenant (*r*). In such case the sub-tenant is not liable to the original lessor (*s*). But if the landlord, with the consent of the tenant, accept the sub-tenant, or a new tenant (*t*), as his tenant, and receive rent from him

(*h*) *Dolby* v. *Iles*, 11 A. & E. 335; *Doe* d. *Marlow* v. *Wiggins*, 4 Q. B. 367.
(*i*) *Evans* v. *Evans*, 3 A. & E. 132.
(*k*) *Fisher* v. *Marsh*, 6 B. & S. 411; 34 L. J., Q. B. 177; 12 L. T. 604; 13 W. R. 834.
(*l*) Ante, 571.
(*m*) *Pinero* v. *Judson*, 6 Bing. 206, 211; 8 L. J. C. P. 19; 31 R. R. 388; *Smith* v. *Twoart*, 2 M. & G. 842.
(*n*) See *Bessell* v. *Landsberg*, 7 Q. B. 638; *Cannan* v. *Hartley*, 9 C. B. 634; 19 L. J., C. P. 323; *Pollock* v. *Stacey*, 9 Q. B. 1033.
(*o*) *Pinero* v. *Judson*, 6 Bing. 206, 211; 8 L. J., C. P. 19; 31 R. R. 388; *Smith* v. *Twoart*, 2 M. & G. 841; *Atkins* v. *Humphrey*, 2 C. B. 654; 3 D. & L. 612; *Pollock* v. *Stacey*, 9 Q. B. 1033; *Cannan* v. *Hartley*, supra.
(*p*) *Shine* v. *Dillon*, 1 Ir. Com. L. R. 277; 15 W. R. 847.
(*q*) *Towne* v. *D'Heinrich*, 13 C. B. 892; 22 L. J., C. P. 219.
(*r*) See *Waring* v. *King*, 8 M. & W. 571.
(*s*) See *Holford* v. *Hatch*, 1 Doug. 183.
(*t*) *Walls* v. *Atcheson*, 3 Bing. 462; *Hall* v. *Burgess*, 5 B. & C. 332.

or distrain upon him for rent due from him, he cannot afterwards sue the original tenant for use and occupation (*u*). If the landlord merely consent to accept of the sub-tenant without exonerating the original tenant, it has been held by Erle, J., that that is not sufficient (*x*).

Lessee who holds over.

A lessee, or his assignee, who holds over after his term or tenancy has expired or been duly determined, is liable for subsequent use and occupation, provided the landlord has acted so as to raise a presumption of a continued tenancy, and not an intention to treat the tenant as a mere trespasser (*y*). But if a party takes premises for a certain time and holds over, he does not thereby necessarily become tenant from year to year, unless something occurs to show the existence of such new contract (*z*). For instance, where a tenancy from year to year has been determined by a regular notice to quit, the mere accidental detention of the key by the tenant (who has quitted the premises and removed his goods) for two days beyond the expiration of the term, does not amount to any evidence of use and occupation, so as to make him liable for another quarter (*a*). It is a question for the jury whether a mere holding over, or the creation of a new tenancy between the parties, was intended (*b*).

Tenant liable for holding over of Sub-tenant.

*Ibbs* v. *Richardson.*

It is the duty of a tenant on the expiration of his term to deliver up possession of the demised premises to his landlord, free from incumbrances created by the tenant (*c*). Therefore, if any sub-tenant refuse to quit possession at the end of the term, the tenant will continue liable for use and occupation so long as his sub-tenant holds over, but no longer (*d*). When premises are let for a certain term to A. and B., and A. holds over after the expiration of the term, with B.'s assent, both are liable in an action for use and occupation so long as A. continues to occupy, but no longer (*e*) ; but if either of them holds over without the other's assent, the latter will not be liable (*f*). It may be well to call attention to one case, that of *Waring* v. *King* (*g*), in which the decision was based on the ground that the conduct of the defendants amounted to an exercise of the option (given them by their lease) to continue tenants for a longer period than the original term for which the property was leased. In that case the defendants took certain premises of the plaintiff for

(*u*) *Thomas* v. *Cook*, 2 B. & A. 119 ; 20 R. R. 374 ; and see *Harding* v. *Crethorn*, 1 Esp. 57 ; 5 R. R. 719.
(*x*) *Dawson* v. *Lamb*, 3 C. & K. 269.
(*y*) *Harding* v. *Crethorn*, 1 Esp. 57 ; 5 R. R. 719 ; *Bayley* v. *Bondley*, 5 C. B. 396 ; *Bishop* v. *Howard*, 2 B. & C. 100 ; 1 L. J. K. B. 243 ; 26 R. R. 291 ; *Davis* v. *Morgan*, 4 B. & C. 8 ; 28 R. R. 193 ; *Waring* v. *King*, 8 M. & W. 571 ; and see *Hellier* v. *Silleox*, 19 L. J., Q. B. 295.
(*z*) *Waring* v. *King*, 8 M. & W. 571.
(*a*) *Gray* v. *Bompas*, 11 C. B., N. S. 520 ; post, Chap. XX.
(*b*) Per Lord Denman, *Jones* v. *Shears*, 4 A. & E. 832.
(*c*) Per Lord Kenyon, in *Harding* v. *Crethorn*, 1 Esp. 57 ; 5 R. R. 719 ; and see post, Chap. XX.
(*d*) *Ibbs* v. *Richardson*, 9 A. & E. 849.
(*e*) *Christy* v. *Tancred*, 7 M. & W. 127 ; 9 Id. 438 ; 12 Id. 316, *S. C.*
(*f*) *Draper* v. *Crofts*, 15 M. & W. 166.
(*g*) *Waring* v. *King*, 8 M. & W. 571.

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nine months, at a certain rent, with the option at the end of that time of taking a lease for seven, fourteen, or twenty-one years; but before the expiration of the nine months the defendants let the premises to a company for six months, who actually occupied them for that period: held, that, at the end of a year from the expiration of the nine months, the defendants were liable to the plaintiff in an action for use and occupation for a year's rent.

Lessee, after an Ejectment or Eviction, not liable.

By issuing and serving a writ in ejectment, the claimant elects to treat the defendants therein named as trespassers, on and from the day mentioned in the writ: and he cannot sue them as tenants for use and occupation subsequent to that day (*h*). But the rent which became due *before* the day mentioned in the writ of ejectment may be recovered in an action for use and occupation (where the demise was not by deed), notwithstanding the proceedings in ejectment (*i*). The remedy for the occupation, &c. on and subsequent to the day mentioned in the writ, is by an action for mesne profits, &c. (*k*), or for double value under 4 Geo. 2, c. 28 (*l*), but not for double rent under 11 Geo. 2, c. 19, s. 18 (*m*). A lessee who has been turned out of possession by the landlord is not liable for subsequent use and occupation (*n*); but where the landlord of apartments forcibly ejected an offensive man left in possession by the tenant, it was held, that it was a question for the jury whether it was done for the purpose of depriving the tenant of his possession, or merely to get rid of the offensive person who had misconducted himself (*o*).

Effect of eviction from part.

Eviction from part is in law eviction from the whole of the demised premises, so as to operate as a suspension of the whole rent while the eviction lasts; nor is the tenant if he continue in possession of the residue liable for use and occupation in respect of such residue (*p*).

A lessee, against whom a judgment in ejectment has been obtained by a third person, and who has been turned out of possession under a writ of habere facias possessionem, or who, to avoid being so turned out, has attorned and become tenant to the claimant in the ejectment, is not liable to his lessor for use and occupation sub-

(*h*) *Birch* v. *Wright*, 1 T. R. 378; 1 R. R. 223; *Jones* v. *Carter*, 15 M. & W. 718; *Franklin* v. *Carter*, 1 C. B. 750; 3 D. & L. 213.

(*i*) *Birch* v. *Wright*, 1 T. R. 378; 1 R. R. 223.

(*k*) Id. 378, 387; and see Rules of the Supreme Court, App. A., Part II., sect. 4.

(*l*) *Soulsby* v. *Neving*, 9 East, 310; 9 R. R. 567; post, Chap. XX.

(*m*) *Soulsby* v. *Neving*, supra.

(*n*) *Prentice* v. *Elliott*, 5 M. & W. 606; 7 Dowl. 819; *Selby* v. *Browne*, 7 Q. B. 620.

(*o*) *Henderson* v. *Mears*, 1 F. & F. 636; 28 L. J., Q. B. 305.

(*p*) *Upton* v. *Townend*, 17 C. B. 65, citing *Smith* v. *Raleigh*, 3 Camp. 513; 14 R. R. 829, where, however, the tenant gave up the keys. *Stokes* v. *Cooper*, cited in the note to *Smith* v. *Raleigh*, and relied on in former editions of this work for the tenant's continuing liability for a retained residue is, as pointed out in *Reeve* v. *Bird*, 1 C., M. & R. 36, and *Hutchinson* v. *Taylor*, L. T. N., 14th June, 1884, bad law.

sequent to such eviction or attornment, for the occupation is then by permission of the ejector and not of the original lessor (*q*).

When a new tenant has been substituted with the mutual consent of all parties, the landlord may sue such new tenant for his subsequent use and occupation (*r*). But unless such substituted tenancy has been created, or there has been an assignment of the lease, the landlord should sue the original tenant, and not another person who has entered into possession during the continuance of the lease (*s*). After paying the rent the original tenant will have a remedy over against his sub-tenant either for use and occupation or for money paid to his use (*t*).

Substituted Tenant.

Assignees of a void lease (not duly granted pursuant to a power) who have paid the rent reserved during the term therein expressed to be granted, and have subsequently held over, are liable to an action for use and occupation (*u*).

Assignee of Term.

The legal personal representatives of a deceased tenant are not liable personally as assignees of the term, unless they have entered as such to take possession of the demised premises, the purpose for which they have entered being a question of fact for the jury (*x*); and for all such use and occupation subsequent to the testator's or intestate's death, they must be charged personally and not in their representative capacity (*y*).

Executors or Administrators.

Further, the case differs from that of assignees, for an entry by one of several executors will not enure as an entry by all of them so as to render them jointly liable *de bonis propriis* in an action for use and occupation (*z*). When an executor who has entered is sued personally for use and occupation, he may show that his occupation was as executor, and that he entered in that character, and that he has no assets, and that the value of the land is not equal to the rent. If the land yields some profit, but less than the rent, he may tender before action such amount of profit, and plead the tender, or he may plead payment of the amount into court (*a*).

With regard to the liability of a trustee in bankruptcy, and the position of a bankrupt tenant, the question will be found discussed in an earlier chapter (*b*).

Trustee in Bankruptcy.

We have seen that corporations aggregate may recover compensation for the use and occupation of their property; they may also be

Corporations aggregate.

(*q*) *Newport* v. *Hardy*, 2 D. & L. 921.
(*r*) *Phipps* v. *Sculthorpe*, 1 B. & A. 50; *Dawson* v. *Lamb*, 3 C. & K. 269. But not the original tenant: *Laurance* v. *Faux*, 2 F. & F. 435.
(*s*) *Hyde* v. *Moakes*, 5 C. & P. 42.
(*t*) *Dawson* v. *Lamb*, 3 C. & K. 269.
(*u*) *Beale* v. *Sanders*, 3 Bing. N. C. 850.
(*x*) *Remnant* v. *Bremridge*, 8 Taunt. 191; 19 R. R. 495; *Kearsley* v. *Oxley*, 2 H. & C. 896.
(*y*) *Nixon* v. *Quinn*, 2 Ir. Com. L. R. 248.
(*z*) *Nation* v. *Tozer*, 1 C., M. & R. 172; cited 3 A. & E. 667.
(*a*) *Patten* v. *Reid*, 6 L. T. 281, Q. B.
(*b*) Ante Chap. VII., sect. 7, p. 286.

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liable for the same as tenants (*c*), where they have actually used and occupied land, for a corporate purpose, by the permission of the owner (*d*). But as they cannot bind themselves by an executory contract, not under their common seal, they will be liable for use and occupation during such period as they actually occupy, and not afterwards under any implied tenancy from year to year (*e*).

Churchwardens and Overseers.

Churchwardens and overseers, if in occupation of land not rented for parochial purposes alone (and therefore not protected by 59 Geo. 3, c. 12, s. 12), will be liable personally to pay for the same (*f*).

Intended Lessee.

We have seen that a person who has *entered into possession* under a mere agreement for a lease, which has never been granted, is liable to be sued for use and occupation (*g*); therefore, where the defendant in expectation of a lease by indenture, which he had agreed to take from the plaintiff, procured attornments from some of the tenants and received rents from others, it was held, that he was liable for use and occupation (*h*). Where the defendant was let into possession of premises provisionally, with a view to an agreement for occupying them, which he afterwards refused to sign, he was held liable to pay for the period of the occupation (*i*). But where the defendant entered under an agreement for a future lease, which it afterwards appeared the plaintiff was unable or unwilling to grant, the defendant was relieved from liability to an action for use and occupation, although he had received some of the rents from the sub-tenants (*k*).

Intended Purchaser

Where the vendee of an estate sold by auction or otherwise has been suffered to enter upon and hold the premises while the title was under investigation, and the contract has afterwards been determined for want of title, the vendor cannot, on these grounds only, recover for use and occupation, although the jury find that the occupation has been beneficial (*l*): or that he has received rent from the sub-tenants (*m*). But if the vendee retain possession *after the contract for purchase has gone off*, he will be liable for the subsequent use and occupation (*n*).

(*c*) *Beverley* v. *Lincoln Gaslight and Coke Co.*, 6 A. & E. 839, 843; and the right seems to have been assumed in *Green* v. *London Cemetery Co.*, 9 C. & P. 6.

(*d*) *Lowe* v. *London and North Western R. Co.*, 18 Q. B. 632; 21 L. J., Q. B. 361; *Markham* v. *Stanford*, 14 C. B., N. S. 380; Willes, J.

(*e*) *Finlay* v. *Bristol and Exeter R. Co.*, 7 Exch. 409; see, too, *Copper Miners' Co.* v. *Fox*, 16 Q. B 229.

(*f*) *Uthwatt* v. *Elkins*, 13 M. & W. 772; and see *Furnival* v. *Coombes*, 5 M. & G. 736.

(*g*) *Smith* v. *Eldridge*, 15 C. B. 236; *Dowes* v. *Dowling*, 31 L. T. 65.

(*h*) *Neale* v. *Swind*, 2 C. & J. 377.

(*i*) *Coggan* v. *Warwicker*, 3 C. & K. 40.

(*k*) *Rumball* v. *Wright*, 1 C. & P. 589.

(*l*) *Winterbottom* v. *Ingham*, 7 Q. B. 611; *Kirtland* v. *Pounsett*, 2 Taunt. 146; *Hearn* v. *Tomlin*, Peake, N. P. C. 192, 253; 3 R. R. 684; *Corrigan* v. *Woods*, 1 Ir. Com. L. R. 73; 15 W. R. 318.

(*m*) *Rumball* v. *Wright*, 1 C. & P. 589.

(*n*) *Howard* v. *Shaw*, 8 M. & W. 118.

The fact that the vendor remains in possession of part of the property after the execution of the conveyance, does not thereby make him a tenant to the purchaser (even at sufferance), nor in any way liable to him in action for use and occupation. The purchaser's remedy in such a case is by an action to recover possession of the land and mesne profits (*o*).

Vendor remaining in Possession not liable.

## Sect. 4.—*For what kind of Property the Action is maintainable.*

This right to recover compensation for use and occupation is not confined to land and houses, or the like, but will extend to any hereditament, corporeal or incorporeal: such, for example, as a fishery (*p*); a right of fishing with rod and line (*q*); a right of shooting (*r*); and of hunting (*s*); a mine with liberty to dig (*t*); a coal pit (*u*); a watercourse and weir (*x*); a way (*y*); tithes; a pew; seats in a Jewish synagogue (*z*); a seat in a house to view a procession; the saloon of a theatre with a right to supply refreshments (*a*); and furnished or unfurnished lodgings (*b*).

Compensation recoverable for Use and Occupation of Incorporeal Property.

## Sect. 5.—*Writ and Pleadings.*

Much of the learning with regard to actions for use and occupations, which under the former system of pleading was of great importance, has become obsolete since the Judicature Acts came into force in 1875. The old form of words is to some extent still preserved in the indorsement of writs; the Schedule to the Rules of the Supreme Court (*c*) giving the form, "the plaintiff's claim is £ for the use and occupation of a house." There is also a form given (*c*), "The plaintiff's claim is for £ for arrears of rent"; and the former will be the more correct indorsement where the money claimed is not strictly rent—*i.e.* is not due under any actual demise: but the writ may be amended by leave at any stage of the proceedings (*d*). As far, however, as the pleadings are concerned the law now requires them to be a statement of facts, and therefore the technical forms are no longer of importance, and it is

Form of Indorsement of Writ.

Pleadings.

(*o*) *Tew* v. *Jones*, 13 M. & W. 12.
(*p*) See the repealed C. L. P. Act, 1852, 15 & 16 Vict. c. 76, Schedule (B), Form 10.
(*q*) *Holford* v. *Pritchard*, 3 Exch. 793.
(*r*) *Thomas* v. *Fredericks*, 10 Q. B. 775.
(*s*) *Bird* v. *Higginson*, 2 A. & E. 696; 6 A. & E. 834.
(*t*) *Jones* v. *Reynolds*, 4 A. & E. 805; 7 C. & P. 335.
(*u*) *Lees* v. *Wright*, 1 D. & R. 391.
(*x*) *Davis* v. *Morgan*, 4 B. & C. 8; 28 R. R. 193.
(*y*) 2 Chit. Pl. (7th ed.), 39, 40, 41.
(*z*) *Israel* v. *Simmons*, 2 Stark. 356.
(*a*) *Drury Lane Theatre Co.* v. *Chapman*, 1 C. & K. 14.
(*b*) 2 Chit. Pl. 41, 42; *Cook* v. *Moylan*, 1 Exch. 67; 5 D. & L. 101; *Izon* v. *Gorton*, 5 Bing. N. C. 501.
(*c*) R. S. C. App. A., Part II., s. 2.
(*d*) R. S. C. Order XXVII., Rule II.

CH. XIV. s. 5. *Use and Occupation (Writ and Pleadings).*

enough if the statement of claim allege facts which show an entry and occupation and a relation of landlord and tenant between the parties.

The defendant will be in the same position as if there had been an actual demise as regards any right to set up that the plaintiff had no title when he the defendant entered, a defence which, as we have seen, is not open to him (*e*), though he may show that it has since come to an end (*f*).

Estoppel.

Thus if the defendant obtained possession of the premises from the plaintiff as tenant thereof to him, he is thereby estopped from disputing the plaintiff's right to dispose of such possession (*g*). The principle is, that the defendant, having had the use, occupation and enjoyment of the premises by the permission of the plaintiff, cannot deny the plaintiff's title to dispose of the possession during the period of such occupation as an answer to the claim for compensation (*h*). If the steward of a person not named says to another, "I let you into possession in the name of the landlord" (not mentioning the name); parol evidence is admissible to show who such landlord is, and the tenant who so obtained possession is estopped from denying such landlord's title (*i*). But in any such cases the defendant may show that after the demise, and before any part of the rent claimed became due, the plaintiff assigned his reversion (*k*); or that the plaintiff's title was defeasible, and was legally defeated after the demise and before the rent claimed became due (*l*). If the defendant obtained possession from A. B. as his tenant, and the plaintiff derives his title from A. B., the defendant is estopped from disputing the right of A. B. to dispose of such possession (*m*), and also from disputing A. B.'s right to assign the reversion (*n*); but the assignment itself may be disputed (*o*). If the defendant has expressly attorned to the plaintiff, he will thereby be estopped from disputing the plaintiff's title, unless such attornment be proved to have been obtained by fraud, or through some mistake of facts (*p*). Where a tenant was let into possession by A. and paid him rent, and afterwards A. agreed to grant a lease to B., who then received one quarter's rent from the tenant, but afterwards the

(*e*) *Lewis* v. *Willis*, 1 Wils. 314; *Curtis* v. *Spitty*, 1 Bing. N. C. 15.

(*f*) *Newport* v. *Hardy*, 2 D. & L. 921; see, too, *Boodle* v. *Campbell*, 7 M. & G. 386; *Selby* v. *Browne*, 7 Q. B. 620; *Hartshorne* v. *Watson*, 4 Bing. N. C. 178.

(*g*) *Fleming* v. *Gooding*, 10 Bing. 549; *Cooper* v. *Blandy*, 1 Bing. N. C. 45; *Cooke* v. *Loxley*, 5 T. R. 4; 2 R. R. 521.

(*h*) See *Agar* v. *Young*, Car. & M. 78.

(*i*) *Fleming* v. *Gooding*, 10 Bing. 549.

(*k*) *Harmer* v. *Bean*, 3 C. & K. 307.

(*l*) *Mountney* v. *Collier*, 1 E. & B. 630; 22 L. J., Q. B. 124; *Powell* v. *Hibbert*, 15 Q. B. 129; 19 L. J., Q. B. 347.

(*m*) *Palmer* v. *Ekins*, 2 Ld. Raym. 1550; 2 Stra. 817; *Bringloe* v. *Goodson*, 4 Bing. N. C. 726.

(*n*) *Rennie* v. *Robinson*, 1 Bing. 147; 1 L. J., C. P. 30; 25 R. R. 604; *Sturgeon* v. *Wingfield*, 15 M. & W. 224; *Doe* d. *Marriott* v. *Edwards*, 5 B. & Adol. 1065.

(*o*) *Phillips* v. *Pearce*, 5 B. & C. 433; 29 R. R. 284.

(*p*) *Phipps* v. *Sculthorpe*, 1 B. & A. 50; 18 R. R. 428; *Doe* d. *Marlow* v. *Wiggins*, 4 Q. B. 367; ante.

agreement between A. and B. was rescinded: it was held that, in an action by B. for use and occupation for the next quarter's rent, the tenant was not estopped from showing these facts, whereby the parties were remitted to their original rights (*q*).

The Statute of Limitations.

It is a good defence to plead the Statute of Limitations where the defendant was formerly tenant from year to year, and quitted without due notice, but has not, within six years before the action, occupied the premises, or paid any rent, or done any act from which a tenancy can be inferred (*r*). It is also a good defence as to any rent which became due and payable more than six years before the commencement of the action. The defendant may also show that the plaintiff's title to the reversion has been barred and extinguished under 3 & 4 Will. 4, c. 27 (*s*). But so long as the relation of landlord and tenant subsists, the right of the landlord to rent is not barred by non-payment, except that under sect. 42 the amount to be recovered is limited to six years (*t*).

## Sect. 6.—*Evidence.*

Relation of Landlord and Tenant.

We have seen that to entitle a plaintiff to recover compensation for the use and occupation of his property it must appear that there was a relation of landlord and tenant between the parties; there may, however, be various modes in which this may be proved for the purposes of an action; an admission of the tenancy by the defendant, by submission to a distress, advertisement of himself as tenant or otherwise, is primâ facie evidence against him (*u*), but may be rebutted by sufficient evidence to the contrary (*x*). Evidence that the defendant has actually occupied the premises, will be primâ facie sufficient (*y*). Payment of rent is a sufficient recognition of the landlord's title to support the action, although it appear upon the evidence on the part of the plaintiff that the defendant originally came in under another person, or that the plaintiff has only an equitable estate (*z*). In one case the defendant and his predecessors in estate had paid to the plaintiffs and their predecessors, overseers of the poor of the township of S., an annual sum of 6*l.* 14*s.* 8*d.*, expressed to be for rent for common lands, and it was admitted that the defendant was in possession of the lands out of which the rent issued, but they were not identified, and there was no evidence given of their extent or value, and the defendant would not produce

Occupation.

Payment of Rent.

(*q*) *Brook* v. *Biggs*, 2 Bing. N. C. 572.
(*r*) *Leigh* v. *Thornton*, 1 B. & A. 625; 19 R. R. 407.
(*s*) *Fursdon* v. *Clogg*, 10 M. & W. 572.
(*t*) *Archbold* v. *Scully*, 9 H. L. Cas. 360; 7 Jur., N. S. 1169.
(*u*) *Panton* v. *Jones*, 3 Camp. 372; 14 R. R. 757; *Cooper* v. *Blandy*, 1 Bing. N. C. 45; *Sullivan* v. *Jones*, 3 C. & P. 570; *Hill* v. *Ramm*, 5 M. & G. 789.
(*x*) *Cox* v. *Knight*, 18 C. B. 645; 25 L. J., C. P. 314.
(*y*) *Harland* v. *Bromley*, 1 Stark. 455.
(*z*) *Dolby* v. *Iles*, 11 A. & E. 335.

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his deeds pursuant to notice: it was, however, held, that there was evidence on which a jury might find that a relation existed between the parties such as to entitle the plaintiffs to recover for use and occupation (*a*).

Judgment in previous Action for Use and Occupation.

A judgment in a previous action for use and occupation between the same parties is primâ facie evidence that the defendant occupied by the sufferance of the plaintiff: but it is not conclusive, and the jury ought to take into their consideration all the circumstances under which that judgment was obtained (*b*). The correctness or validity of such judgment can be questioned only in a court of appeal (*c*): and parol evidence will probably always be admissible to show in respect of what premises, and for what rent such judgment was recovered (*d*). But a previous judgment against two persons is no evidence in another action against one of them only for subsequent use and occupation (*e*).

Notice to quit given by Defendant.

A notice to quit given by the defendant is admissible evidence that the defendant held the premises therein mentioned as tenant thereof to plaintiff (*f*).

We have also seen that there must be an *entry* as tenant; for example, if a party to whom a mining lease is granted enter and dig holes merely to ascertain what sort of a bargain he has made, or is about to make, and has them filled up again immediately, that does not amount to an entry *to take possession as tenant* (*g*). But where a party who had agreed to rent a house sent in a woman to clean it, and workmen to paper one of the rooms, that was held sufficient evidence to go to the jury of a taking possession as tenant (*h*). So where, after an agreement for a lease, the intended lessee entered and put up a board stating "this house to let, inquire, &c.;" this was held to be sufficient evidence to go to the jury of a taking possession as tenant (*i*).

Evidence of Entry of Defendant as Tenant.

If the landlord prove that a tenancy commenced and entry was had, the burden is then on the defendant to show that it has been determined before the time for which compensation is claimed (*k*).

Surrender.

The defendant may prove a surrender of his term to the plaintiff before any of the rent claimed became due; such surrender may be by deed, or by the acceptance of a new lease, or by other act and operation of law (*l*).

(*a*) *Hardon* v. *Hesketh*, 4 H. & N. 175; 28 L. J., Ex. 137; compare this case with *Att.-Gen.* v. *Stephens*, 6 De Gex, M. & G. 111; 25 L. J., Ch. 888.

(*b*) Per Coleridge, J., *Jones* v. *Reynolds*, 7 C. & P. 335.

(*c*) 9 C. B. 333; *Dick* v. *Tolhausen*, 4 H. & N. 695.

(*d*) See, as to the right to reopen a verdict, *Seddon* v. *Tutop*, 6 T. R. 607; 3 R. R. 274; *Preston* v. *Peeke*, E., B. & E. 336; 28 L. J., Q. B. 424, 427.

(*e*) *Christy* v. *Tanered*, 9 M. & W. 438; 12 M. & W. 316.

(*f*) *Marston* v. *Dean*, 7 C. & P. 13.

(*g*) *Jones* v. *Reynolds*, 7 C. & P. 335.

(*h*) *Smith* v. *Twoart*, 2 M. & G. 841.

(*i*) *Sullivan* v. *Jones*, 3 C. & P. 579.

(*k*) *Ward* v. *Mason*, 9 Price, 291.

(*l*) See ante, Chap. VIII., Sect. 3.

The defendant may prove that he gave due notice to quit and quitted accordingly before the commencement of the period in respect whereof the rent is claimed (*m*). Whether the notice to quit was sufficient and served in due time is sometimes the real question to be decided in this form of action (*n*). Such notice is sufficient if given to the plaintiff's authorized agent, or sent to him by post in due time (*o*). Where a tenant from year to year, at a rent payable half-yearly, quitted at the end of a current year without giving notice, and the landlord before the end of the next half-year re-let the premises to another tenant: held, that such re-letting amounted to an eviction of the first tenant, and that the landlord could not maintain use and occupation against him for any rent subsequent to the period when he quitted (*p*). But the entry by the landlord must be for the purpose of a profitable occupation, and therefore if he enters and puts a bill in the window for the purpose of re-letting the premises, but not to retake possession, that will not be sufficient to prevent him recovering subsequent rent from a tenant who quitted without notice (*q*).

Notice to quit, &c.

## Sect. 7.—*What Amount can be recovered.*

What can be recovered.

As the presumption, when a landlord proceeds to recover compensation of this kind, is, that no specific rent has been agreed on, he may recover in this form of action a reasonable satisfaction for the use and occupation of the lands, tenements, or hereditaments held or occupied by the defendant as his tenant, or by his permission or sufferance (*r*). No inquiry is made as to the profit resulting from the cultivation, or as to the property being cultivated at all (*s*). He who holds another's premises with his permission, but without an express bargain as to the rent, agrees to pay what a jury may find the occupation to be worth. This is a principle resulting from the nature of an action for "use and occupation" (*t*). Such "reasonable satisfaction" accrues, like interest, *de die in diem* according to the time of the actual occupation (*u*).

Where a specific Rent agreed on.

Where it turns out that a specific rent has been agreed on, payable quarterly, half-yearly or yearly, such rent is the proper measure of damages; and the lease (if not under seal) or the written agreement,

(*m*) *Bird* v. *Defonville*, 2 C. & K. 415.
(*n*) *Bessell* v. *Landsberg*, 7 Q. B. 638; *Papillon* v. *Brunton*, 5 H. & N. 518.
(*o*) *Papillon* v. *Brunton*, supra.
(*p*) *Hall* v. *Burgess*, 5 B. & C. 332.
(*q*) *Redpath* v. *Roberts*, 3 Esp. 225, Kenyon, C.J.; *Bird* v. *Defonville*, 2 C. & K. 415, Erle, J.
(*r*) *Tomlinson* v. *Day*, 2 Brod. & B. 680; 23 R. R. 541.
(*s*) 1 Man. & Gr. 312, n. (*a*).
(*t*) *Mayor of Thetford* v. *Tyler*, 8 Q. B. 109; 15 L. J., Q. B. 33.
(*u*) *Slack* v. *Sharpe*, 8 A. & E. 373; *Kirkman* v. *Jervis*, 7 Dowl. 678; *Packer* v. *Gibbins*, 1 Q. B. 421.

CH. XIV. s. 7. *Use and Occupation (what Amount can be recovered).*

if duly stamped, may, as we have seen, by the Distress for Rent Act, 1737, 11 Geo. 2, c. 19, s. 14, be used as evidence of the *quantum* of damages to be recovered (*x*), and of the time at which such rent became payable. It makes no difference in this respect that the agreement is void as to the duration of the term therein mentioned, either by the Statute of Frauds or the Real Property Act, 1845, 8 & 9 Vict. c. 106, s. 3 (*y*); nor that the defendant was and is a lunatic (*z*). But if the defendant has not had the use and occupation of *all* the premises agreed to be demised, or if there had been an eviction from part, by reason of a defect in the plaintiff's title, the jury may ascertain the value of the occupation of the land actually enjoyed, without regarding the amount of rent reserved by the agreement (*a*). So where the plaintiff has not performed a *condition precedent* on his part, ex. gr. to do certain repairs (*b*), to furnish the house or apartments in a specified manner (*c*), or the like, the jury may find how much the actual occupation by the defendant, in the then state and condition of the premises, was reasonably worth. The landlord in such case could not recover or distrain *for the agreed rent* (*d*).

After an Eviction from Part.

Where Plaintiff has not performed a Condition precedent.

Where there was an agreement to pay rent quarterly, and there was an effective surrender before the quarter day, it was held that the landlord could not recover for use and occupation during the broken period subsequent to the quarter day (*e*), but it is conceived that a right to recover has been given by the Apportionment Act (*f*). If, however, it be mutually agreed to put an end to a tenancy during a current quarter, the tenant to pay pro ratâ at that time, and the landlord accordingly retakes possession, the amount so agreed to be paid may be recovered in an action for use and occupation (*g*). So where the tenant holds over for a week after such an agreement has been come to, and then quits possession, and the landlord then accepts possession, the rent to the end of the week may be recovered, together with any previous arrears of rent pro ratâ (*h*): but the landlord cannot recover as for any subsequent use and occupation (*i*).

Where the Tenant agrees to pay Rent pro Ratâ.

If the term or tenancy as agreed on has commenced (the tenant having entered), the lessee or tenant will be liable to all the rent as

Where the Tenant has ceased to occupy.

(*x*) Ante, Sect. 1.

(*y*) *De Medina* v. *Polson*, Holt, N. P. C. 47; *Collett* v. *Curling*, 10 Q. B. 785; 5 D. & L. 605; *Viscount Downe* v. *Thompson*, 9 Q. B. 1044.

(*z*) *Dane* v. *Viscountess Kirkwall*, 8 C. & P. 675.

(*a*) *Tomlinson* v. *Day*, 2 Brod. & B. 680; 23 R. R. 541.

(*b*) *Smith* v. *Eldridge*, 15 C. B. 236; *Smith* v. *Twoart*, 2 M. & G. 841.

(*c*) *Meechelen* v. *Wallace*, 6 N. & M. 316; 7 A. & E. 54, n.

(*d*) *Mechelen* v. *Wallace*, supra.

(*e*) *Grimman* v. *Legge*, 8 B. & C. 324; 2 M. & R. 438; 6 L. J., K. B. 318; 32 R. R. 398.

(*f*) See 32 R. R. 398, n., and p. 434, ante.

(*g*) *Thomas* v. *Williams*, 1 A. & E. 478.

(*h*) *Kirkman* v. *Jervis*, 7 Dowl. 678.

(*i*) *Whitehead* v. *Clifford*, 5 Taunt. 518; 15 R. R. 579.

agreed, notwithstanding he has ceased to occupy (*k*): unless indeed something has since happened to put an end to the term or tenancy, ex. gr. a surrender by deed or by act and operation of law (*l*).

After a Fire. *Izon* v. *Gorton.*

It is clear upon the authorities, that even if the premises be destroyed by fire, the whole rent will, if a rent has been agreed on, be payable; unless indeed it has also been agreed that if a fire destroy the premises the rent shall cease (*m*), in which case a proportionate part may be recovered for the time the premises are actually in use (*n*). If, however, there is no contract for rent, and the landlord is left to recover compensation for use and occupation, he is (as we have seen (*n*)) only entitled to such sum as a jury shall find to be a reasonable compensation, and the loss of the buildings by fire might, it is presumed, be taken into consideration by the jury in fixing the sum to be paid; and the same principles will apply if a part only be destroyed by fire (*o*).

When Premises are held over.

Where a tenancy is continued beyond the time for which the premises were originally taken, and nothing is arranged respecting the amount to be paid on the new holding, that new holding is not of necessity to be on the same terms as the former, but the jury may give the landlord a larger sum for the continued occupation, if there be circumstances to show that such increased rent was expected by him in the event of the tenant holding over, and that such expectation was known to and not repudiated by the tenant (*p*). For instance, where a yearly tenant at 47*l*. per annum continued in possession after the determination of his tenancy and during negotiations for a new lease at 80*l*. per annum, which ultimately went off, it was held, that it was a question for the jury what rent was fairly payable for the continued holding (*q*). In such a case the landlord should not *distrain*, but may maintain an action for use and occupation (*r*).

No reduction of Rent by reason of Acts of Third Persons.

The defendant will not be entitled to any reduction of rent in respect of acts done by a third person which reduced the value of his occupation, but which were done without the authority of the plaintiff (*s*): as where the demised premises are "injuriously affected" (but no part thereof *taken*) by a railway or other company pursuant to their special act or any act incorporated therein (*t*).

(*k*) Ante, Sect. 3.

(*l*) *Whitehead* v. *Clifford*, supra; *Grimman* v. *Legge*, 8 B. & C. 324 and (*c*); *Hall* v. *Burgess*, 5 B. & C. 332; *Ward* v. *Mason*, 9 Price, 291.

(*m*) *Baker* v. *Holtpzaffell*, 4 Taunt. 45; 13 R. R. 556; *Izon* v. *Gorton*, 5 Bing. N. C. 501.

(*n*) Ante, 587.

(*o*) *Bennet* v. *Ireland*, E., B. & E. 326; 28 L. J., Q. B. 48.

(*p*) *Elgar* v. *Watson*, Car. & M. 494.

(*q*) *Mayor, &c., of Thetford* v. *Tyler*, 8 Q. B. 95.

(*r*) *Alford* v. *Vicery*, Car. & M. 280; *Jenner* v. *Clegg*, 1 Moo. & R. 213.

(*s*) *Drury Lane Theatre Co.* v. *Chapman*, 1 C. & K. 14.

(*t*) As to the compensation recoverable by the tenant from the company in such case, see Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), ss. 119—121.

CH. XIV. s. 7.
*Use and Occupation (what Amount can be recovered).*

Effect of Judgment by Default.

Prior to the Judicature Act, where the defendant suffered judgment by default in an action for use and occupation, a writ of inquiry appears to have been necessary (*u*). And as, if the action is strictly one for use and occupation, it is properly for such a sum as shall be found to be a reasonable compensation, a writ of inquiry or other mode of trial would seem to be still necessary (*x*).

(*u*) *Arden* v. *Connell*, 5 B. & A. 885; Coote, L. & T. 504.

(*x*) R. S. C. Order XIII., Rule 6; Order XXIX., Rule 4. By the former of these rules, "where the defendant fails to appear to the writ of summons, and the plaintiff's claim is not for a debt or liquidated damages only, but for detention of goods, and pecuniary damages, or either of them, no statement of claim need be delivered, but interlocutory judgment may be entered, and a writ of inquiry shall issue to assess the value of the goods and the damages, or the damages only, as the case may be, in respect of the causes of action disclosed by the indorsement on the writ of summons." The rule proceeds to provide that the damages may by order be ascertained "in any way in which any question arising in an action may be tried." Order XXIX., Rule 4, provides a similar process in case of default of pleading.

# CHAPTER XV.

## RATES, TAXES, AND ASSESSMENTS.


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### Sect. 1.—*Contracts as to Rates, Taxes, &c.*

Ordinary Rule.

The ordinary rule is, that rates and taxes fall upon the tenant, in the absence of express agreement.

Express Agreement.

In addition to this, the ordinary express agreement is that the tenant pay all rates, taxes and assessments. Sometimes, however, they are thrown partly upon the landlord and partly upon the tenant, the agreement being construed according to the real intention of the parties (*a*).

Not usually interfered with by Statute.

Such stipulations are seldom interfered with by the legislature, which usually provides that "nothing in this act contained shall be construed to alter, change, determine, or make void any contracts, covenants, or agreements whatsoever between landlord and tenant, or any other persons, touching the payment of taxes and assessments," or to that effect (*b*).

Exceptions.

Property Tax.

But the property tax always formed an exception to the general rule (*c*); and more than one recent statute has either imposed a burden wholly on the landlord, or shared it between the landlord and the tenant (*d*). Generally where a tenant covenants to pay a rent without deducting taxes, a subsequent statute authorizing tenants to deduct will not repeal the

(*a*) See *Watson* v. *Atkins*, 3 B. & A. 647.

(*b*) See e.g. 38 Geo. 3, c. 5, s. 35 (Land Tax); 18 & 19 Vict. c. 120, s. 219 (Metropolis Management Act); 25 & 26 Vict. c. 102, ss. 96, 97 (Amendment of the Metropolis Management Acts); 38 & 39 Vict. c. 55, s. 226 (The Public Health Act, 1875); 54 & 55 Vict. c. 76 (Public Health (London) Act, 1891), s. 121 (b).

(*c*) 5 & 6 Vict. c. 35, ss. 60, 103; post, Sect. 2 of this chapter.

(*d*) See 32 & 33 Vict. c. 41, as to rating to poor rates any rateable hereditament let for three months or less (post, Appendix (A), Sect. 6, where the act is set out verbatim); and the Rating Act, 1874, post, Sect. 15. The Contagious Diseases (Animals) Act, 1869 (32 & 33 Vict. c. 70), s. 89, was to a like effect; but that act has been repealed, and the act of 1878 which replaced it contained no such provision, nor does the Act of 1894, which now takes the place of the Act of 1878.

CH. XV. s. 1. *Contracts as to Rates, Taxes, &c.*

covenant. It does not *compel* the tenant to make such deduction, and therefore leaves the covenant in full force (*e*). So a tenant may covenant to pay all rates, &c., including those which, under a previous local act, he would have been entitled to deduct from his rent (*f*). But the Property Tax Act makes all such contracts, covenants, and agreements, "utterly void" (*g*), so far only as they relate to the property or income tax (*h*).

Land Tax and Sewers Rates.

The land tax usually falls upon the landlord in the absence of an express covenant or stipulation to the contrary (*i*). So do sewers rates, except perhaps those made for ordinary annual expenses (*k*). But the tenant may expressly take upon himself the payment of land tax and sewers rates (*l*); and a general covenant or promise to pay all rates, taxes, &c., will include the land tax and sewers rates (*m*). An oral agreement to pay all taxes includes the land tax (*n*).

Tithe Rent-charge.

Under an agreement for a lease at a yearly rent of 40*l.*, payable quarterly "free of all outgoings," the tenant ought to pay the land tax and commutation rent-charge; and the landlord is entitled to have a covenant to that effect inserted in the lease (*o*). The tithe rent-charge must be paid under a covenant to pay "any taxes, rates, assessments or charges whatsoever" (*p*), but not, if the words be only "all taxes and assessments" (*q*).

Generally

Where a contract for an assignment of the lease of a public house described the public house as held at a certain "*net*" *annual rent under usual and common covenants*, it was held, that these words included a covenant by the tenant to pay land tax and sewers rates (*r*). A covenant in a sub-lease to perform all the covenants in the original lease (except to pay rent and insure) will in effect comprise a covenant, contained in the lease, to pay all rates and taxes whatsoever; and may render the sub-lessee liable to rates for extraordinary drainage and other works of a permanent nature (*s*).

Construction of Covenants to pay Rates, &c.

A covenant by a lessee to pay taxes generally, includes parliamentary taxes, and consequently the land tax; for when taxes are generally

(*e*) *Brewster* v. *Kitchell*, 1 Ld. Raym. 320, 321; Carthew, 438, 439; 12 Mod. 169; Holt, R. 175, 669.

(*f*) *Payne* v. *Burridge*, 12 M. & W. 727; *Thompson* v. *Lapworth*, L. R., 3 C. P. 149; 37 L. J., C. P. 74.

(*g*) 5 & 6 Vict. c. 35, s. 103.

(*h*) *Tinckler* v. *Prentice*, 4 Taunt. 549; 13 R. R. 684; *Festing* v. *Taylor*, 3 B. & S. 217, 231. See Sect. 3, post.

(*i*) Post, Sect. 3.

(*k*) Post, Sect. 4; Callis on Sewers, 140.

(*l*) See *Bennett* v. *Womack*, 7 B. & C. 627; 1 M. & R. 644; 6 L. J., K. B. 175; 31 R. R. 270; 3 C. & P. 96; *Payne* v. *Burridge*, 12 M. & W. 730.

(*m*) *Amfield* v. *White*, Ry. & Moo. 246; 27 R. R. 745; *Manning* v. *Lunn*, 2 C. & K. 13.

(*n*) *Amfield* v. *White*, Ry. & Moo. 246; 27 R. R. 745.

(*o*) *Parish* v. *Sleeman*, 1 De G., F. & J. 326; 29 L. J., Ch. 96. See Form of Covenant, post, Appendix B., Sect. 15; and see further post, Sect. 16, "Tithe Rent-charge."

(*p*) *Lockwood* v. *Wilson*, 43 L. J., C. P. 179; 30 L. T. 761.

(*q*) *Jeffrey* v. *Neale*, L. R., 6 C. P. 240; 40 L. J., C. P. 191.

(*r*) *Bennett* v. *Womack*, 7 B. & C. 627; 31 R. R. 270; 3 C. & P. 96.

(*s*) *Sweet*, app., *Seager*, resp., 2 C. B. N. S. 119; *Thompson* v. *Lapworth*, L. R., 3 C. P. 149; 37 L. J., C. P. 74.

spoken of, if the subject-matter will bear it, parliamentary taxes given to the crown are included. If, therefore, a lease be made for years, at a rent "free and clear from all manner of taxes, charges, and impositions whatsoever," the lessee is bound to pay the whole rent without any manner of deduction for any old or new tax, charge or imposition whatsoever: thus on a grant of a fee-farm rent, "without any deduction, defalcation or abatement for or in any respect whatsoever," the grantee was held to be entitled to receive the full rent without deducting the land tax (*t*).

Parliamentary and Parochial Taxes.

An agreement that "all taxes, parochial and parliamentary," shall be paid by the tenant, will not comprise a sewers rate, for that is neither parochial nor parliamentary (*u*): so an improvement rate made by commissioners under a local act is not parochial or parliamentary (*x*): but the land tax is a parliamentary tax, being imposed directly by parliament (*y*). A covenant by the lessee to pay all parliamentary taxes, assessments, &c., will extend to the land tax which has been redeemed or purchased by a former lessee, and is payable to him under the Land Tax Act (*z*). A county rate is not a parliamentary tax, but it is a parochial rate, because levied and paid with and out of the poor's rate (*a*). By certain acts of parliament provision was made for making rates on certain lands which were before liable ratione tenuræ to repair a bridge, for raising a fund for such repairs; a lessee of part of those lands covenanted to pay his rent free and clear of and from any land tax and all other taxes and deductions whatsoever, either parliamentary or parochial, imposed upon the premises or upon the lessor; it was held that the rate for the repair of the bridge was not a parliamentary tax within this covenant (*b*). Where a local act imposed upon owners the duty of paving, &c., and, in case of their default authorized the commissioners to do the work themselves, and to charge the owners with the expenses proportionally, and to levy the amount by distress on the premises: held, that the sum paid by an owner was for his *breach of duty*, and not for a rate or tax which the tenant was liable to repay (*c*).

New Taxes.

A covenant to discharge from taxes extends to subsequent taxes of the same nature as those in being at the time the covenant was

(*t*) *Bradbury* v. *Wright*, 2 Doug. 624; *Giles* v. *Hooper*, Carth. 135.

(*u*) *Palmer* v. *Earith*, 14 M. & W. 428.

(*x*) *Guardians of Bedford Union* v. *Bedford Improvement Commrs.*, 7 Exch. 777; but general words may include it so as to render the tenant liable; *Payne* v. *Burridge*, 12 M. & W. 727; *Sweet*, app., *Seager*, resp., 2 C. B., N. S. 119.

(*y*) *Manning* v. *Lunn*, 2 C. & K. 13.

(*z*) *Governors of Christ's Hospital* v. *Harrild*, 2 M. & G. 707.

(*a*) *Reg.* v. *Inhabts. of Aylesbury*, 9 Q. B. 261.

(*b*) *Baker* v. *Greenhill*, 3 Q. B. 148.

(*c*) *Tidswell* v. *Whitworth*, L. R., 2 C. P. 326; 36 L. J., C. P. 103. Compare this case with *Thompson* v. *Lapworth*, L. R., 3 C. P. 149; 37 L. J., C. P. 74; and see *Bird* v. *Elwes*, L. R., 3 Ex. 225; 37 L. J., Ex. 91.

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New Taxes—*contd.*

made, but not to those of a different nature (*d*). Where a lessee covenanted that he would pay all taxes, charges, rates, tithes or rent-charge in lieu of tithe, dues and duties whatsoever as then were or should at any time thereafter during that demise be taxed, charged, assessed or imposed *upon the said demised* premises; it was held that the covenant was not confined to rates payable by the landlord, but meant all rates then imposed on the lessee in respect of his occupation, and all future rates which might be imposed on the land itself (*e*). Where a person took a part of certain premises, the whole of which were rated at a certain annual value, and the lessor covenanted to pay all taxes then chargeable thereon, and the lessee covenanted to pay all fresh taxes which might thereafter be charged on the premises, or any part thereof: it was held that the true construction of these covenants was, that the lessor should pay such taxes as were charged on the premises at the time of making the lease, at the then annual value, and that the lessee should pay all fresh taxes, and all such additions to those formerly chargeable as were occasioned by the improved value of the premises (*f*).

Extraordinary Assessments.

A tenant of marsh lands, who agreed to pay all outgoings whatsoever, rates, taxes, scots, whether parochial or parliamentary, that then were or should thereafter be chargeable upon the lands, the present land tax excepted, is liable to pay an extraordinary assessment made by the commissioners of sewers for a work of permanent benefit to the land (*g*). A covenant by the tenant to pay all taxes, rates, duties, levies, assessments and payments will extend to the cost for paving footways, which by a local act passed before the lease was made, were made payable by the tenants of the adjoining houses, and which they were allowed to deduct from their rents, in the absence of any express stipulation to the contrary (*h*). A covenant by a lessor to pay all taxes on the demised premises has been held not to extend to the removal of a nuisance caused by an accumulation of mud in ornamental water, which the tenant ought to have cleared out, and which was removed under the Nuisances Removal Act, 1855 (*i*); but a covenant to "bear, pay and discharge" the sewers rate, "and all other taxes, rates, assessments and outgoings whatsoever," was held, in *Crosse* v. *Raw* (*k*), to throw upon the

*Crosse* v. *Raw.*

(*d*) *Brewster* v. *Kitchell*, 1 Salk. 198; 1 Ld. Raym. 317; Carthew, 438; 12 Mod. 166; Holt, K. 175, 669.

(*e*) *Hurst* v. *Hurst*, 4 Exch. 571.

(*f*) *Watson* v. *Atkins*, 3 B. & A. 647; *Graham* v. *Wade*, 16 East, 29.

(*g*) *Waller* v. *Andrews*, 3 M. & W. 315; *Palmer* v. *Earith*, 14 M. & W. 431; *Sweet*, app., *Seager*, resp., 2 C. B., N. S. 119.

(*h*) *Payne* v. *Burridge*, 12 M. & W. 727; *Sweet*, app., *Seager*, resp., 2 C. B., N. S. 119; *Thompson* v. *Lapworth*, L. R., 3 C. P. 149; 37 L. J., C. P. 74.

(*i*) *Bird* v. *Elwes*, L. R., 3 Ex. 225; 37 L. J., Ex. 91.

(*k*) L. R., 9 Ex. 209; 43 L. J., Ex. 144. See *Budd* v. *Marshall*, and other cases, post, Sect. 10; and as to water rate, see *Direct Spanish Telegraph Co.* v. *Shepherd*, L. R., 13 Q. B. D. 202; and Sect. 12, post.

Extraordinary Assessments —*contd.*

tenant the obligation to pay for the making of a drain which, under the 10th section of the repealed Sanitary Act, 1866 (*l*), the landlord as "owner" might have been required by the sewer authority to make, but which the tenant had made under an arrangement with the landlord by which the expense was to be borne by the party liable. Under the Public Health Act, 1875, sect. 23, the local authority has an option to give notice to the owner *or* occupier to make an improvement of this character, and to recover the expenses from the owner, *or* to declare them to be "private improvement expenses."

Land Tax of Bishop.

A bishop not being able to bind his successors unless certain conditions and formalities are observed by him, a covenant by him to pay all charges, ordinary and extraordinary, does not include land tax (*m*).

In what Proportion Rates and Taxes are to be paid.

When a lessee agrees to pay all rates, taxes, &c., he must pay the full amount thereof, notwithstanding any subsequent increase occasioned by additions and new buildings, of which he has the use and benefit during the term (*n*). But when a lessor covenants to pay any rate or tax, or it is specifically excepted from the lessee's covenant, and the annual value of the premises is afterwards increased by alterations and new buildings, the landlord is liable to pay, not the whole rate or tax as paid from time to time by the tenant, but only so much thereof as his rent or the annual value of the premises when demised bears to the improved annual value (*o*). Thus a landlord who covenants to pay the land tax, and save the tenant harmless, will discharge his covenant, if he pay the tax according to the rent he receives, although the premises may be taxed at a higher rate (*p*). If the tenant be under-rated, he can only deduct pro ratâ (*q*). Where the tenant of a piece of ground, at a fixed annual rent, covenanted not to build without the licence of the lessor, and the lessor covenanted to pay all taxes charged or to be charged during the term, and at the time of executing the lease the lessor gave the lessee a licence to build, which he did, and thereby much increased the annual value of the premises; it was held, that the lessor was liable to pay taxes in proportion to the rent received, and not according to the improved annual value (*r*). Where A. granted a building lease to B. at a yearly rent of 7*l.*, who covenanted to pay

(*l*) See now Public Health Act, 1875, ss. 23, 214, 226, 251.

(*m*) *Bp. of Oxford* v. *Wise*, cited in *Blandford* v. *Marlborough*, 2 Atk. 544; *Davenant* v. *Bp. of Salisbury*, 1 Ventr. 223; 2 Lev. 68.

(*n*) *Hurst* v. *Hurst*, 4 Exch. 571.

(*o*) *Smith* v. *Humble*, 15 C. B. 321; *Watson* v. *Home*, 7 B. & C. 285, and (*r*) infra; *Hyde* v. *Hill*, 3 T. R. 377; *Yeo* v. *Leman*, 2 Str. 1190; 1 Wils. 21.

(*p*) *Whitfield* v. *Brandwood*, 2 Stark. 440; 20 R. R. 712; *Yeo* v. *Leman*, 2 Str. 1191; 1 Wils. 21; *Bramston* v. *Robins*, 4 Bing. 11; 29 R. R. 493.

(*q*) *Sherrington* v. *Andrews*, Comb. 483; but see *Werdon* v. *Pickering* there cited; *Watson* v. *Home*, 7 B. & C. 285, and (*r*) infra, 2nd point.

(*r*) *Watson* v. *Home*, 7 B. & C. 285; 6 L. J., K. B. 73; 31 R. R. 200.

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all taxes except the land tax, and afterwards improved the estate, and sub-let it at 54*l.* per annum; it was held, that A. was liable only to pay the land tax in proportion to the old rent (*s*). Under a covenant by a tenant for the payment of 80*l.* yearly rent, all taxes thereon being to him allowed; and also that he would pay all *further* or additional rates on the premises, or on any additional buildings or improvements made by him; and a covenant by the landlord to pay all rates on the premises or on the tenant, in respect of the said yearly rent of 80*l.*, except such further or additional taxes as may be assessed on the demised premises; the tenant was held bound to defray all increase of the old as well as the new rates, beyond the proportion at which the premises were rated at the time of the deed, which was 20*l.* in respect of the 80*l.* rent (*t*). Where the owner of a house, in consideration of a premium, demised it at one-third of its annual value, and afterwards redeemed the land tax, it was held, that he was entitled to receive from the tenant an annual payment equal to two-thirds of the land tax so redeemed (*u*).

Landlord's Remedy.

When a tenant neglects to pay any rates, taxes, &c., pursuant to his covenant or promise in that behalf, the lessor may sue him for the breach of such covenant or promise (*x*), or he may maintain ejectment if the lease contain a proviso for re-entry applicable to such covenant or promise (*y*), but not otherwise.

Tenant's Remedy by Deduction from Rent.

Where a landlord is liable to any rate or tax, which the tenant has paid, under actual or implied compulsion, the latter may deduct the amount from his rent, unless there is an express covenant or stipulation to the contrary (*z*). He is not entitled to make such deduction until he has actually paid the rate or tax (*a*). The deduction should be made from the rent of the current year; and the tenant cannot claim it from his landlord at any subsequent period (*b*). On this ground, a plea in bar to a cognizance for a distress for rent, which stated that "divers sums, amounting to a certain sum, had been from time to time duly assessed and rated for the premises for land tax, and from time to time paid by the plaintiff, wherefore he deducted the said sum, being the amount of the tax which the defendant, as landlord, was liable to bear in respect of the rent," was held bad, for not stating the specific periods for which the respective sums were assessed or paid; and in not showing that the payment claimed to be deducted was made after the rent distrained

(*s*) *Barnfather* v. *Lee*, cited 3 T. R. 379.
(*t*) *Graham* v. *Wade*, 16 East, 29; *Watson* v. *Atkins*, 3 B. & A. 647.
(*u*) *Ward* v. *Const*, 10 B. & C. 635.
(*x*) *Hurst* v. *Hurst*, 4 Exch. 571; *Thompson* v. *Lapworth*, L. R., 3 C. P. 149; 37 L. J., C. P. 74.
(*y*) *Davis* v. *Burrell*, 10 C. B. 821.
(*z*) *Payne* v. *Burridge*, 12 M. & W. 727; *Sweet*, app., *Seager*, resp., 2 C. B., N. S. 119; *Hurst* v. *Hurst*, 4 Exch. 571.
(*a*) *Ryan* v. *Thompson*, L. R., 3 C. P. 144; 37 L. J., C. P. 134.
(*b*) *Andrew* v. *Hancock*, 1 B. & B. 37; 21 R. R. 569; *Cumming* v. *Bedborough*, 15 M. & W. 438.

for had accrued, or was then accruing (*c*). Where the landlord covenants to pay the land tax, the lessee is not entitled to deduct for more than would be assessed on the amount of his rent, although he may have actually paid more (*d*). Where by lease rent is to be paid without deduction, except for land tax and sewers rate, and the annual value of the premises is afterwards increased by alterations and new buildings, the deduction is to be made not of the whole tax as paid, but only in proportion to the rent reserved as compared with the improved annual value of the premises (*e*). In one case, a succeeding tenant, who came in at Michaelmas (at which time a quarter's rent was due), and received from the former tenant a receipt for a year's property tax also due at Michaelmas, was held to be entitled to deduct the amount upon the landlord's distraining for half a year's rent at Christmas (*f*). A broker, who, when receiving rent under a distress, deducts a sum purporting to be for land tax, is not to be considered as *allowing* the land tax, so as to affect the landlord's right, but as merely, from not knowing how to act, consenting to receive the money without the sum deducted (*g*). Sums allowed by way of deduction from rent in respect of rates and taxes paid (although so allowed erroneously) operate as payment, and will support a defence of payment of so much of the rent (*h*).

Deduction from Rent—*contd.*

Where a tenant has paid a tax, which his landlord is bound to pay, he may recover the amount paid by action (*i*). A tenant who had been compelled by the "building owner" to pay the proportion of the expenses of a party-wall or structure which was payable under the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), repealed by the London Building Act, 1894, by his landlord, the "adjoining owner" could maintain an action against the latter to recover the sum so paid, and was not bound (though entitled) to deduct it from the rent due or accruing due (*k*).

Remedy by Action.

Where the tenant has paid his full rent, without deduction, *under protest*, because of a threat of distress, he may recover by action the amount of rates and taxes which he has paid for the landlord, and which the latter has improperly refused to allow (*l*); but where a tenant has omitted to deduct a landlord's tax (*m*), or voluntarily paid his full rent without deducting a landlord's tax for a considerable time, he cannot recover it back. Thus, where the tenant of

Mode of Claiming Deduction.

(*c*) *Stubbs* v. *Parsons*, 3 B. & A. 516.
(*d*) *Whitfield* v. *Brandwood*, 2 Stark. 440; 20 R. R. 712.
(*e*) *Smith* v. *Humble*, 15 C. B. 321.
(*f*) *Clennel* v. *Read*, 7 Taunt. 50.
(*g*) *Saunderson* v. *Hanson*, 3 C. & P. 314.
(*h*) *Waller* v. *Andrews*, 3 M. & W. 312; *Bramston* v. *Robins*, 4 Bing. 11.
(*i*) *Graham* v. *Tute*, 1 M. & S. 609; *Watson* v. *Home*, 7 B. & C. 285; 6 L. J., K. B. 73; 31 R. R. 200.
(*k*) *Earle* v. *Maugham*, 14 C. B., N. S. 626, applicable apparently to s. 173 (5) of the London Building Act, 1894.
(*l*) *Baker* v. *Greenhill*, 3 Q. B. 148.
(*m*) *Cumming* v. *Bedborough*, 15 M. & W. 423 (Property Tax).

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premises under a lease, which contained no reservation as to the payment of land tax, claimed a deduction for such tax, which was refused by the landlord, who afterwards distrained, and was paid the whole rent, and the tenant afterwards paid his full rent for five successive years, without claiming to deduct such tax; it was held, that such acquiescence was equivalent to a dereliction of his claim in the first instance; and that he could not recover back any of the sums so paid by him for land tax, in an action of assumpsit for money paid, on the ground of their being involuntary payments (*n*); and where an occupier of lands had, during a course of twelve years, paid to the collector of taxes the landlord's property tax, and the full rent as it became due to the landlord, without claiming any deduction on account of the tax so paid; it was held, that the occupier could not recover back from the landlord any part of the property tax so paid (*o*).

Deductions under Local Acts.

But where a local act provided that a drainage tax of one shilling per acre should be paid by the tenants of the land charged with the same, and that the tenants might deduct the same out of the rents payable to their landlords; it was held, that a tenant who on the determination of his tenancy paid the full rent then due, without deducting the tax falling due on the determination of the tenancy, but not then called for, might recover from the landlord the amount of tax which he (the tenant) was afterwards compelled to pay, and would never have any opportunity to deduct from rent (*p*). Where a plaintiff demised a house to the defendant, who by the agreement was to pay a rent clear of all deductions for taxes and parochial rates; and after occupying the premises for some time, the defendant quitted them, leaving claims for land tax and poor rates, which latter the landlord was obliged by a local act of parliament to pay, and he did pay them; it was held, that he could not recover the amount from the defendant in the action for money paid, but should have declared specially on the agreement, because as there was no original liability on the defendant to pay, it could not be said to be money paid to his use (*q*).

Remedy by Defence to Action for Rent.

In an action for rent, the tenant may plead as to part, that he has paid a landlord's tax to that amount, in respect of the rent due to the plaintiff claimed by the declaration, after he has in fact paid the tax (*r*). In such action the validity of the rate or tax, or the

(*n*) *Spragg* v. *Hammond*, 2 B. & B. 59; 4 Moo. 431; *Andrew* v. *Hancock*, 1 B. & B. 37; 3 Moo. 278; 21 R. R. 569; *Fuller* v. *Abbott*, 4 Taunt. 105; *Waller* v. *Andrews*, 3 M. & W. 312; *Stubbs* v. *Parsons*, 3 B. & A. 516; *Brisbane* v. *Dacres*, 5 Taunt. 143; 14 R. R. 718.

(*o*) *Denby* v. *Moore*, 1 B. & A. 123; 18 R. R. 444.

(*p*) *Dawson* v. *Linton*, 5 B. & A. 521.

(*q*) *Spencer* v. *Parry*, 3 A. & E. 331.

(*r*) *Tinckler* v. *Prentice*, 4 Taunt. 549; 13 R. R. 684; *Baker* v. *Davis*, 3 Camp. 474; 14 R. R. 814; *Pocock* v. *Eustace*, 2 Camp. 181; 13 R. R. 691.

plaintiff's liability to pay all or any part of it, may be disputed (*s*); or the plaintiff may reply that by the lease or agreement the defendant expressly agreed to pay all rates and taxes (*t*). In support of a plea of payment of a landlord's tax, the tenant should call the collector, and produce the assessment (*u*); but the latter has been held unnecessary (*x*).

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Sect. 2.—*Rating of Landlord instead of Tenant, by Statute.*

Provision has in some cases been made by the Legislature, where the tenant's holding is of small value, for collecting rates from the landlord instead of the tenant, thus reversing the ordinary rule of the incidence of the rate upon the occupier. The principal statute upon this head, The Poor Rate Assessment and Collection Act, 1869, 32 & 33 Vict. c. 41, is set out at length in the Appendix (*y*); but it will be well to say a few words in this place on the general subject.

Sturges Bourne's Act.

The earliest statute seems to be "Sturges Bourne's Act," 59 Geo. 3, c. 12. This by sect. 19 empowers the vestry of any parish to pass a resolution that "the owner or owners of all houses, apartments, or dwellings" in the parish "being the immediate lessor or lessors of the actual occupier or occupiers, which shall respectively be let to the occupiers thereof at any rent or rate not exceeding 20*l.* nor less than 6*l.* by the year or on any agreement by which the rent shall be reserved or made payable at any shorter period than 3 months," shall be assessed to the rates in respect of such houses instead of the actual occupiers. This section has no application to houses let at a weekly rent amounting to more than 20*l.* by the year (*z*). The same section provides that the resolution of the vestry may be rescinded from time to time, and that the sums assessed may upon non-payment be levied upon, and the payment thereof enforced against the owner and his goods.

But the 20th section provides that the goods of the occupier "shall be *liable* to be distrained and sold for raising so much of any such rate or assessment being in arrear, as shall have become due during the occupancy of the person whose goods shall be so distrained," providing also, however, that any occupier paying the rate or suffering a distress for it may deduct out of the rent payable by him the amount so paid or levied upon him.

(*s*) *Lobban* v. *Cook*, 3 H. & N. 238.
(*t*) *Payne* v. *Burridge*, 12 M. & W. 727.
(*u*) *Gabell* v. *Shevell*, 5 Taunt. 81.
(*x*) *Phillips* v. *Beer*, 4 Camp. 266.
(*y*) Appendix A.
(*z*) *West Ham Union* v. *Iles*, L. R., 8 App. Cas. 386; 52 L. J., Q. B. 650; 49 L. T. 205; 31 W. R. 928; affirming decision of C. A.

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*Rating of Landlord by Statute.*

The next act, 13 & 14 Vict. c. 99, commonly called the Small Tenements Act, being now repealed (*a*), it need only be stated that it empowered vestries to rate owners instead of occupiers in cases where the yearly rateable value did not exceed 6*l.*

Poor Rate Assessment and Collection Act, 1869.

"The Poor Rate Assessment and Collection Act, 1869," 32 & 33 Vict. c. 41, is the principal act upon the subject. This statute by s. 1 provides that the occupier of any rateable hereditament let to him for a less period than three months may deduct the amount paid by him for a poor rate from rent, and "that every such payment shall be a valid discharge of the rent to the extent of the rate so paid."

The 3rd section provides that owners may agree in writing with overseers to become liable for the poor rates assessed on hereditaments the rateable value of which does not exceed 20*l.* in the metropolis, or 13*l.* in Liverpool, or 10*l.* in Manchester or Birmingham, or 8*l.* elsewhere; and the 4th section empowers a vestry to order owners to be rated instead of occupiers in all cases to which section 3 extends, except that a dwelling-house must be included in the rateable hereditament for the order to apply.

Ambassadors, Attachés, &c.

In the peculiar case of *Parkinson* v. *Potter* (*b*), a local act relating to the parish of Marylebone, 35 Geo. 3, c. lxxiii, s. 190, provided that any rate made on a house which an ambassador, or his servant, &c., or other person not liable by law to rates should inhabit, should be recoverable from the landlord. A house in the parish was let to the defendant under a covenant to pay all rates, &c., imposed on the premises or on the landlord in respect thereof. The defendant assigned the house to an attaché who claimed exemption from rates both at common law and by virtue of the Diplomatic Privileges Act, 1708, 7 Ann. c. 12, whereupon the landlord paid the rates and sued the defendant to recover the money paid. It was held that an attaché came within the exemption and the local act, and that the defendant was liable to recoup his landlord.

The deduction of part of certain rates from rent under the Rating Act, 1874, and the rating of owners instead of occupiers under the Public Health Act, 1875, is treated hereafter (see Sects. 11, 15).

Proposed division of Rates between Landlord and Tenant.

It may be well to mention here that the Royal Commission on Agriculture, which reported in 1882, was of opinion "that, without disturbing existing contracts of tenancy, all rates should in future be borne equally by owners and occupiers."

(*a*) By 32 & 33 Vict. c. 41, s. 6, and by the Statute Law Revision Act, 1875.

(*b*) *Parkinson* v. *Potter*, 16 Q. B. D. 152; 55 L. J., Q. B. 153; 53 L. T. 818; 34 W. R. 215.

## Sect. 3.—*Property Tax.*

Ch. XV. s. 3. *Property Tax.*

The Acts relating to property tax and income tax are very numerous (*c*). The principal act, passed in 1842, is 5 & 6 Vict. c. 35, and the amount of the landlord's tax is now (Feb., 1898), eightpence (*d*).

Tenant to deduct Property Tax paid from his *next Rent.*

The property tax, like most others, is a tenant's tax as between him and the public (*e*). But the Income Tax Act, 1842, 5 & 6 Vict. c. 35, s. 60 (Sched. (A.), No. IV., *ninth Rule*), directs the tenant, on paying the tax, to deduct it from his rent, and directs the landlord to allow the deduction, in the following terms :—

Income Tax Act, 1842, s. 60, Sched. (A.), Rule 9.

The occupier of any lands, tenements, hereditaments, or heritages, being tenant of the same, and paying the said duties, shall deduct so much thereof in respect of the rent payable to the landlord for the time being (all sums allowed by the commissioners being first deducted) as a rate of [*seven* (*f*) pence] for every twenty shillings thereof would by a just proportion amount unto, which deduction shall be made out of the first payment thereafter to be made on account of rent; and the receivers of her Majesty, and all landlords, both mediate and immediate, their respective heirs, executors, administrators, and assigns, according to their respective interests, and their respective receivers or agents, shall allow such deduction upon receipt of the residue of the rent, under the penalty herein (*g*) contained; and the tenant paying the said assessment shall be acquitted and discharged of so much money as if the same had actually been paid unto the person to or for whom his rent shall have been due and payable; and the occupier of lands charged on the amount of any composition, rent, or payment for tithes arising therefrom, and paying the said duties, shall be entitled to make the like deduction from such composition, rent, or payment on paying the same.

Landlord to allow such Deduction.

Tenant paying, discharged.

So mesne landlords, by whom any such deductions shall have been allowed as aforesaid, may deduct and retain a just proportion thereof from the rent, &c. payable by them to their superior landlord (*h*).

The 73rd section of the same act provides that no agreement between landlord and tenant as to payment of taxes shall be deemed to extend to the duties charged under the act. The 103rd section adds, that if any person shall refuse to allow any deduction authorized by the act out of any rent he shall forfeit the sum of fifty pounds, and that all contracts, covenants and agreements made or entered into, *or to be made or entered into* (*i*), for payment of any rent in full, without allowing the deduction, "shall be utterly void,"—which means that the particular stipulation for payment in full shall be void, and not the whole contract of tenancy (*k*).

Penalty 50*l* for refusing Deduction. S. 103.

Contract against Deduction *void.* S. 103.

(*c*) See Chit. Stat. tit. "Property Tax."

(*d*) Finance Act, 1897, 60 & 61 Vict. c. 24, s. 4.

(*e*) *Cumming* v. *Bedborough*, 15 M. & W. 438.

(*f*) The effect of each annual Finance Act is to read into the section sixpence or eightpence, or other current rate for the original sevenpence, and also to incorporate all prior Income Acts in force.

(*g*) See sect. 103, infra.

(*h*) Id. Rule "Tenth."

(*i*) As to the necessity of these words, see *Re Knight*, 1 Exch. 802.

(*k*) *Gaskell* v. *King*, 11 East, 165; 10 R. R. 462; *Tinckler* v. *Prentice*, 4 Taunt. 549; 13 R. R. 684.

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A larger rent, however, may be reserved, subject to a reduction on the repeal or diminution of the property tax (*l*).

Larger Rent, Subject to Reduction, good.

It has been held by the Court of Appeal that an agreement, that if the tenant will continue to pay his rent in full, without any deduction in respect of landlord's property paid by him, the landlord will repay to the tenant all sums which he has paid, or shall pay for the landlord's property tax, is not invalid as being contrary to this section (*m*).

Repayment by Landlord. *Lamb* v. *Brewster.*

*When* the Deduction may be made. *Cumming* v. *Bedborough.*

A tenant is not entitled to make any deduction in respect of property tax until he has *actually paid* the amount (*n*). Such payment operates as a payment pro tanto of the rent then due, or then accruing (*o*). It was held in *Cumming* v. *Bedborough* that where the tenant omitted to deduct the tax on his *next payment of rent*, he could not afterwards recover the amount as "money paid" to the use of the landlord (*p*). By the Revenue (No. 1) Act, 1864, 27 & 28 Vict. c. 18, s. 15, however, the tenant has the right to deduct the tax from subsequent rent "during the period through which the same was accruing due."

Revenue Act, 1864.

Penalty on Landlord not allowing Deduction.

If the landlord or his agent wrongfully refuse to allow the deduction, he will be liable to a penalty of 50*l.* on each occasion (*q*). Such penalty may be recovered, either by her Majesty's attorney-general on behalf of the crown, or in a qui tam action or information commenced in the Queen's Bench Division (*r*) of the High Court within two years from the time of the penalty being incurred (*s*). But the attorney-general may stay any such qui tam action or information by entering a nolle prosequi, or otherwise, in case it shall appear to his satisfaction that any penalty or forfeiture was incurred without intention of fraud (*t*).

Income Tax payable on Royalties reserved in *Demise.*

Income tax is payable upon royalties in the case of a demise, but not of a sale. In *Edmonds* v. *Eastwood* a piece of land was *demised*, with power to the lessee to get from the land clay, brick earth and other materials for making bricks, and to make the same into bricks

(*l*) *Colbron* v. *Travers*, 12 C. B., N. S. 181; 31 L. J., C. P. 257; *Beadel* v. *Pitt*, 13 W. R. 287; 11 Jur., N. S. 152. As to annuity, see *Abadam* v. *Abadam*, 33 Beav. 475; 33 L. J., Ch. 593; and as to rent-charge (which may be devised free of property tax), see *Festing* v. *Taylor*, 32 L. J., Q. B. 41, Ex. Ch.

(*m*) *Lamb* v. *Brewster*, L. R., 4 Q. B. D. 607; 48 L. J., Q. B. 421; 40 L. T. 537; 27 W. R. 478—affirming decision below.

(*n*) Ante, p. 599.

(*o*) *Baker* v. *Davis*, 3 Camp. 474; 14 R. R. 814; *Franklin* v. *Carter*, 1 C. B. 750; 3 D. & L. 213, cited 15 M. & W. 551.

(*p*) *Cumming* v. *Bedborough*, 15 M. & W. 438; *Denby* v. *Moore*, 1 B. & A. 123; *Spencer* v. *Parry*, 3 A. & E. 331.

(*q*) 5 & 6 Vict. c. 35, s. 103, ante; 18 R.R. 444; *Reg.* v. *Sheil*, 1 F. & F. 204; *Att.-Gen.* v. *Shield*, 3 H. & N. 834; 28 L. J., Ex 49.

(*r*) Judicature Act, 1873, s. 34, as amended by Order in Council.

(*s*) This seems to be the effect of the 22nd section of the Inland Revenue Regulation Act, 1890, 53 & 54 Vict. c. 21.

(*t*) Ib. s. 62. The 185th section gives costs; and this seems not to be impliedly repealed by Rules of the Supreme Court, Order LXV., which places costs in the discretion of the court. See *Hasker* v. *Wood*, 54 L. J., Q. B. 419, and ante, 561 (*u*).

upon the premises for a term of fourteen years, paying to the lessor the yearly sum of 17*l.* 10*s.* for surface rent, by quarterly payments; also paying to the lessor for royalty or brick rent the yearly sum of 100*l.*, by four equal quarterly payments on the same days; and also paying in respect of every thousand bricks over and above the first million which should be made on the premises in any one year, an additional royalty or brick rent of 2*s.*, to be paid on the last day of every year. It was held, that both the royalties or brick rents were chargeable with income tax, and that it was payable in the first instance by the lessee, who was entitled to deduct it from the amount due to the lessor (*u*). In such a case the royalties would go to the heir rather than to the executor of the lessor (*x*), although where a mine is *sold* and the purchase-money is made payable by fifty annual instalments, such instalments constitute capital (not income), and no income tax ought to be paid or deducted in respect thereof (*y*).

No deduction from Succession Duty in respect of Income Tax.

In estimating the value of a succession to land under the Succession Duty Act, 1853, 16 & 17 Vict. c. 51, the successor is not entitled to a deduction for income tax, or the agent's charges for collecting rents (*z*).

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## Sect. 4.—*Land Tax.*

Land Tax Acts, and Land Tax Redemption Acts.

The principal Land Tax and Land Tax Redemption enactments, are the Land Tax Act, 1797, 38 Geo. 3, c. 5, made perpetual by the Land Tax Perpetuation Act, 1798, 38 Geo. 3, c. 60; the Land Tax Redemption Act, 1802, 42 Geo. 3 (a), c. 116; the Land Tax Redemption Act, 1813, 53 Geo. 3, c. 123; and sections 31 to 36 inclusive of the Finance Act, 1896, the latter act reducing the maximum limit of the tax from four shillings to one shilling in the pound, simplifying and cheapening the terms of redemption, and repealing large portions of the prior acts.

Finance Act, 1896.

Land Tax—how charged.

By the Land Tax Act, 1797, 38 Geo. 3, c. 5, s. 4, the land tax was directed to be rated and charged in manner therein mentioned upon all hereditaments in *England*, *Wales*, and *Berwick-upon-Tweed*, and upon all persons "having or holding" any such hereditaments "in respect thereof;" and by s. 180 of the Land Tax Redemption Act, 1802, 42 Geo. 3, c. 116, it is raised by an equal rate according to the annual value of the hereditaments in each parish. Neither

(*u*) *Edmonds* v. *Eastwood*, 2 H. & N. 811; 27 L. J., Ex. 209.

(*x*) *Barrs* v. *Lea*, 33 L. J., Ch. 437; 10 Jur., N. S. 996.

For effect of Land Transfer Act, 1897, see p. 303, ante.

(*y*) *Taylor* v. *Evans*, 1 H. & N. 101; 25 L. J., Ex. 269; *Lady Emily Foley* v. *Fletcher*, 3 H. & N. 769; 28 L. J., Ex. 100.

(*z*) *In re Elwes*, 3 H. & N. 719; 28 L. J., Ex. 46.

(*a*) See the whole series of Land Tax and Land Tax Redemption Acts in Chitty's Statutes, 5th ed., tit. "Land Tax," and for the Finance Act, 1896, see Lely's Annual Statutes of that year.

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that act nor any other provided a definition of "annual value." A definition is now provided by the Finance Act, 1896, which by s. 35 enacts that "annual value" means annual value by determination of the Income Tax Commissioners for the purpose of Schedule A. in the Income Tax Act, 1842.

"Annual Value."

May be levied by Distress and Sale, or by Commitment.

By sect. 17, it is to be levied and raised, when necessary, by distress and sale, with power to break open outer doors, &c., in the presence of a constable; and with power to the commissioners of land tax to commit defaulters to prison, there to remain until the arrears of land tax, with costs, are paid. But a distress may not be made immediately after the tax is demanded; there must be a refusal, or a neglect and default to pay the tax, and a reasonable time after demand made should be allowed, otherwise the distress will be illegal (*b*). An outer door, &c., cannot be broken open to levy land tax, except in the presence of a constable (*c*).

Power to Tenant to deduct a proportionate Part from the Rent.

By the same sect. 17, the tenant rated by virtue of the act is required and authorized to pay such sum or sums of money as shall be rated, and *to deduct out of the rent so much of the said rate as, in respect of the said rents* of any such houses, &c. the landlord should and ought to pay and bear; and the said landlords, both mediate and immediate, according to their respective interests, are required to allow such deductions and payments upon the receipt of the residue of the rents.

Acquittance from Rent, pro tanto.

Commissioners to settle Disputes as to Land Tax.

By sect. 18, "every tenant paying the said assessment or assessments last mentioned shall be acquitted and discharged of so much money as the said assessment or assessments shall amount unto, as if the same had actually been paid unto such person or persons to whom his rent shall have been due and payable;" with power to the commissioners of land tax, or any two of them, to settle, as they shall think fit, any differences between landlord and tenant, or any other, concerning the said rates. When they have decided any such difference the court will not re-examine it (*d*).

Express Contracts as to Rates and Taxes not interfered with.

Sect. 35 provides, "that nothing in this act contained shall be construed to alter, change, or determine, or make void any contracts, covenants, or agreements whatsoever between landlord and tenant, or any other persons, touching the payment of taxes and assessments in England, Wales, and Berwick-upon-Tweed; anything herein contained to the contrary notwithstanding."

Tenant liable to the Public for the Land Tax.

The land tax is to be rated and charged upon the person "having or holding" the property "in respect thereof" (*e*). It is a tenant's tax, as between him and the public (*f*). But, in the absence of any

(*b*) *Gibbs* v. *Stead*, 8 B. & C. 528.
(*c*) *Foss* v. *Racine*, 8 C. & P. 699; 4 M. & W. 419; 7 Dowl. 53.
(*d*) *Brockman* v. *Honywood*, 1 P. Wms. 328.
(*e*) 38 Geo. 3, c. 5, s. 4, supra, 601.
(*f*) *R.* v. *Mitcham*, Cald. 276 (a); Doug. 226, Buller, J.; *Watson* v. *Home*,

express stipulation to the contrary, the tenant is entitled to deduct out of the current or accruing rent, when paid by him (*g*), not the whole rate as paid, but only so much thereof as the rent paid to his immediate landlord bears to the assessed annual value of the demised premises; and such landlord may deduct out of the next rent paid by him to his superior landlord so much of the rate as such last-mentioned rent bears to the assessed annual value of the property, and so on, toties quoties (*h*). When an outgoing tenant who has paid the land tax hands over the receipt to the succeeding tenant, it seems that the latter may have the allowance of it (*i*).

With Power to deduct a proportionate Part thereof from his next Payment of Rent.

Any contract by a tenant to pay the land tax, or to pay "all rates and taxes," will render him liable to pay the whole land tax, without making any deduction from his rent in respect thereof (*k*). Even an oral agreement to pay "all taxes" (not specifically mentioning the land tax) will be sufficient for this purpose (*l*). Under an agreement for a lease at the yearly rent of 40*l.*, payable quarterly, "free of all outgoings," the tenant ought to pay the land tax and tithe commutation rent-charge, and the landlord is entitled to have a covenant to that effect inserted in the lease (*m*). The land tax is a "parliamentary tax" within the meaning of an agreement to pay rent "and all taxes parliamentary and parochial" (*n*), but not a parochial tax (*o*).

Express Contracts by Tenants to pay Land Tax, &c.

When the tenant covenants or agrees to pay all rates, taxes and impositions, *except land tax*, or when the landlord covenants or agrees to pay the land tax, or "all rates and taxes" (which would include the land tax), and new buildings are subsequently erected, or other improvements made, during the term, whereby the amount of land tax is increased, the landlord is bound to allow the tenant to deduct from his rent only so much of the land tax as would have been payable for the premises in the state in which they were demised, and not such part of the land tax as is occasioned by the new buildings or other improvements, of which the tenant has the use or benefit (*p*). The result is, that the lessor is bound to pay such proportion only of the land tax as the reserved rent bears to the total annual value (*q*).

Express Contract by Landlord to pay the Land Tax—New Buildings.

7 B. & C. 285; *Ward* v. *Const*, 10 B. & C. 649.

(*g*) *Andrew* v. *Hancock*, 1 Brod. & B. 37; 3 Moo. 278; 21 R. R. 569; *Denby* v. *Moore*, 1 B. & A. 123; *Stubbs* v. *Parsons*, 3 B. & A. 516; *Carter* v. *Carter*, 5 Bing. 406; 7 L. J., C. P. 141; 30 R. R. 677.

(*h*) 38 Geo. 3, c. 5, s. 17, supra.

(*i*) *Clennel* v. *Read*, 7 Taunt. 50.

(*k*) 38 Geo. 3, c. 5, s. 35, supra, p. 602; *Gibs* v. *Hooper*, Carth. 135; *Brewster* v. *Kitchell*, 1 Ld. Raym. 317; *Christ's Hospital* v. *Harrild*, 2 M. & G. 707.

(*l*) *Amfield* v. *White*, Ry. & Moo. 246; *Hopwood* v. *Barefoot*, 11 Mod. 237.

(*m*) *Parish* v. *Sleeman*, 1 De G., F. & J. 326; 29 L. J., Ch. 96.

(*n*) *Manning* v. *Lunn*, 2 C. & K. 13; *Christ's Hospital* v. *Harrild*, supra.

(*o*) *Waterloo Bridge Co* v. *Cull*, 1 E. & E. 213; 28 L. J., Q. B. 70; 29 Id. 10.

(*p*) *Hyde* v. *Hill*, 3 T. R. 377; *Graham* v. *Wade*, 16 East, 29; *Whitfield* v. *Brandwood*, 2 Stark. R. 441; 20 R. R. 712; *Watson* v. *Home*, 7 B. & C. 285 and 593 (*r*) ante; *Smith* v. *Humble*, 15 C. B. 321.

(*q*) *Const* v. *Ward*, 10 B. & C. 649, 654.

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Distress—no Breach of Covenant for quiet Enjoyment.

A distress for land tax is no breach of a landlord's covenant for quiet enjoyment, without interruption by him or any other person claiming "by, from or under him" (*r*).

Where a tenant is bound to pay the land tax, the amount of it, if redeemed by the person entitled to the rent, is payable and may be recovered as rent. For sect. 126 of the Land Tax Redemption Act, 1802, 42 Geo. 3, c. 116, provides that—

Land Tax redeemed may be recovered as Rent.

> Where any tenant or lessee at a rack-rent for any term or number of years, or at will, of any manors, messuages, lands, tenements, or hereditaments, shall be bound by agreement to pay the land tax charged thereon during the continuance of any demise, and such land tax shall have been or shall be redeemed by or on the behalf of the bodies politic or corporate, or companies, or other person or persons beneficially entitled to the rent reserved or made payable on such lease or demise, the amount of the land tax so redeemed shall during the continuance of such lease or demise be considered as rent reserved or made payable thereon, and the same shall be payable on the same days, and the same powers shall be had, used, and enjoyed for the recovery thereof as for the recovery of such rent when in arrear.

Where the owner of a house in consideration of a premium demised it at one-third of its annual value, and afterwards redeemed the land tax, it was held that he was entitled to recover from the tenant an annual payment equal to two-thirds of the land tax so redeemed (*s*); and where the owner of land subject to a fee-farm rent redeemed the land tax, that he was entitled to deduct a proportionate part of the land tax from such fee-farm rent (*t*).

Terms of Redemption.

The Finance Act, 1896, 59 & 60 Vict. c. 28, has improved and simplified the terms of redemption, sect. 32 enacting that the "owner" of any land [which term by sect. 35 includes "any person entitled under the land tax acts to redeem the land tax assessed on that land"] may redeem the tax by payment to the Commissioners of Inland Revenue of a capital sum equal to thirty times the sum assessed on such land by the assessment last made and signed.

Tenant at Rack-Rent may not redeem.

By sect. 10 of the Land Tax Redemption Act, 1802, 42 Geo. 3, c. 116, redemption may be effected by all persons having any interest in the land assessed, *except* tenants at rack-rent and crown tenants.

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### SECT. 5.—*Sewers Rates.*

Sewers Acts.

The principal acts relating to sewers and sewers rates are 23 Hen. 8, c. 5 (made perpetual by 3 & 4 Edw. 6, c. 8); 13 Eliz. c. 9; 7 Ann. c. 10; 3 & 4 Will. 4, c. 22; 4 & 5 Vict. c. 45; 12 & 13 Vict. c. 50 (*u*).

(*r*) *Stanley* v. *Hayes*, 3 Q. B. 105.
(*s*) *Ward* v. *Const*, 10 B. & C. 635.
(*t*) *Moody* v. *Dean and C. of Wells*, 1 H. & N. 40; 25 L. J., Ex. 273.
(*u*) See Chitty's Statutes, tit. "Sewers."

Metropolitan Sewers Acts.

The Metropolitan Sewers Acts are mainly regulated by the Metropolis Management Act, 1855; 18 & 19 Vict. c. 120, as amended by the Metropolis Management Act Amendment Act, 1862, 25 & 26 Vict. c. 102 (*x*).

Sewers within Urban Districts.

Sewers within the district of any urban authority are provided for by the Public Health Act, 1875 (*y*). Real property within the district of a local board of health cannot be assessed to a district rate for the purpose of defraying the expenses of sewers for the benefit of the district, unless there be some person having such an occupation as would make him liable to the poor rate in respect thereof (*z*).

A Landlord's Tax.

Under the Statutes of Sewers, every person whose property derives benefit from the works of the commissioners is liable to be rated, although the benefit be not immediate (*a*). The sewers rate is not an annual tax, but a charge in respect of the improvement of the land (*b*). In the absence of any special stipulation to the contrary, a sewers rate for extraordinary repairs falls upon the landlord, but a rate for ordinary annual repairs falls on the tenant (*c*), and, if necessary, the commissioners of sewers will, on appeal to them, decide by whom and in what proportion any particular rate shall be borne (*d*).

Deduction from Rent by Ratepaying Tenant.

The tenant or occupier pays the rate in the first instance (*e*), and afterwards is entitled to deduct from the next payment of his current rent so much of the rate as the landlord ought to bear; in like manner as with respect to land tax (*f*). Where A. demised land to B. upon a building lease, at the yearly rent of 60*l*., "clear of all parliamentary, parochial, and other taxes, rates, assessments and deductions whatsoever (the sewers rate, land tax and landlord's property or income tax only excepted)," with the usual covenant to pay the rent without any deduction or abatement whatsoever (except on account of the sewers rate, land tax and landlord's property or income tax); and B. having, by building on the land, increased its rateable value to 300*l*. per annum: it was held, that he was only entitled to deduct the sewers rate and land tax *upon the original rent*, and not in respect to the original value (*g*).

The Tenant must pay any Increase of the Rate caused by New Buildings, &c.

Not a "Parliamentary" Tax.

A sewers rate properly so called, not being imposed *directly* by act of parliament, but by the authority and judgment of the commis-

(*x*) See Chitty's Statutes, tit. "Metropolis," and particularly ss. 68—89, 145—148, 163, 164, 169, 181, 182 of this act; *Reg.* v. *Great Western R. Co.*, E., B. & E. 600; *Reg.* v. *Head*, 3 B. & S. 419; 32 L. J., M. C. 115; *Re Pittiward*, 19 C. B., N. S. 489; 34 L. J., C. P. 301.

(*y*) 38 & 39 Vict. c. 55, s. 13 *et seq.*

(*z*) *Hodgson*, app., *Carlisle Local Board*, resp., 8 E. & B. 116; *Reg.* v. *Licensed Victuallers' Society*, 1 B. & S. 71.

(*a*) *Brady* v. *Wilson*, 3 A. & E. 248.

(*b*) *Smith* v. *Humble*, 15 C. B. 330.

(*c*) Callis on Sewers, 140.

(*d*) Callis on Sewers, 143; Coote, L. & T. 278; *Payne* v. *Burridge*, 12 M. & W. 730.

(*e*) Callis, 140; *Soady* v. *Wilson*, 3 A. & E. 248.

(*f*) Ante, 602; *Smith* v. *Humble*, 15 C. B. 321.

(*g*) *Smith* v. *Humble*, 15 C. B. 321.

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sioners of sewers, is not a "parliamentary" tax (*h*); and therefore a tenant who has agreed to pay "all taxes, parochial and parliamentary," may, after paying a sewers rate, deduct the amount from his next rent (*h*); or such proportion thereof as the landlord ought to bear (*i*). But where a tenant of marsh lands agreed to pay *all outgoings* whatsoever, rates, taxes, *scots*, &c., whether parliamentary or parochial (the land tax only excepted): it was held, that an extraordinary assessment made by commissioners of sewers upon the land, for a work of permanent benefit to the land, was a "scot and outgoing" within the meaning of the agreement (*k*).

but it is a "Scot or Outgoing."

## SECT. 6.—*Poor Rates.*

Origin and Nature of Poor Rates.

The Poor Relief Act, 1601 (as it may be styled by the Short Titles Act, 1892), 43 Eliz. c. 2, which may be considered the origin and foundation of our poor laws, empowers the overseers of every parish to raise rates for the support of the poor "by taxation of every inhabitant, parson, vicar and other, and of *every occupier* of lands, houses, tithes impropriate, propriations of tithes, coal-mines or saleable underwoods in the said parish." Amongst the numerous statutes (*l*) relating to poor rates passed subsequently to the above statute, the more important are the Parochial Assessment Act (6 & 7 Will. 4, c. 96), the Union Assessment Committee Act (25 & 26 Vict. c. 103), and the Rating Act, 1874 (37 & 38 Vict. c. 54).

Principal Statutes.

The Occupier is rateable generally.

The poor rate is not a tax on the land, but a personal charge in respect of the land: in general, therefore, the farmer or occupier, and not the landlord, is liable to this tax; for the rate is a charge upon the occupier in respect of his possession, and not on the lessor in regard to the rent received (*m*).

Rating of Owner in case of short Tenancies or low Rents.

The Poor Rate Assessment and Collection Act, 1869 (*n*), makes provision for the rating of the owner instead of the occupier (1) where the demise is for three months or less, at the option of the occupier who may deduct the rate from the rent or (2) where the rateable value is not more than a certain small amount (*o*), by agreement between the owner with the vestry; and in either of such cases the vestry may make an order for the rating of owners instead of occupiers.

Title of Occupier.

As the *occupier* of land is rateable, it is immaterial by what tenure he holds, or whether he has any title or not: thus if a disseisor obtain possession of land, he is rateable as the occupier of it (*p*).

(*h*) *Palmer* v. *Earith*, 14 M. & W. 428.
(*i*) *Smith* v. *Humble*, supra.
(*k*) *Waller* v. *Andrews*, 3 M. & W. 312.
(*l*) See Chit. Stat. tit. *Poor* (*Rating*).
(*m*) *Rowls* v. *Gells*, Cowp. 452; 1 Doug. 304.
(*n*) 32 & 33 Vict. c. 41, s. 1, see post, Appendix A., where the act is set out verbatim.
(*o*) Not more than 20*l*. in the Metropolis, or 13*l*. in Liverpool, or 10*l*. in Birmingham, or 8*l*. elsewhere.
(*p*) *Ld. Bute* v. *Grindall*, 2 H. Blac. 260; 1 T. R. 343; 1 R. R. 220.

Any one of several joint occupiers is liable for the whole amount of their joint assessment to a poor rate; and a warrant of distress against any one alone is good (*q*). A lessee for a term of years of a private box in a theatre is rateable under a local act, by which all persons are rateable who "inhabit, hold, occupy, possess or enjoy any land, house, shop, wharf, warehouse, or any other building, tenement, or hereditament, or other persons who by law are chargeable" (*r*). No deductions are now allowed for repairs done or agreed to be done by the tenant, nor for contingent or future renewal of buildings or machinery (*s*). Consequently the rateable value more nearly equals the rack-rent than it formerly used to do.

Where there is an Occupancy by a servant only.

The words "inhabitant" and "other," in the Poor Relief Act, 1601, 43 Eliz. c. 2, mean *resident* inhabitants and other inhabitants. If a man do not live within a parish he is to be assessed according to his land; but if he live within the parish he is to be rated as dwelling there. The residence in a lighthouse by the servant of the owner, at an annual salary, to take care of the light, is the occupation of the master, who alone can be rated in respect of such occupation of the lighthouse (*t*). A servant who engaged and occupied a house and garden, the rent and taxes of which were paid by his master, was held liable to be rated as occupier, and not the master (*u*). The trustees of premises not demised to any one, but who meet occasionally on the premises for the purposes of the trust (the actual occupants being the servants and others who are employed in the objects of the trust), are the persons rateable (*x*). The proprietor of a toll traverse who demises it from year to year *by parol* is properly rateable, as the lessee is a mere bailiff for the collection of it (*y*).

Where there is Partial Occupancy only.

If the owner of a house occupy part of it, he is liable to be rated for the whole, unless there be a distinct occupation of the rest by some other person (*z*). A sub-tenant of part is not liable to be rated for the whole of the premises; the rate should be either upon the immediate landlord in respect of his entire interest, or upon each sub-tenant in respect of such portion of the premises as he occupies (*a*). Where a man went from home with his family for nearly a year, but left his assistant to carry on his business in his shop in one room of the house, which for this purpose was parted off by laths from the rest; and he left the key of the house door with a friend, and had the garden cultivated for his own benefit as usual;

(*q*) *Paynter* v. *The Queen*, 10 Q. B. 908.
(*r*) *Reg.* v. *St. Martin's*, 3 Q. B. 204.
(*s*) *Reg.* v. *Wells*, 8 B. & S. 607; L. R., 2 Q. B. 542; 36 L. J., M. C. 109.
(*t*) *Rex* v. *Tynemouth*, 12 East, 46; 11 R. R. 328.
(*u*) *Reg.* v. *Lynn*, 8 A. & E. 377.
(*x*) *Reg.* v. *Sterry*, 12 A. & E. 84.
(*y*) *Reg.* v. *Marquis of Salisbury*, 8 A. & E. 716.
(*z*) *Rex* v. *St. Mary the Less, Durham*, 4 T. R. 477; 16 R. R. 811.
(*a*) *Lobban* v. *Cook*, 3 H. & N. 238.

CH. XV. s. 6. *Poor Rates.*

it was held that he was liable to be rated to the relief of the poor as occupier of the whole house (*b*).

Rating of Hereditaments demised for Three Months or less.

By the Poor Rate Assessment and Collection Act, 1869, 32 & 33 Vict. c. 41, s. 1 (*c*), the occupier of a rateable hereditament let to him for not more than three months is entitled to deduct the amount paid by him, in respect of any poor rate assessed thereupon, from the rent due or accruing due to the owner.

Special provisions for Appeal by Landlord in Metropolis.

In the metropolis an owner or lessee who is liable to be assessed for any rate in the place of the occupier or tenant, or does in fact pay any such rate in his place under any contract or arrangement with him, is, by sect. 2 of the Valuation Metropolis Amendment Act, 1884, 47 & 48 Vict. c. 5, deemed to be the ratepayer having the right of appeal against the assessment committee.

Rating of Iron Mines, &c., under the Rating Act, 1874.

Under the Poor Relief Act, 1601, 43 Eliz. c. 2, no other mines than coal mines were rateable, but now, by the Rating Act, 1874 (37 & 38 Vict. c. 54), s. 3, all the poor rate acts extend to mines of every kind, and the 8th section of the Act of 1874 provides that—

Where any poor or other local rate, which at the commencement of this act any lessee, licensee, or grantee of a mine is exempt from being rated to in respect of such mine, becomes payable by him in respect of such mine during the continuance of his lease, grant, or licence, or before the arrival of the period at which th eamount of the rent, royalty, or dues is liable to revision or readjustment, he may (*unless he has specifically contracted* (*d*) to pay such rate in the event of the abolition of the said exemption) deduct from any rent, royalty, or dues payable by him one half of any such rate paid by him :

Tenant may deduct one half from Rent.

Provided that he shall not deduct any sum exceeding what one half of the rate in the pound of such poor or other local rate would amount to if calculated upon the rent, royalty, or dues so payable by him.

Rating of Plantation, &c., under Rating Act, 1874.

The Rating Act, 1874, s. 3, also extends the operation of the poor rate acts to "land used for a plantation or a wood, or for the growth of saleable underwood, and not subject to any right of common," and by sect. 5—

Deduction by Tenant.

Where the rateable value of any land used for a plantation or a wood, or both for a plantation or wood and for the growth of saleable underwood, is increased by reason of the same being estimated in accordance with this act, the occupier of that land under any lease or agreement made before the commencement of this act, may, during the continuance

(*b*) *Rex* v. *Aberystwith*, 10 East, 354.

(*c*) See post, Appendix A.

(*d*) A covenant to pay rent "free of all rates, taxes, and deductions whatsoever, parliamentary, parochial, or of any other nature" is not within this exception. *Devonshire* (*Duke of*) v. *Barrow Hematite Steel Co.*, 2 Q. B. D. 286 (C. A.); nor is a covenant to "pay or cause to be paid all manner of taxes, rates, assessments, charges, and impositions whatever, parliamentary or parochial, which now are or which shall at any time or times hereafter during the continuance of this demise be taxed, rated, charged, assessed, or imposed upon the said demised mines and premises, the landlord's property tax only excepted:" *Chaloner* v. *Bolckow*, 39 L. T. 134; 26 W. R. 541—H. L.

of the lease or agreement, deduct from his rent any poor or other local rate, or any portion thereof, which is paid by him in respect of such increase of rateable value, and every assessment committee, on the application of such occupier, shall certify in the valuation list, or otherwise, the fact and amount of such increase.

Rating of Rights of Sporting, &c., under Rating Act, 1874, s. 6.

The Rating Act, 1874, s. 3, also extends the operation of the poor rate acts to "rights of fowling, of shooting, of taking or killing game or rabbits, and of fishing, when severed from the occupation of the land;" and by sect. 6—

(1.) Where any right of fowling, or of shooting, or of taking or killing game or rabbits, or of fishing, (hereinafter referred to as a right of sporting), is severed from the occupation of the land, and is not let, and the owner of such right receives rent for the land, the said right shall not be separately valued or rated, but the gross and rateable value of the land shall be estimated as if the said right were not severed; and in such case, if the rateable value is increased by reason of its being so estimated, but not otherwise, the occupier of the land may (unless he has specially contracted (*e*) to pay such rate in the event of an increase) deduct from his rent such portion of any poor or other local rate as is paid by him in respect of such increase; and every assessment committee, on the application of the occupier, shall certify in the valuation list, or otherwise, the fact and amount of such increase.

(2.) Where any right of sporting, when severed from the occupation of the land, is let, either the owner or the lessee thereof, according as the persons making the rate determine, may be rated as the superior thereof.

(3.) Subject to the foregoing provisions of this section the owner of any right of sporting, when severed from the occupation of the land, may be rated as the occupier thereof.

(4.) For the purpose of this section the person who, if the right of sporting is not let, is entitled to exercise the right, or who, if the right is let, is entitled to receive the rent for the same, shall be deemed to be the owner of the right.

Local Rate.

Local rate, by sect. 15, means any "county rate, borough rate, highway rate, and other local rate leviable upon property rateable to the relief of the poor."

In case of Bankruptcy of Tenant.

When a tenant becomes bankrupt, all parochial and other local rates to which he is liable rank, with certain other liabilities, as preferential debts (*f*).

(*e*) See note (*d*), supra. For cases prior to the act, see Chap. XVIII., post.

(*f*) Preferential Payments in Bankruptcy Act, 1888, ante, p. 536.

CH. XV. s. 7.
*House Tax.*

## SECT. 7.—*House Tax.*

Window Duties repealed.

The window duties under 48 Geo. 3, c. 55, were repealed by the House Tax Act, 1851, 14 & 15 Vict. c. 36 (*g*), which imposed the following house duties, viz.:—

House Tax.

"For every *inhabited* dwelling-house which, with the household and other offices, yards and gardens therewith occupied and charged, is or shall be *worth the rent of* 20*l.* *or upwards* by the year:"

If occupied as a shop, or by a person licensed to sell beer, &c., or by a tenant farmer or his servant, sixpence in the pound, and if otherwise used, ninepence in the pound.

Exemption of Trade Premises.

By the Customs and Inland Revenue Act, 1867. 30 & 31 Vict. c. 90, s. 25, to entitle the occupier to exemption from inhabited house duties on the ground of occupation for trade only, &c., it is not necessary to prove that the occupier resides in a separate and distinct dwelling-house or part of a dwelling-house charged with the said duties.

Exemption from Duties of Trade Premises under Care of Servant only.

By the Customs and Inland Revenue Act, 1869, 32 & 33 Vict. c. 14, s. 11, any tenement or part of a tenement occupied as a house for trade only, &c., is exempt from inhabited house duties, although a servant or other person may dwell in such tenement, or part of a tenement, for the protection thereof.

Tenant's Taxes.

In the absence of any special stipulation to the contrary the house tax falls upon the tenant, who has the use and enjoyment of it.

Effect of Exemptions in Local Acts.

A local act which exempts certain land from all taxes and assessments whatsoever will not exonerate such land from house duty or other taxes imposed by subsequent public general acts (*h*).

## SECT. 8.—*County Rates.*

County Rate Acts.

The assessment and collection of county rates are regulated by 15 & 16 Vict. c. 81, as altered by 21 & 22 Vict. c. 33 (*i*). By 15 & 16 Vict. c. 81, s. 6, "for the purpose of preparing 'the basis for the county rate as in the act mentioned,' the words 'full and fair annual value' shall be taken to mean the net annual value of any property as the same is or may be required by law to be estimated for the purpose of assessing the rates for the relief of the poor."

Not Parliamentary Taxes,

"A county rate is not a parliamentary tax, although it is in one sense made by parliament; but the rate is not fixed or assessed by act of parliament" (*k*), but by the justices at quarter sessions, subject

but Parochial,

to an appeal (*l*). It is not a tax or tollage within the meaning of the

(*g*) See this and kindred enactments, Chitty's Statutes, tit. "House Tax."
(*h*) *Perchard* v. *Heywood*, 8 T. R. 468.
(*i*) See Chit. Stat. tit. "County Rate."
(*k*) 14 M. & W. 328, Alderson, B.
(*l*) 15 & 16 Vict. c. 81, ss. 21, 22; 21 & 22 Vict. c. 33.

privilege of tenants in ancient demesne as to exemption from taxes and tollage granted by a parliament, unless specially named (*m*). It seems, however, to be a parochial tax, being paid out of the poor rate (*n*). The county rate is collected together with the poor rate, and of course falls upon the tenant, who has no right to deduct any part thereof from his rent, in the absence of any special stipulation to the contrary. Unoccupied houses capable of being rated ought to be included in the valuation (*o*), but an incoming tenant will have to pay only his proportion according to the time of his occupation (*p*).

and fall on the Tenant.

Unoccupied Houses.

## Sect. 9.—*Borough Rates.*

By the Municipal Corporations Act, 1882, 45 & 46 Vict. c. 50, s. 144, re-enacting s. 92 of the repealed Municipal Corporations Act, 1835, 5 & 6 Will. 4, c. 76, if the borough fund of a municipal corporation be insufficient for all the purposes to which it is applicable, the council "shall order" a borough rate, to make up the deficiency; and by sect. 147 of the same act where the vestry of a parish has made or makes under sect. 4 of the Poor Rate Assessment and Collection Act, 1869 (*q*), an order that owners instead of occupiers shall be rated to the poor rate, every such order while in force "shall be deemed to apply to and include rating to the borough rate."

Borough Rates in Municipal Boroughs.

## Sect. 10.—*Highway Rates.*

By the Highways Act, 1835, 5 & 6 Will. 4, c. 50 (*r*), highway rates are to be made by the surveyor of highways, and allowed by two justices, and published and collected in the same way as poor rates (*s*). They are to be made in a prescribed form and manner upon *the occupiers* (*t*). Errors in highway rates may be corrected by the surveyor with the consent and approbation of the justices at a special session for the highways (*u*). Persons rated who through poverty are unable to pay may be excused by the justices at such session (*x*). When property, or the owner or occupier in respect thereof, was previous to the passing of this act *legally exempt from the performance of statute duty*, or from the payment of any composition in lieu thereof, or of highway rate, the said property, and the owners and occupiers

Highway Rates—how made and enforced generally.

On Occupiers.

Correction of Errors.

Excuses from Poverty.

Exemptions.

(*m*) *Reg.* v. *Aylesford*, 2 E. & E. 538; 29 L. J., M. C. 83.
(*n*) *Reg.* v. *Aylesbury-with-Walton*, 9 Q. B. 261.
(*o*) *Reg.* v. *Hammersmith*, 31 L. J., Q. B. 3; 7 W. R. 524.
(*p*) 32 & 33 Vict. c. 41, p. 598, supra.
(*q*) 32 & 33 Vict. c. 41, post, Appendix A.
(*r*) See Spearman on Highways; Chit. Stat. tit. "Highways."
(*s*) 5 & 6 Will. 4, c. 50, ss. 27—34.
(*t*) Sect. 29, and Sched. Form No. 4.
(*u*) Sect. 31.
(*x*) Sect. 32.

CH. XV. s. 10. *Highway Rates.*

thereof, are exempt from the payment of the rate (*y*). For levying and recovering the rate, the surveyor has the same powers, remedies, and privileges, as the overseers of the poor of the parish have by law for the recovery of any poor rate (*z*). In parishes in which the overseers of the poor have power by local acts of parliament to compound with or require composition for poor rates from the landlords of certain houses, tenements, or hereditaments, and in case of their refusal to compound, to rate such landlords as the occupiers, the surveyor has the same powers, &c., to compound and enforce composition, and, in case of refusal by the landlords, to assess them in the same proportions to the rates authorized to be made by this act, as the overseers of the poor have by such acts for assessing and recovering any rate made for the relief of the poor, or the compositions entered into for the same (*a*). An appeal against any highway rate may be made to the quarter sessions (*b*).

Recovery of Rates.

Compositions in certain Cases.

Appeal to Sessions.

Highways within the district of any urban sanitary authority are usually provided for under the Public Health Act, 1875 (38 & 39 Vict. c. 55, s. 216), by general district rates levied under that act.

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### SECT. 11.—*General District Rates under Public Health Act.*

Assessment of General District Rate.

Public Health Act, 1875, s. 211.

By sect. 211 (1) of the Public Health Act, 1875 (38 & 39 Vict. c. 55), "general district rates" are levied on the "occupier of all kinds of property for the time being by law assessable to any rate for the relief of the poor," and are assessed "on the full net annual value of such property ascertained by the valuation list for the time being in force, or if there is none, by the rate for the relief of the poor made next before the making of the assessment," under the act.

Rating of Owner instead of Occupier

But the same section provides for the rating of the owner in certain cases as follows:—

(a) The owner, instead of the occupier, may, at the option of the urban authority, be rated in cases—

Where the rateable value of any premises liable to assessment under this act does not exceed the sum of 10*l.*; or

Where any premises so liable are let to weekly or monthly tenants; or

Where any premises so liable are let in separate apartments, or where the rents become payable or are collected at any shorter period than quarterly:

at Reduced Rate.

Provided that in cases where the owner is rated instead of the occupier, he shall be assessed on such reduced estimate as the urban authority deem reasonable of the net annual value, not being less than two-thirds nor more than four-fifths of the net annual value; and where such reduced

(*y*) Sect. 33.
(*z*) Sect. 34.
(*a*) Sect. 30.
(*b*) Sects. 105—108.

estimate is in respect of tenements whether occupied or unoccupied, then such assessment may be made on one half of the amount at which such tenements would be liable to be rated if the same were occupied and the rate were levied on the occupiers.

Quarter Rating.

The same section (211 of the Public Health Act, 1875) provides that (inter alios) the occupier of land used as arable, meadow or pasture ground only, or as woodland, market gardens, or nursery grounds, or of land covered with water, shall be assessed in the proportion of one-fourth part only of the net annual value; and as to unoccupied premises, that they "shall be included in the rate, but the rate shall not be charged on any person in respect of the same while they continue to be unoccupied."

Unoccupied Premises.

Outgoing and Incoming Tenants.

As to incoming tenants, the same section by sub-s. (3) provides that:—

> If any owner or occupier assessed or liable to any such rate ceases to be owner or occupier of the premises in respect whereof he is so assessed or liable, before the end of the period for which the rate was made, and before the same is fully paid off, he shall be liable to pay only such part of the rate as may be in proportion to the time during which he continues to be such owner or occupier; and in every such case if any person afterwards become owner or occupier of the premises during part of the said period, he shall pay such part of the rate as may be in proportion to the time during which he continues to be such owner or occupier, and the same shall be recovered from him in the same manner as if he had been originally assessed or liable.

The same section keeps alive exemptions under local acts, and provides for divisions of districts and assessments accordingly (*c*).

Contracts between Landlord and Tenant not interfered with.

Sect. 97 of the Public Health Act, 1848, which act is entirely repealed by the Act of 1875, provided "that nothing in this act shall alter, interfere with, or affect any lease, contract or agreement which shall have been made or entered into between landlord and tenant *before this act is applied to the district* in which the premises are situate in respect of which the lease, contract or agreement was made." On the same principle, sect. 226 of the Act of 1875 provides that "nothing in this part [i.e. Part VI., which applies to "rating and borrowing powers"] of this act shall alter or affect any lease, contract or agreement made or entered into between the landlord and tenant of any premises;" and sect. 121 of the Public Health (London) Act, 1891, 54 & 55 Vict. c. 76, that "nothing in this section" [which provides that costs and expenses recoverable under the act may be recovered from the occupier, and that the owner shall allow the occupier to deduct any money so paid out of the rent] "shall affect any contract between any owner and occupier of any

Public Health Act, 1875, s. 226.

(*c*) See Lumley's Public Health Act, 1875; and see sect. 320 of the act as to division of expenses between landlord and tenant, under the provisions of any local act before the passing of the Public Health Act, 1872.

CH. XV. s. 11.
*Rates under Public Health Act.*

premises whereby the occupier agrees to pay or discharge all rates, dues, and sums of money payable in respect of such premises, or shall affect any contract whatsoever between landlord and tenant."

Expenses of abating Nuisance.
*Budd* v. *Marshall.*

Where the landlord executed certain works upon the demised premises in consequence of a notice from the sanitary authority under section 94 of the Public Health Act, 1875, to abate a nuisance thereon, and in order to prevent proceedings against himself, it was held that he could not recover the expenses of such works from the tenant upon the tenant's covenant to pay all taxes, rates, charges, assessments and impositions whatsoever (except land tax and landlord's property tax) charged &c. "by authority of parliament, *or otherwise howsoever*" (*d*). In the subsequent and similar, though in law distinguishable, case of *Budd* v. *Marshall* (*e*), however, in which the word "duties" occurred in the covenant to pay taxes, the Court of Appeal held that the landlord could recover; and words extending to charges upon the lessor as that the lessee will pay all "rates, assessments, charges or impositions whatever taxed, charged or imposed on the premises or on the lessor, his executors, administrators or assigns for or in respect of" them have been construed in favour of the landlord (*f*) with the result that the tenant had to repay expenses incurred by the landlord in complying with an order of a sanitary authority under the Public Health (London) Act, 1891, to abate a nuisance by repairing a house drain (*g*). In a subsequent case, where the covenant was to "pay the land tax, sewers rate, and all other taxes, rates, duties, assessments, and impositions, parliamentary, parochial or otherwise, which now are or shall at any time during this demise be assessed or imposed on or in respect of the said demised premises," and the requirement was under the same act to take up a defective drain and lay a new one, the same result followed, the Court laying a stress on the word "duties" as imposing the obligation to lay the new drain (*h*). But

Paving Street.

the words "rates, taxes and assessments," do not include a sum assessed upon a landlord as his proportion of the expense of paving a street upon which the demised premises abut, this being a charge imposed upon the owner for the permanent benefit of the property (*i*); though in a subsequent case, where the covenant included "outgoings of every description payable by either landlord or tenant,"

(*d*) *Rawlins* v. *Briggs*, 3 C. P. D. 368; 47 L. J., C. P. 487; 27 W. R. 138.

(*e*) *Budd* v. *Marshall*, 5 C. P. D. 481; 50 L. J., C. P. 24; 42 L. T. 793; 29 W. R. 148, Brett, L.J., diss., affirming judgment of Grove, J., who had tried the case without a jury (Id. 149). See also *Melhado* v. *Woodcock*, 9 T. L. R. 48.

(*f*) *Smith* v. *Robinson*, [1893] 2 Q. B. 53; 62 L. J., Q. B. 509; 69 L. T. 434; 41 W. R. 588; 5 R. 469.

(*g*) See Public Health (London) Act, 1891, 54 & 55 Vict. c. 76, s. 4.

(*h*) *Brett* v. *Rogers*, [1897] 1 Q. B. 525; 66 L. J., Q. B. 287; 76 L. T. 26; 45 W. R. 334, following *Payne* v. *Burridge*, 13 L. J., Ex. 119; 12 M. & W. 727.

(*i*) *Wilkinson* v. *Collyer*, 13 Q. B. D. 1; 53 L. J., Q. B. 278; 51 L. T. 299; 32 W. R. 614.

the tenant was held liable to pay the landlord's proportion of the cost of paving a street under the Metropolis Management Act, 1862, 25 & 26 Vict. c. 102, s. 96 (*k*); and a similar decision was come to upon very similar words although the tenant held upon only a three years' agreement (*l*).

Private Improvement Rates.

The urban authority have also power, under the Public Health Act, 1875, to make and levy "private improvement rates" upon the occupier (*m*), who may deduct three-fourths, or such proportion of three-fourths of the rate paid by him as his rent bears to the rack-rent (*n*), unless there be some special stipulation in his lease to the contrary (*o*). By sect. 215, "at any time before the expiration of the period for which any private improvement rate is made, the owner or occupier of the premises assessed thereto may redeem the same, by paying to the urban authority the expenses in respect of which the rate was made, or such part thereof as may not have been defrayed by sums already levied in respect of the same."

Water Rates.

Any urban authority may also, under the same act, provide their district with water, and where they supply to any premises "may charge in respect of such supply a water rate to be assessed on the net annual value of the premises" (*p*).

Generally fall on Occupier.

With respect to each of the above-mentioned rates it is to be observed that they are to be made and levied *upon the occupier*, who generally has no right to deduct any part thereof from his rent (except about three-fourths of "improvement rates"). But contracts between landlord and tenant as to the payment of rates and taxes are not interfered with (*q*).

Appeal.

The validity of a rate which might be appealed against cannot be questioned in an action, or otherwise than on appeal, unless such rate was wholly *illegal*, and made without jurisdiction (*r*). Any appeal must be entered within a very limited time, and notice of appeal, together with the grounds of appeal, given, and a recognizance with sureties entered into, within the time and in manner in that behalf prescribed (*s*).

Repairs of Highways *Ratione Clausuræ*.

The liability to repair a highway *ratione clausuræ* is in the occupier of the land inclosed; not in the owner as owner (*t*). And it seems that such liability does not accrue where either the highway is not immemorial, or where the adjoining land inclosed has not before the inclosure been used for passage (*t*).

(*k*) *Aldridge* v. *Fearne*, 17 Q. B. D. 212; 55 L. J., Q. B. 587; 34 W. R. 578.
(*l*) *Batchelor* v. *Bigger*, 60 L. T. 416.
(*m*) 38 & 39 Vict. c. 55, s. 213.
(*n*) Sect. 214.
(*o*) Sect. 226, supra; and see *Smith* v. *Humble*, 15 C. B. 321.
(*p*) Sects. 51, 56 et seq. And see sect. 13, post.
(*q*) Sect. 226, supra.
(*r*) *Luton Local Board*, app., *Davis*, resp., 2 E. & E. 678; 29 L. J., M. C. 173.
(*s*) Sect. 268 et seq.
(*t*) *Reg.* v. *Ramsden*, *Bart.*, E., B. & E. 949.

CH. XV. s. 12.
*Lighting and Watching Rates.*

## SECT. 12.—*Lighting and Watching Rates.*

Lighting and Watching Act.

The Lighting and Watching Act, 1833, 3 & 4 Will. 4, c. 90, was passed to enable parishes and parts of parishes, *without obtaining any local acts*, but with the consent of the ratepayers (*u*), to watch and light, or watch or light, their own parish or district under the direction of inspectors appointed by the ratepayers, and by means of rates to be raised and levied in like manner as poor rates, not exceeding a certain sum to be fixed in the first year, and not to be exceeded in any subsequent year (*x*). The provisions of this act may be adopted in any parish, or part of a parish, in England or Wales, as to watching and lighting, or watching or lighting (both or either), as may be deemed expedient (*y*); and in rural parishes the exclusive power of adopting the act rests, by virtue of s. 7 of the Local Government Act, 1894, 56 & 57 Vict. c. 73, with the parish meeting. But they are not to interfere with "An Act for improving the Police in and near the Metropolis" (10 Geo. 4, c. 44); nor to extend to any parish or place already regulated by or under the provisions of any act of parliament for all or any of the purposes hereinbefore provided for; or to interfere with the powers which any corporate body may have with respect to watching and lighting (*z*); nor to extend to any part of a parish so regulated (*a*). But the powers of this act may be adopted in any parish so far as the same relate to lighting, although such parish shall be watched (*b*).

In any district where the Public Health Act, 1875, is in force, in which the Lighting and Watching Act, 1833, 3 & 4 Will. 4, c. 90, has been adopted, such last-mentioned act is superseded (*c*).

Rates on Occupiers.

Rates made under 3 & 4 Will. 4, c. 90, or under local acts as to paving, watching, lighting, &c., generally fall upon the occupier, who has no right to deduct them from his rent. But sometimes the burthen is thrown upon the landlord. Thus by 57 Geo. 3, c. xxix. for regulating the pavement of London, Westminster and Southwark, and the parishes of St. Marylebone and St. Pancras, the paving rates are directed to be paid by the landlord in certain cases.

## SECT. 13.—*Water Rates.*

Payable by Tenant.
10 & 11 Vict. c. 17, s. 72.

Water rates are always payable by the tenant or occupier in the absence of an express stipulation to the contrary, for he has the

(*u*) *Eynsham's case*, 12 Q. B. 398, n.; *Reg.* v. *Dunn*, 7 E. & B. 220; 26 L. J., M. C. 74.
(*x*) *Beechey* v. *Quintery*, 10 M. & W. 65.
(*y*) Sects. 71, 73.
(*z*) Sect. 72.
(*a*) Sect. 73.
(*b*) See 3 Burn's Justice, 364—389 (30th ed., 1869).
(*c*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 163.

use and enjoyment of the water supplied. But by the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 72, the owners of dwelling-houses, the annual value of which does not exceed 10*l.*, are made liable to the payment of water rates instead of the occupiers; "and the person receiving the rents of any such house or tenement as aforesaid from the occupier thereof on his own account, or as agent or receiver for any person interested therein, shall be deemed the owner of such house or tenement." Sect. 73 gives power to owners of tenements, where the occupation is under a lease or agreement made *prior to the passing of the special act* (*d*), to recover such payments from the occupiers in the same manner as arrears of rent may be recovered.

By Landlords of Small Tenements.

The 74th section of the Act of 1847 allows water companies to cut off the water supply for non-payment of the water rate. But the powers to cut off the tenants' water supply are limited, where the rate is paid by the landlord, by the Water Companies (Regulation of Powers) Act, 1887, 50 & 51 Vict. c. 21, s. 4, as follows:—

Cutting off Water for Non-payment of Rate.

Where the owner and not the occupier is liable by law or by agreement with the water company to the payment of the water rate in respect of any dwelling-house or part of a dwelling-house occupied as a separate tenement, no water company shall cut off the water supply for non-payment of the water rate, but such water rate, without prejudice to the other remedies of the company for enforcing payment thereof from such owner, shall, together with interest thereon at the rate of five pounds per centum per annum, computed from the expiration of one month from the time when the same has been claimed by the company until receipt thereof by the company, be a charge on such dwelling-house in priority to all other charges affecting the premises; and (without prejudice to such charge) the amount may be recovered, with the costs incurred, from the owner or from the occupier for the time being in the same manner as water rates may by law be recovered: Provided always, that proceedings shall not be taken against the occupier until notice shall have been given to him or left at his dwelling-house to pay the amount due for water rate out of the rent then due or that may thereafter become due from him, and he shall have omitted so to pay such water rate; and provided also, that no greater sum shall be recovered at any one time from any such occupier than the amount of rent owing by him, or which shall have accrued due from him since such notice shall have been given or left as aforesaid, and that every such occupier shall be entitled to deduct from the rent payable by him the sum so recovered from him or which he shall have paid on demand.

Restriction of power to cut off Water, under Act of 1887.

By s. 5 the penalty is five pounds a day, recoverable summarily and to be paid to the person aggrieved, for cutting off the supply in contravention of the Act, which by s. 3 applies to every company to which the Act of 1847 applies.

By sects. 51—66 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), local authorities within the meaning of that act may supply

Water Rate under Public Health Act.

(*d*) The local act which incorporates the general act above-mentioned.

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their districts with water: and for this purpose there are incorporated with the Public Health Act, 1875, the Waterworks Clauses Act, 1863, and the provisions (inter alia) of the Waterworks Clauses Act, 1847, which relate to the "payment and recovery of the water rates." And it is provided by sect. 57 of the Public Health Act, 1875, that "any rent for pipe and works paid by an occupier" under sect. 44 (*e*) of the Waterworks Clauses Act, 1847, "may be deducted by him from any rent from time to time due from him to such owner."

Water Rate included in term "Rates."

It has been held by the High Court that a water rate for water separately supplied to a shop and basement and paid for by the tenant was included in the terms "all rates and taxes chargeable in respect of" the shop and basement and three rooms on a third floor, which the lessor thereof covenanted to pay (*f*), but by the Court of Appeal that the rate is not within the expression "all rates and impositions whatsoever, whether parliamentary, parochial, or imposed by the Corporation of the City of London, or otherwise howsoever" (*g*), and though the two cases are distinguishable, the first of them seems open to doubt, on the ground that the water rate is a voluntary rate (*h*).

Water Rate "assessed" does not include rate specially agreed for.

A covenant to pay "all rates, taxes, assessments, water rate and other outgoings, except the gas and electric light, now or hereafter to be imposed or assessed upon the said premises, or on the lessor or lessee in respect thereof," obliges payment of the rate to be fixed with certainty under the statutory power of charging the rate, and not of a rate for water supplied, as for other than domestic purposes, by agreement between the consumer and the water company. Therefore, where the lessor agreed in the above terms to pay the rate in the lease of premises within the New River Company's district, and the company's special act by one section provided that the rate should be at a percentage upon the annual value of the house supplied for domestic purposes, by another section that a supply for domestic purposes should not include a supply for trade or business requiring an extra supply, and by another that the company might supply water for other than domestic purposes at such rate and terms as should be agreed upon, it was held that the lessees (who were refreshment contractors) could not require the lessor to

(*e*) This section applies to houses of not exceeding ten pounds annual value. To such houses, by virtue of the same section as amended by sect. 57 of the Public Health Act, 1875, communication pipes must be laid down at the request of owners *or* occupiers.

(*f*) *Direct Spanish Telegraph Co.* v. *Shepherd*, 13 Q. B. D. 202; 53 L. J., Q. B. 420; 51 L. T. 124; 32 W. R. 217, per Hawkins and Smith, JJ., who refused leave to appeal.

(*g*) *Badcock* v. *Hunt*, 58 L. J., Q. B. 134; 37 W. R. 111—C. A.

(*h*) See per Lord Esher, M.R., in *Badcock* v. *Hunt*, supra.

pay an additional rate of 30*l.* agreed on between the lessee and the company for an additional supply for the purposes of their business (*i*).

Water Rate levied on "Rateable Value" in Metropolis.

In the metropolis the water rate is a percentage on the rateable value of the premises supplied with the water (*k*).

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## Sect. 14.—*Gas Rates.*

In the Metropolis.

Gas rates are always payable by the tenant, in the absence of any express stipulation to the contrary. The supply of gas to the metropolis is regulated by the Metropolis Gas Act, 1860, 23 & 24 Vict. c. 125, which, however (by sect. 5), excepts *nine* gas companies in the suburbs. The act itself must be referred to for details.

Supply of Gas to Incoming Tenant.

But, by sect. 33, "in case any consumer leaves the premises where gas was supplied to him, without paying to the gas company the rate or meter rent due from him, the gas company shall not require from the next tenant of the premises payment of the arrears so left unpaid, unless the incoming tenant agreed with the defaulting consumer to pay the arrears; but the gas company shall, notwithstanding any such arrears, in the absence of collusion between the outgoing and incoming tenant, supply gas to the incoming tenant as required by this act, on being required by him so to do."

Elsewhere than in the Metropolis.

The supply of gas elsewhere than in the metropolis is regulated by the Gasworks Clauses Acts, 1847 and 1871, and by the special acts of each company. By sect. 39 of the Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), "in case any consumer of gas" leaves the premises where the gas has been supplied to him "without paying the gas rent or meter rent due from him," the company "shall not be entitled to require from the next tenant the payment of the arrears left by the former tenant, unless such incoming tenant has undertaken with the former tenant to pay or exonerate him from the payment of such arrears."

An injunction has been granted restraining the landlords of a third floor flat from interfering with the supply of gas thereto on the ground that the plaintiff their tenant had not paid them over and above the amount paid by them to the gas company an extra 3*d.* for every 1,000 cubic feet of gas supplied to him (*l*).

(*i*) *Floyd* v. *Lyons*, [1897] 1 Ch. 633; 66 L. J., Ch. 350; 76 L. T. 251; 45 W. R. 435—C. A., reversing Kekewich, J.

(*k*) Waterworks Clauses Act Amendment Act, 1885 (48 & 49 Vict. c. 34).

(*l*) *Hersey* v. *White*, 9 T. L. R. 335, per Collins, J.

CH. XV. S. 15.

*The Rating Act*, 1874.

## SECT. 15.—*The Rating Act*, 1874.

Commencement of Act.

The more important special sections of the Rating Act, 1874, 37 & 38 Vict. c. 54, have already been set forth (*m*). The general sect. 9, as to deduction of rates, enacts that—

Deduction of Rates.

Where any occupier, lessee, licensee, grantee, or other person is authorized by this act to deduct any rate or sum in respect of a rate from any rent, royalty, or dues payable by him, then—

(1.) Any payment so authorized to be deducted shall be a good discharge for such amount of rent, royalty, or dues as is equal to the amount of such payment, and shall be allowed accordingly.

(2.) Any payment so authorized to be deducted may be recovered as an ordinary debt from the person to whom the debt, royalty, or dues may be payable.

(3.) The person receiving the rent, royalty, or dues shall have the same right of appeal and objection with reference to the rate and to the valuation of the hereditament in respect of which the rate is payable as he would have if he were the occupier of such hereditament.

Liability of Property to Local Rates as well as Poor Rates.

And by sect. 10, the hereditaments to which the poor rate acts are extended by the act are rateable to all local rates in like manner as if the poor rate acts had extended to such hereditaments.

## SECT. 16.—*Tithe Rent-charge.*

The incidence of the tithe rent-charge is regulated by the Tithe Commutation Act, 1836 (6 & 7 Will. 4, c. 71), and its amending acts (*n*). Up to 1891, although the legislature imposed the charge upon the land alone, and imposed no personal liability to the tithe-owner on either landlord or tenant (*o*), and further expressly (by sect. 80 of the Tithe Commutation Act of 1836) allowed the tenant to deduct the rent-charge from his rent (*p*) in case he should have paid it, it was very frequently provided in the contract of tenancy that the tenant should pay it, and the law gave effect to such a provision. Arrears being made recoverable by distress by s. 81 of the act, in course of time many tenants in Wales, where the tenants are mostly Nonconformists, came to resist the distresses which were levied upon them to such an extent that it was deemed expedient to interfere with the contracts between landlord and tenant for payment of tithe, and to extinguish all liability on the part of the

(*m*) Ante, Sect. 6, p. 608.

(*n*) See Chit. Stat. tit. *Tithe Rent-charge*.

(*o*) See section 67 of the Tithe Act, 1836, 6 & 7 Will. 4, c. 71; *Griffenhoofe* v. *Daubuz*, 24 L. J., Q. B. 20; 5 E. & B. 746.

(*p*) The 80th section of the Act of 1836 authorizes deduction from the current rent only. *Dawes* v. *Thomas*, [1892] 1 Q. B. 414; 61 L. J., Q. B. 482; 66 L. T. 451; 40 W. R. 516—C. A. This section is not repealed, and it is conceived that a tenant who became such prior to the Act of 1891 may still pay the tithe if he pleases, and deduct it from the rent under the section.

tenant to the tithe-owner. This was effected by the Tithe Act, 1891, 54 & 55 Vict. c. 8, which received the Royal Assent on the 26th of March, 1891.

Contracts *after* the Tithe Act, 1891.

Dealing first with contracts *after* the act, this act by sub-s. 1 of s. 1 provides that:—

Tithe rent-charge as defined (*q*) by this act issuing out of any lands shall be payable by the owner of the lands, notwithstanding any contract between him and the occupier of such lands, and any contract made between an occupier and owner of lands, after the passing of this act, for the payment of tithe rent-charge by the occupier shall be void.

The effect of this is that any stipulation in a contract of tenancy *made either* (*r*) *on* or after the 26th March, 1891, for payment of tithe by tenant, though the tenancy be expressed to commence before that day, is to be deemed non-existent; but a lease made after in pursuance of a contract for a lease, enforceable by decree for specific performance, made before that day would probably be held effective to throw the tithe on the tenant contracting to bear it.

Contracts *before* the Tithe Act, 1891.

Dealing next with contracts *before* the act, the act by sub-s. 2 of s. 1 provides that:—

Where the occupier is liable under any contract made before the passing of this act to pay the tithe rent-charge, then he shall cease to be bound by that part of his contract, but he shall be liable to pay to the owner such sum as the owner has properly paid on account of the tithe rent-charge which such occupier is liable under his said contract to pay, exclusive of any costs incurred or paid by the owner in respect of such tithe rent-charge, and every receipt given for such sum shall state expressly that the sum is paid in respect of that tithe rent-charge; provided that where the lands, out of which any tithe rent-charge issues are occupied by several occupiers who have contracted to pay the tithe rent-charge, any of such occupiers shall be liable only to pay such proportion of the sum paid by the owner of the lands on account of that tithe rent-charge as the rateable value of the lands occupied by him bears to the rateable value of the whole of the lands occupied by such occupiers.

Distress by Owner or the Occupier.

By sub-s. 3 "such sum shall be recoverable from the occupier by distress in like manner as is provided" by sections 81 and 85 of the Tithe Commutation Act, 1836, 6 & 7 Will. 4, c. 71, "and the enactments amending those sections, and not otherwise." These sections are as follows:—

Distress on Land after Notice to Tenant in Possession.

**81.** In case the said rent-charge shall at any time be in arrear and unpaid for the space of twenty-one days next after any half-yearly day of payment, it shall be lawful for the person entitled to the same, after having given or left ten days' notice in writing at the usual or last-known residence of the tenant in possession (*s*), to distrain upon the lands liable

(*q*) See s. 9, sub-s. 2 of the act, p. 624, post.

(*r*) See *Tomlinson* v. *Bullock*, 4 Q. B. D. 232.

(*s*) Or if no person in occupation, then by affixing the notice in some conspicuous place on the land; 5 & 6 Vict. c. 54, s. 17.

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to the payment thereof, or any part thereof, for all arrears of the said rent-charge, and to dispose of the distress when taken, and otherwise to act and demean himself in relation thereto as any landlord may for arrears of rent reserved on a common lease for years; provided that not more than two years' arrears shall at any time be recoverable by distress.

Extent of Land liable to Distress.

**85.** Whenever any rent-charge payable under the provisions of this act shall be in arrear, notwithstanding any apportionment which may have been made of any such rent-charge, every part of the land situate in the parish in which such rent-charge shall so be in arrear, and which shall be occupied by the same person who shall be the occupier of the lands on which such rent-charge so in arrear shall have been charged, whether such land shall be occupied by the person occupying the same as the owner thereof, or as tenant thereof, holding under the same landlord under whom he occupies the land on which such rent-charge so in arrear shall have been charged, shall be liable to be distrained upon or entered upon as aforesaid for the purpose of satisfying any arrears of such rent-charge, whether chargeable on the lands on which such distress is taken or such entry made, or upon any other part of the lands so occupied or holden: provided always, that no land shall be liable to be distrained or entered upon for the purpose of satisfying any such rent-charge charged upon lands which shall have been washed away by the sea, or otherwise destroyed by any natural casualty.

Notice by Landowner to Tithe-owner of liability of Occupier under contract before Act.

The 2nd section of the Act of 1891 provides for the recovery of tithe rent-charge, where in arrear for not less than three months, by means of a receiver of the rents and profits of the lands, to be appointed by the County Court after hearing the owner, if he appears and desires to be heard; and the 6th sub-section of that section provides for landlords giving notices to tithe-owners of the liabilities of their tenants under contracts made before the act within s. 1, sub-s. 2, as follows:—

"Where the occupier of the lands out of which the tithe rent-charge issues is liable under any contract made before the passing of this act to pay the tithe rent-charge, and is consequently liable by virtue of this act to pay the amount thereof to the owner of the lands, the owner of the lands shall serve notice of such liability on the owner of the tithe rent-charge, and thereupon before an order under this section is made there shall be such service on the occupier in addition to the owner as may be prescribed, and a hearing of such occupier if he appears and desires to be heard. Any owner of the lands who fails to serve such notice as aforesaid on the owner of the tithe rent-charge shall not be entitled to recover from the occupier any sum which he has paid on account of tithe rent-charge as aforesaid unless and until he has after notice to the occupier of his application for the same obtained from the county court a certificate that there was good and sufficient cause for the failure to give such notice, and that the occupier has not been prejudiced thereby." In granting a certificate under this sub-section, the county court judge

Certificate of County Court Judge of good cause of failure to give notice.

has only to consider whether there has been good cause for failure to give notice, and whether the tenant has been prejudiced by the failure; he has not to construe the tenant's lease or his liability thereunder (*t*).

Recovery of tithe rent-charge where rent insufficient.

The 4th section of the act provides as follows for the case of lands being let at a rent insufficient to enable the receiver to recover from the owner the sum ordered to be recovered :—

Where a receiver appointed under this act of the rents and profits of any lands satisfies the county court that the lands are let on such terms as not to reserve a rent sufficient to enable the receiver to recover from the owner thereof the sum ordered to be recovered, the court after such service on the owner and occupier of the lands as may be prescribed (*u*), and after hearing such owner and occupier, if they appear and desire to be heard, may direct that the order for such recovery shall be executed as if the occupier were the owner of the lands: provided that any such occupier shall be entitled in addition to any other remedy, unless he would have been liable to pay the tithe rent-charge under any contract made before the passing of this act, to deduct from any sums at any time becoming due from him to the landlord under whom he holds, any amount which shall have been recovered from him under this section in respect of tithe rent-charge or costs, with interest thereon at the rate of four per centum per annum: provided further, that such occupier shall be entitled, notwithstanding anything in this act, to recover from such landlord by action at law any such amount which shall have been recovered from him under this section as aforesaid as money paid on the account of such landlord.

Rent-charge in lieu of Extraordinary Charge on Hop-grounds, Orchards, &c.

The Tithe Commutation Act, 1836, 6 & 7 Will. 4, c. 71, s. 42, authorized an "extraordinary rent-charge" on hop-grounds, orchards, fruit plantations, and market gardens. But this extraordinary charge is abolished by the Extraordinary Tithe Redemption Act, 1886, 49 & 50 Vict. c. 94, as to hop-grounds, &c., newly cultivated after the passing of that act [25th June, 1886], which also makes provision for its redemption, and for the creation of a new rent-charge, being 4 per cent. on the capitalised value, ascertained as in the act mentioned, of the charge existing at the passing of the act.

Incidence of Rent-charge in lieu of extraordinary charge.

The rent-charge is payable by the landlord, not by the tenant, any agreement to the contrary notwithstanding, with a saving however for contracts of tenancy subsisting at the passing of the act. On this subject the 7th section of the act provides that :—

"(1.) Where a tenant of land subject to an extraordinary charge has before the passing of this act contracted to pay the charge or any part thereof, he shall, whilst his tenancy subsists, be liable to pay to his landlord the rent-charge substituted for the extraordinary

(*t*) *Hughes* v. *Rimmer*, [1893] 2 Q. B. 314; 69 L. T. 417; 42 W. R. 79; 5 R. 475.

(*u*) By rules under s. 3.

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charge; and any sum which a tenant is so liable to pay may be recovered by the landlord as the tenant's rent is for the time being recoverable.

"(2.) For the purposes of this section a tenancy from year to year, or a tenancy at will, shall be deemed to determine at the time when it would by law become determinable if notice or warning to determine the same were given at the date of the passing of this act [i.e., 25th June, 1886].

"(3.) Subject as aforesaid a rent-charge under this act shall as between landlord and tenant be payable by the landlord, any agreement to the contrary notwithstanding."

Therefore in the case of tenancies for years, the obligation of the tenant lasts as long as his lease; and in the case of tenancies from year to year the obligation of the tenant came to an end in the case of a Lady-day tenancy, on Lady-day, 1888, and in the case of a Michaelmas tenancy, on Michaelmas-day, 1887.

Definition of "Tithe Rent-charge" by s. 9, sub-s. 2 of Act of 1891.

The rent-charge under the Act of 1886 is not subject to the Tithe Act, 1891; for by sub-s. 2 of s. 9 of that act:—

"In this act, unless the context otherwise requires,—

"The expression 'tithe rent-charge' means tithe rent-charge issuing out of lands and payable in pursuance of the Tithe Acts, and includes any rent-charge into which a corn-rent has either before or after the passing of this act, been converted under the Tithe Act, 1860, and which is subject to the like incidents as such tithe rent-charge as aforesaid; but does not include a rent-charge payable under the Extraordinary Tithe Redemption Act, 1886, nor a rent-charge payable under the Tithe Act, 1860, in respect of the tithes on any gated or stinted pasture, nor a sum or rate payable for each head of cattle or stock turned on land subject to common rights or held or enjoyed in common.".

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### SECT. 17.—*Temporary Half-Rating of "Agricultural" Land.*

Half-rating, for 5 years, of "Agricultural Land."

For five years after the 31st March, 1897, the occupier [including in that term the owner where the owner is rated in place of the occupier, as to which see p. 598] of "agricultural land" is liable in the case of every rate to which the Agricultural Rates Act, 1896, 59 & 60 Vict. c. 16, applies, to pay one half only of the rate in the pound payable in respect of buildings and other hereditaments.

Definition of "Agricultural Land."

"Agricultural Land" for the purposes of this act means, by s. 9 of the act—

"Any land used as arable, meadow, or pasture ground only, cottage gardens exceeding one quarter of an acre, market gardens,

nursery grounds, orchards, or allotments, but does not include land occupied with a house as a park, gardens, other than as aforesaid, pleasure grounds, or any land kept or preserved mainly or exclusively for purposes of sport or recreation or land used as a racecourse."

Definition of "Cottage."

"Cottage" means a house occupied as a dwelling by a person of the labouring classes.

Definition of "Rate."

Rate means "a rate made during the continuance of the act, the proceeds of which are applicable to public local purposes, and which is leviable on the basis of an assessment in respect of the yearly value of property, and includes any sum which, though obtained in the first instance by a precept, certificate or other instrument requiring payment from some authority or officer, is or can be ultimately raised out of a rate as before defined," *except*—

(a) Any rate which the occupier of agricultural land is specially liable (see e.g., p. 613) to pay in the proportion of one half or less; or

(b) Any rate assessed under any commission of sewers (see ante, p. 604) or in respect of any drainage, wall, embankment, or other work for the benefit of the land.

# CHAPTER XVI.

## OBLIGATIONS WITH RESPECT TO THE PRESERVATION OF THE DEMISED PREMISES.


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### Sect. 1.—*Express Contract to Repair, &c.*

#### (a) *By Tenant.*

Repair of House.

Leases of houses usually contain a covenant by the lessee to repair and keep in repair the demised premises during the term: also another distinct covenant to repair specific defects within a certain number of months (usually three) after written notice thereof (*a*): also to paint the outside and inside wood and ironwork in a certain manner at stated times: and a covenant to leave the premises in proper repair at the end or other sooner determination of the term, besides other covenants as agreed: after which usually follows a proviso for re-entry on breach of any of the covenants (*b*). Prior to the Conveyancing Act, 1881, especially where a premium is given, and in building leases, it was of importance to qualify this proviso for re-entry, and to limit it to breaches occasioning a specified amount of damage to the reversion and inheritance (*c*), or to breaches after a certain notice in writing (*d*), or to cases where damages in an action for the breach had not been paid: but it was

(*a*) See *Few* v. *Perkins*, L. R., 2 Ex. 92; 36 L. J., Ex. 54.

(*b*) See Forms, post, Appendix B.

(*c*) See *Doe* d. *Earl of Darlington* v. *Bond*, 5 B. & C. 855; 5 L. J., K. B. 68; 8 D. & R. 738; 29 R. R. 436.

(*d*) See *Doe* d. *Rankin* v. *Brindley*, 4 B. & Ad. 84.

commonly made to apply to any breach of covenant whatever, without due consideration on behalf of the lessee as to the possible very serious consequences (*e*).

The 14th section of the Conveyancing Act, however (ante, 349), by the liberality of its provisions for relief against forfeiture, has so greatly mitigated these consequences as to render such qualifications unnecessary.

Breaches before Execution of the Lease.

A lessee is not liable for breaches of covenant to repair, committed *before the execution of the lease* by the lessor, although subsequent to the day from which the habendum states the commencement of term (*f*). An agreement made on the 31st of August, to take premises from the 29th of September following, the landlord agreeing to take back the fixtures at the end of the term, provided "they are in as good a condition as they *now* are," and the tenant agreeing to leave the premises "in the same state as they *now* are," there being at the time another tenant in possession, and the new tenant not taking possession until the 29th of September, refers to the state of the premises on the 29th of September (*g*).

Covenant to Repair *forthwith.*

A covenant "forthwith" to put premises in repair must receive a reasonable construction, and is not limited to any specific time: therefore it is for the jury to say, upon the evidence, whether the defendant has done what he reasonably ought in performance of it (*h*). "There is no doubt that the word *forthwith* means with all reasonable celerity" (*i*). It does not mean "immediately" (*k*).

Covenant to keep in repair *during the term.*

A lessee who has covenanted to repair and keep in repair the demised premises during the term must have them in repair *at all times during the term;* and if they are at any time out of repair, he commits a breach of covenant (*l*), for which the lessor or his assigns may, even during the term, recover damages commensurate with the injury thereby done to the reversion (*m*), or may, subject to sect. 14 of the Conveyancing Act, maintain an action of ejectment, if there be a proviso for re-entry applicable to such covenant. On a covenant to keep premises in repair, it is a breach to pull them down either wholly or partially, even so far as to open doors in a wall; and it is a breach for which the lessor may sue and recover substantial damages during the term: nor is it any equitable defence that it was done with the "consent and acquiescence" of the lessor, unless it appears that it was with his previous consent (*n*). Where there

(*e*) See *Hodgkinson* v. *Crowe*, L. R., 10 Ch. 622; and 130, ante.
(*f*) *Shaw* v. *Kay*, 1 Ex. 412.
(*g*) *White* v. *Nicholson*, 4 M. & G. 95.
(*h*) *Doe* d. *Pitman* v. *Sutton*, 9 C. & P. 706.
(*i*) *Burgess* v. *Boetefeur*, 7 M. & G. 494.
(*k*) *Roberts* v. *Brett*, 11 H. L. Cas. 337; 34 L. J., Ch. 241.
(*l*) *Luxmore* v. *Robson*, 1 B. & A. 584; 19 R. R. 396.
(*m*) *Smith* v. *Peat*, 9 Exch. 161. See post, Sect. 3 (b).
(*n*) *Gange* v. *Lockwood*, 2 F. & F. 115; *Doe* d. *Vickery* v. *Jackson*, 2 Stark. R. 293.

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is a demise for seven years, and thenceforth from year to year, the covenants to repair, &c., continue in force after the expiration of the seven years (*o*).

General Covenant to repair—how construed.

A general covenant to repair is satisfied by the lessee keeping the premises in *substantial repair:* a literal performance of the covenant is not to be required (*p*). "It is a monstrous thing to say that because a person put nails into the walls of a house he must take them out and fill up the holes, or commit a breach of the covenants of a repairing lease" (*q*).

Old Premises.

Where a lessee covenants to keep *old* premises in repair, he is not liable for such dilapidations as result from the natural operation of time and the elements (*r*); and with a view to determine the relative sufficiency of repair, the jury may consider whether the house was new or old at the time of the demise (*s*); and what was its *then* state of repair and condition *generally* (*t*), not in detail (*u*). These principles are carried to their full extent by the Court of Appeal in *Lister* v. *Lane* (*x*). There the covenant was to "repair, uphold, sustain and maintain" a house in Lambeth more than 100 years old, built on a timber platform resting on a boggy soil, with the result that a wall bulged and the foundation sank so that rebuilding became necessary. It was held that the tenant was not liable, inasmuch as the dilapidations were due to the inherent defect of the house.

*Lister* v. *Lane.*

"Keep" in repair. *Payne* v. *Haine.*

A covenant to *keep* premises in repair and to leave them in repair at the end of the term, means that the lessee will, if necessary, *put them into repair;* for otherwise they cannot be kept or left in repair pursuant to the covenant (*y*). But in every case the age of the premises, and also their class, and general condition, must be taken into consideration in order to measure the extent of repairs to be done (*z*).

Sub-lease. *Walker* v. *Hatton.*

A covenant to repair contained in a sub-lease, though in the same words as the covenant in the original lease (except as to names), has not the same legal effect and meaning, because of the different ages and conditions of the premises at the respective times of the lease

(*o*) *Brown* v. *Trumper*, 26 Beav. 11.

(*p*) *Harris* v. *Jones*, 1 Moo. & R. 173.

(*q*) *Perry* v. *Chotzner*, 9 T. L. R. 488, per Cave, J.; in this case the action was brought in the 20th year of a 99 years' lease.

(*r*) *Gutteridge* v. *Munyard*, 1 Moo. & R. 334.

(*s*) *Stanley* v. *Towgood*, 3 Bing. N. C. 4.

(*t*) *Burdett* v. *Withers*, 7 A. & E. 136.

(*u*) *Mantz* v. *Goring*, 4 Bing. N. C. 451; *Young* v. *Mantz*, 6 Scott, 277; *Belcher* v. *M'Intosh*, 8 C. & P. 720; 2 Moo. & R. 186; *Woolcock* v. *Dew*, 1 F. & F. 337.

(*x*) *Lister* v. *Lane*, [1893] 2 Q. B. 212; 62 L. J., Q. B. 583; 69 L. T. 176; 41 W. R. 626; 57 J. P. 725—C. A.

(*y*) *Proudfoot* v. *Hart*, 25 Q. B. D. 42; 59 L. J., Q. B. 389; 63 L. T. 171; 38 W. R. 730 and p. 630, infra—C. A.; *Payne* v. *Haine*, 16 M. & W. 541; *Easton* v. *Pratt*, 2 H. & C. 676; 33 L. J., Ex. 233; *Haldane* v. *Newcomb*, 12 W. R. 135; and see *Schroder* v. *Ward*, 13 C. B., N. S. 410.

(*z*) *Proudfoot* v. *Hart*, p. 630, infra, per Lord Esher, M.R., citing *Payne* v. *Haine*, supra.

and sub-lease (*a*). "It is perfectly well settled," observed Parke, B., in *Walker* v. *Hatton* (*a*), "that a general covenant to repair must be construed to have reference to the condition of the premises at the time when the covenant begins to operate."

Cases as to Construction of Covenants to repair.

A covenant to repair the buildings demised and to rebuild them if necessary, compels the tenant always during the term to keep them in good repair, and a deduction in damages for their age has been disallowed (*b*). Where a tenant agrees "to put the premises in habitable repair," he is to put them in a better state than that in which he found them, and into a state reasonably fit for the occupation of the class of persons likely to inhabit them (*c*). A tenant under a covenant to repair is liable for repairs only, and not for the extra expense of laying a new floor on an improved plan (*d*). Breaking a doorway through the wall of a demised house into an adjoining house is a breach of the general covenant to keep in repair, and so is the continuing of it so broken (*e*); but enlargement of windows, opening external doors, and taking down partitions, are no breach of a covenant to repair and keep in repair a dwelling-house, together with all such buildings, *improvements and additions* as should be executed, or made by the lessee; for such a covenant evidently contemplates such alterations, and allows them to be made (*f*). A covenant by a lessee, that he will, during the term, repair, uphold, support, maintain and sustain the brick walls to the demised premises belonging, is broken if he pull down a brick wall which divides the court-yard at the front of the house from another yard at the side of the house (*g*). A covenant to repair the external parts of the demised house comprises the partition wall between it and an adjoining house (*h*). Where the tenant of a farm covenanted "well and substantially" to repair and "keep in good substantial repair," and so "well and substantially repaired" to yield up at the end of the term, it was held that the tenant was bound to give up the premises in as good a state of repair as when he took possession, and that they must be inferred to have been then in a tenantable state (*i*). On a letting of a farm and mill a contract by the tenant to keep "the messuages and buildings" in repair obliges him to keep the mill-wheel in repair (*k*). A covenant to leave the premises at the end of the term sufficiently maintained, repaired, paled and

Party Wall.

Farm.

Mill-wheel

Glass, &c.

(*a*) *Walker* v. *Hatton*, 10 M. & W. 249; 2 Dowl., N. S. 263.
(*b*) *Worcester School Trustees* v. *Rowlands*, 9 C. P. 734.
(*c*) *Belcher* v. *M'Intosh*, 8 C. & P. 720; 2 Moo. & R. 186, 189.
(*d*) *Saward* v. *Leggatt*, 7 C. & P. 613.
(*e*) *Doe* d. *Vickery* v. *Jackson*, 2 Stark. 293; *Gange* v. *Lockwood*, 2 F. & F. 115; *Borgnis* v. *Edwards*, Id. 111.
(*f*) *Doe* d. *Dalton* v. *Jones*, 4 B. & Ad. 126; Cole Ejec. 425.
(*g*) *Doe* d. *Wetherell* v. *Bird*, 2 N. & M. 285; 6 C. & P. 195.
(*h*) *Green* v. *Eales*, 2 Q. B. 225.
(*i*) *Brown* v. *Trumper*, 26 Beav. 11.
(*k*) *Openshaw* v. *Evans*, 50 L. T. 156.

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fenced, was held to have been broken when the pavement was out of repair and the glass in the windows broken (*l*).

Painting.

The painting of a house is usually provided for in express words, but some degree of painting is implied in the mere term "repair." It has been ruled for instance, that under a covenant to "substantially repair, uphold, and maintain" a house, the tenant is bound to keep up the inside painting (*m*); but it has been also ruled, on a covenant, as often as necessary well and sufficiently to repair, uphold, sustain, paint, glaze, cleanse, and scour, and keep and leave the premises in such repair, reasonable wear and tear excepted, that the tenant, if he has repaired within a reasonable time before leaving, is only bound, in addition to the repair of actual dilapidations, to clean the old paint, &c., and not to repaint (*n*).

"Tenantable Repair." *Crawford* v. *Newton.*

Questions of this kind will often be more questions of fact than of law; but if the painting be left to be included in the general term "repair," the only legal obligation would seem to be to paint just as much as is necessary to keep the premises from actual deterioration, and this seems to be the effect of *Crawford* v. *Newton* (*o*) in which upon an agreement to keep the inside of the demised premises in "tenantable repair," Cave, J., ruled that a tenant who had occupied for seventeen years without having painted or papered was only bound to paint and paper so as to prevent the house from going to decay, and the Court of Appeal affirmed this ruling. In *Proudfoot* v. *Hart*, where the tenant agreed "during the said term" [of 3 years] to keep the said premises [a house] "in good tenantable repair, and so leave the same at the expiration thereof," the Court of Appeal held that the tenant's obligation was only to put and keep the premises in such repair, as having regard to the age, character and locality of the house, would make it reasonably fit for the occupation of a reasonably-minded tenant of the class who would be likely to take it (*p*), and that though the tenant was not bound to repaper, repaint, or whitewash, or to refloor a kitchen as a matter of course, he might be so bound if the state of paper, paint, ceilings, or kitchen floor were so bad that no reasonable man would take the house.

"Good tenantable Repair." *Proudfoot* v. *Hart.*

Buildings erected during the Term.

Generally covenants to repair and leave in repair, extend to all buildings erected during the term (*q*). But where, in a lease of land

(*l*) *Ryot* v. *Lady St. John*, Cro. Jac. 329.
(*m*) *Monk* v. *Noyes*, 1 C. & P. 265.
(*n*) *Scales* v. *Lawrence*, 2 F. & F. 289.
(*o*) *Crawford* v. *Newton*, 36 W. R. 45.
(*p*) *Proudfoot* v. *Hart*, 25 Q. B. D. 42; 59 L. J., Q. B. 389; 63 L. T. 171; 38 W. R. 730—C. A. In this case Mr. Ridley (afterwards Ridley, J.), as official referee had said, that in his view, good tenantable repair included painting, papering, and decorating, and the Court affirming the judgment of Cave and Mathew, JJ., sent the case back to the official referee.
(*q*) *Dowse* v. *Cale*, 2 Ventr. 126; S. C. nom. *Douse* v. *Earle*, 3 Lev. 264; Bac. Abr. *Covenant* (F).
See as to construction of express covenant to repair buildings "to be erected," *Hudson* v. *Williams*, 39 L. T. 632.

with buildings on it, the covenant was to repair *the buildings demised*, and to rebuild *them* if necessary, and to keep the fences in repair; it was held, that the tenant was not bound to keep in repair additional buildings erected on other parts of the land (*r*). In *White* v. *Wakley*, under a lease of a farm, the tenant was bound to keep in repair the buildings to be erected thereon during the term: the tenant, with the permission of the landlord, who was lord of the manor, built a house, on the waste adjoining the farm, and enjoyed it with the farm. It was held that the tenant was also under an obligation to keep the house in repair (*s*). A covenant to yield up in repair all buildings and improvements erected during the term, has been held to be broken by the removal of a veranda, the lower part of which was attached to posts fixed in the ground (*t*); but if the buildings erected during the term be solely for the purpose of trade and manufacture, and rest merely upon blocks or pattens, the covenant to yield up in repair all buildings to be erected during the term does not extend to them (*u*), although it would be otherwise if they had been let into the soil: on this point, however, many distinctions in favour of trade have been taken (*x*). Where a tenant erects fixtures for the purpose of his trade on the demised premises, and afterwards takes a new lease to commence at the expiration of the former one, and the latter lease contains a general covenant to repair, such lessee is bound to repair such fixtures, unless it can be satisfactorily shown that they were not intended to pass under the general words of the second lease (*y*).

House built on Waste of Manor.

Removal of Veranda.

If a tenant covenant to repair and keep in repair the demised premises during the term (not saying "damage by fire excepted," or to that effect (*z*)), he must rebuild them if burnt down by accident, negligence, or otherwise (*a*), or if destroyed by tempest or earthquake. He must also continue to pay his rent in the same manner as if no fire had happened (*b*), and it has been said to make no

Repair, in case of Fire.
*Bullock* v. *Dommitt.*

(*r*) *Worcester School Trustees* v. *Rowlands*, 9 C. & P. 734; *Cornish* v. *Cleife*, 3 H. & C. 446; 34 L. J., Ex. 19.

(*s*) *In re Newbery*, *White* v. *Wakley*, 26 Beav. 17; 28 L. J., Ch. 77.

(*t*) *Penry* v. *Brown*, 2 Stark. R. 403; 20 R. R. 705.

(*u*) *Naylor* v. *Collinge*, 1 Taunt. 19; 9 R. R. 691.

(*x*) See post, Sect. 8, "Fixtures."

(*y*) *Thresher* v. *East London Waterworks Co.*, 2 B. & C. 608; 4 D. & R. 62; 2 L. J., K. B. 100; 26 R. R. 486.

(*z*) As to the construction of such an exception, see *Bennet* v. *Ireland*, E., B. & E. 326; 28 L. J., Q. B. 48.

(*a*) *Bullock* v. *Dommitt*, 2 Chit. R. 608; 6 T. R. 650; 3 R. R. 300; *Earl of Chesterfield* v. *Duke of Bolton*, Comyn, 267; *Poole* v. *Archer*, Skin. 210; *Clarke* v. *Glasgow Assurance Co.*, 1 Macq. H. L. Cas. 668. See also *Manchester Bonded Warehouse Co.* v. *Carr*, 5 C. P. D. 507; 49 L. J., C. P. 809; 43 L. T. 476; 29 W. R. 354.

In Scotland the law is otherwise. See *Bayne* v. *Walker*, 3 Dow, 233; 15 R. R. 53, where it was held by the House of Lords that the Scotch law does not oblige a landlord to rebuild a house burnt down by accident.

(*b*) *Belfour* v. *Weston*, 1 T. R. 310; 1 R. R. 210; *Baker* v. *Holtpzaffell*, 4 Taunt. 45; 13 R. R. 556; *Holtzapffell* v.

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In case of Fire —*contd.*

difference that the landlord has received insurance money (*e*). Even where the tenant's covenant to repair, &c., contains an express exception of damage by fire and tempest, whereby he is exonerated from rebuilding, it seems that this exception casts no obligation upon the landlord to rebuild or repair in the event of loss or damage by fire or tempest (*d*), and that only an express covenant by the landlord to repair will cast such an obligation upon the landlord.

Insurance Money.

A covenant for quiet enjoyment during the term is not sufficient (*e*). If there be a covenant by the tenant to keep the premises in repair, and also a covenant to insure them for a specific amount against fire, on their being burnt down, the tenant's liability on the former covenant is not limited to the amount to be insured under the latter covenant (*f*).

Exemption from Liability for Fire by Building Act.

The 86th section of the Building Act (14 Geo. 3, c. 78) provides that no action shall be maintained against any person in whose house, chamber, stable, barn, or other building, or on whose estate, any fire shall *accidentally begin*, nor shall any recompense be made by such person for any damage suffered thereby: provided, "that no contract or agreement made between landlord and tenant shall be hereby defeated or made void" (*g*).

Covenant to rebuild.

Where a lessee in a lease of three houses covenanted to pull them down, and rebuild three others, and that he would repair the houses so agreed to be built, *and also that he would repair the demised premises*, and leave the said premises in repair; and he pulled down the three and built four in their stead; it was held, that though he was obliged to build only three houses, yet he was bound to deliver up all in repair; the last covenant being general, and not confined, as the former, to the houses agreed to be built (*h*). Where, however, in a lease of four houses for 99 years, the lessee covenanted within two years to put them in good repair, and keep them in repair during the term, and further, within the first fifty years of the term, to take down the houses "as occasion may require," and in the place thereof to erect four new brick houses: the court intimated that, if within the fifty years the houses should be so repaired as to make them completely and substantially as good as new houses, the "occasion" on which the new houses were to be built did not arise (*i*). A lease was granted of a piece of land with two unfinished houses

*Baker*, 18 Ves. 118; *Izon* v. *Gorton*, 5 Bing. N. C. 501; *Parker* v. *Gibbins*, 1 Q. B. 421; *Lofft* v. *Dennis*, 1 E. & E. 474.

(*e*) *Leeds* v. *Cheetham*, 1 Sim. 146; 5 L. J., Ch. 105; 27 R. R. 181; *Lofft* v. *Dennis*, 1 E. & E. 474; 28 L. J., Q. B. 168. But see 438, ante.

(*d*) *Weigall* v. *Waters*, 6 T. R. 488.

(*e*) *Brown* v. *Quilter*, 2 Ambler, 619.

(*f*) *Digby* v. *Atkinson*, 4 Camp. 275; 16 R. R. 792.

(*g*) As to the construction of this section, see post, Chap. XVII., Sect. 1.

(*h*) *Dowse* v. *Earle*, 3 Lev. 264; *Dowse* v. *Cale*, 2 Ventr. 126.

(*i*) *Evelyn* v. *Raddish*, 7 Taunt. 411; Holt, 543.

thereon, and the lessee covenanted to complete them within two months, and to keep them in repair during the term, there being a proviso for re-entry on breach of the covenant. The two houses were never finished, and long after the expiration of the two months they were much dilapidated. It was held, that a person to whom the reversion was assigned long after the expiration of the two months might maintain ejectment for the subsequent non-repair (*k*).

Covenant to repair after Notice.

The covenant to repair generally, and the covenant to repair within three months after notice (*l*), are generally held to be distinct and independent covenants (*m*); but if they immediately follow in such a manner, that they must be joined to make the sentence complete, they are construed as one entire covenant, and the latter part respecting notice is held to qualify the former (*n*), as where there is a covenant to repair at all times, when, where and as often as occasion shall require, and, at the farthest, within three months after notice of want of reparation (*n*). And where a notice to repair has been given, and the lessee meets it by an offer to sell which leads to negotiation, the effect is to suspend the notice until the negotiation is broken off (*o*).

Suspension of effect of Notice.
*Hughes* v. *Met. R. Co.*

Conditional or qualified Covenants to repair, &c.

Where a lessee covenanted that *from and after the amendment and repair* of the demised messuages, &c. by the lessor he would repair and sustain them during the term, and at the end thereof leave them well and sufficiently repaired, and the lessor sued him for non-repair of a dovehouse, parcel of the demised premises, which at the commencement of the term was in good and sufficient repair, it was held, after verdict for the plaintiff, that the defendant's covenant was conditional only, and that no action could be maintained against him for the alleged breach, the plaintiff not having first amended and repaired the premises pursuant to the lease (*p*). So where a lessee agrees to keep in repair the messuages, buildings and premises demised, *the same being first put into repair by the lessor*, the latter words create a covenant on the part of the lessor to do all such repairs (*q*), and also a condition precedent; and, until the lessor has put all the demised premises into repair, the lessee is not liable for the non-repair of any part (*r*). So where the tenant covenants

(*k*) *Bennett* v. *Herring*, 3 C. B., N. S. 370.

(*l*) See forms of such notice, Appendix C., Sects. 13, 14, post.

(*m*) *Baylis* v. *Le Gros*, 4 C. B., N. S. 537; *Roe* d. *Goatley* v. *Paine*, 2 Camp. 520; *Few* v. *Perkins*, L. R., 2 Ex. 92; 36 L. J., Ex. 54; *Doe* d. *Morecraft* v. *Meux*, 4 B. & C. 606; 7 D. & R. 98; 4 L. J., K. B. 4; 1 C. & P. 346; 28 R. R. 426.

(*n*) *Horsefall* v. *Testar*, 7 Taunt. 385.

(*o*) *Hughes* v. *Metropolitan R. Co.*, 45 L. J., C. P. 578; 1 C. P. Div. 120 (C. A.); affirmed by House of Lords, L. R., 2 App. Cas. 439; 46 L. J., C. P. 583; 36 L. T. 932; 25 W. R. 680.

(*p*) *Slater* v. *Stone*, Cro. Jac. 645.

(*q*) *Cannock* v. *Jones*, 3 Exch. 233; 5 Id. 713.

(*r*) *Neale* v. *Rateliff*, 15 Q. B. 916; 20 L. J., Q. B. 130; *Coward* v. *Gregory*, L. R., 2 C. P. 153, 172; 36 L. J., C. P. 1.

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to repair, the landlord "finding, allowing and assigning timber sufficient" for the reparations; the landlord cannot maintain an action against the tenant for breach of such covenant to repair, without alleging that he did find, allow and assign sufficient timber (*s*). So where a tenant covenanted to repair and keep in repair the buildings on the demised premises, "being allowed" a certain class of timber; it was held, that in order to create an obligation on the tenant to repair, the landlord must supply, or at all events be ready and willing to supply, such timber (*t*). But where, in a lease for lives, the lessee covenanted that he "would from time to time, and at all times, during the estate thereby granted, at his own proper costs and charges, well and sufficiently repair, amend, maintain, uphold and keep all and singular the demised premises in all manner of needful and necessary reparations whatsoever, *having or taking* in and upon the premises competent and sufficient housebote, hedge-bote, fire-bote, plough-bote and gate-bote for the doing thereof, without committing any waste or spoil:" in an action by the lessor for not repairing, it was held, that the lessee's covenant to repair was absolute, and that the words "having or taking, &c." "without committing waste or spoil," did not amount to a condition precedent that there should be a sufficient supply of that kind of timber on the premises, but only to a licence to the tenant to take it, if there were, for repairs, even if made necessary by his own default, without being liable for waste (*u*). Where a lessee covenants to complete the buildings "under the direction and to the satisfaction of the surveyor" of the lessor, the appointment of such surveyor is a condition precedent to the performance by the lessee of his covenant to complete the buildings (*x*).

Compulsory taking under Lands Clauses Acts.

When a company or corporation give notice to the tenant that they are willing to treat for the purchase of his interest under the Lands Clauses Consolidation Act, 1845, the tenant is not thereby freed from his covenant to repair, but must continue the performance of such covenants until a conveyance of the demised premises to the company be executed (*y*).

### (b) *By Landlord.*

Liability of Landlord on express Covenants to repair, &c.

A landlord may of course take upon himself to do all or any of the repairs during the term, by an express covenant or promise to that effect in the lease or agreement (*z*); but in the absence of

(*s*) *Thomas* v. *Cadwallader*, Willes, 496; cited 1 E. & E. 487; Smith L. & T. 272, 373 (2nd ed.).
(*t*) *Martyn* v. *Clue*, 18 Q. B. 661.
(*u*) *Dean and C. of Bristol* v. *Jones*, 1 E. & E. 484; 28 L. J., Q. B. 201.
(*x*) *Hunt* v. *Bishop*, 8 Exch. 675; 22 L. J., Ex. 337; *Hunt* v. *Remnant*, 9 Exch. 635; 23 L. J., Ex. 135; *Coombe* v. *Greene*, 11 M. & W. 480; 2 Dowl., N. S. 1023.
(*y*) *Mills* v. *East London Union Guardians*, L. R., 8 C. P. 79; 42 L. J., C. P. 46.
(*z*) *Neale* v. *Ratcliff*, 15 Q. B. 916; 20 L. J., Q. B. 130; *Cannock* v. *Jones*, 3

any such stipulation he is not liable to do any repairs whatever (*a*). Whatever he agrees to do in this respect should be inserted in the lease or agreement (*b*); the tenant should not rely upon any oral promise made before the lease or agreement is executed (*c*). There is no implied duty in the owner of an *unfurnished* house which is in a ruinous and unsafe condition to inform a proposed tenant that it is unfit for habitation: and no action will lie against him for an omission to do so, in the absence of express warranty or active deceit (*d*).

Notice.
*Makin* v. *Watkinson.*

Where the lessor covenants to do repairs, the condition is implied that notice of want of repair must be given, and the lessee cannot proceed for a breach of such covenant, without first giving such notice. So it was held in *Makin* v. *Watkinson* (*e*), which case was followed with approval by the Court of Appeal in *Hugall* v. *M'Lean* (*f*), in which the tenant sued the landlord for breach of an agreement to keep drains in repair (by reason of which breach the tenant's house had been flooded with sewage), and the jury found that neither party knew of the defective condition of the drains, but that the tenant had not, and the landlord had, the means of knowing.

Construction of Particular Covenants for repair by Landlord.
Party Wall.

A covenant by lessor to repair the external parts of a demised house comprises the partition wall between it and an adjoining house; and where the adjoining house was pulled down by other persons whereby the wall was damaged, and the lessor did nothing to prevent it sinking, and suffered it to continue in a ruinous state, and refused to repair it, he was held liable for the expenses the lessee was put to in rebuilding the wall, and for glass broken by the sinking of it, but not for rent and the expenses of the lessee for other premises

Exch. 233; 5 Id. 713; *Coward* v. *Gregory*, L. R., 2 C. P. 153; 36 L. J., C. P. 1; *Bird* v. *Elwes*, L. R., 3 Ex. 225; 37 L. J., Ex. 91.

(*a*) Post, Sect. 2 (b); *Arden* v. *Pullen*, 10 M. & W. 321; *Gott* v. *Gandy*, 2 E. & B. 845; *Lofft* v. *Dennis*, 1 E. & E. 474; 28 L. J., Q. B. 168.

(*b*) *Tidey* v. *Mollett*, 16 C. B., N. S. 298; 33 L. J., C. P. 235.

(*c*) *Scago* v. *Deane*, 4 Bing. 459; 1 M. & P. 227; 6 L. J., C. P. 66; 3 C. & P. 170; 29 R. R. 599; *Haldane* v. *Newcomb*, 12 W. R. 135.

(*d*) *Keates* v. *Earl Cadogan*, 10 C. B. 591. As to furnished house, see ante, 184.

(*e*) *Makin* v. *Watkinson*, L. R., 6 Ex. 25; 40 L. J., Ex. 33; 19 W. R. 286; 23 L. T. 592 (per Bramwell and Channell, BB., diss. Martin, B.).

(*f*) *Hugall* v. *M'Lean*, 53 L. T. 568; 33 W. R. 588—C. A., per Brett, M.R., and Baggallay and Bowen, L.JJ., Brett, M.R., doubting "whether the landlord if he had notice aliunde would be liable."

These decisions, which are supported by a dictum in *Moore* v. *Clark*, 5 Taunt. 96, are at variance with the ordinary rule that where a man contracts to do a thing he must either do it or pay damages, however unreasonable the contract may be. Neither *Vyse* v. *Wakefield*, 6 M. & W. 442, nor *London and South-Western R. Co.* v. *Flower*, 1 C. P. D. 77, which were relied on as authorities, are landlord and tenant cases, and it is submitted that *Vyse* v. *Wakefield* is distinguishable, on the ground that performance there would have been *impossible* without notice. It is to be observed (1) that both in *Makin* v. *Watkinson* and *Hugall* v. *M'Lean*, the agreement was to do *inside* repairs, and (2) that in neither of them does it appear that the landlord had power to enter to view the state of repair.

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during the progress of the repairs (*g*). If a lessor covenant to keep the demised premises in repair, he is not bound to cleanse an ornamental piece of water in the grounds (*h*). A covenant by lessor to keep drains in good and tenantable repair has been ruled by Wills, J., not to extend to the rectification of a structural defect (*i*). If a lessor covenant that he will, in case the demised premises be burnt down, rebuild and replace the same in the same state they were in before the fire, he is only bound to rebuild what he let, and not any additional parts which may have been erected by the lessee (*k*). If a lessor sell premises let under a lease not expired, and bind himself to do repairs "at the expiration of the tenancy," it appears that he is liable to do the repairs whenever and however the tenancy is determined (*l*).

Ornamental Water.

Drains.

Rebuilding.

Repudiation of Contract to Rebuild not constituted by statement of inability to do so.

Where a lessor had covenanted after the expiration of the first four years of the lease upon 6 months' notice from the lessee, it was held that the lessor's statement that he would be unable to rebuild was not such a repudiation of his contract as to justify the lessee in treating the contract as broken and suing the lessee for damages (*m*).

Rights of Tenant on breach of Landlord's contract to repair.

Where the landlord expressly binds himself to do any repairs, there is no implied condition that if such repairs be not done the tenant may quit (*n*): but it was held in an old case that the tenant may do the repairs, and deduct the expense from the rent (*o*), and such would still seem to be the law (*p*). At any rate the tenant could counter-claim for the expense, if sued for the rent.

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## SECT. 2.—*Implied Contract to Repair, &c.*

### (a) *By Tenant.*

Obligation to use Demised Premises in "Tenant-like Manner."

The contract of tenancy usually contains some express stipulation for repair by the tenant, but if it contain no such stipulation, or only contain a stipulation for rent, and whether it be by deed, writing without deed, or by parol only, a stipulation is implied by law—in the absence of any express stipulation, but not otherwise (*q*)—that the tenant will use the demised premises in a tenant-like manner. If the tenancy be for years, this obligation is merged in the more definite and statutory obligation not to commit *or permit* waste,

(*g*) *Green* v. *Eales*, 2 Q. B. 225.
(*h*) *Bird* v. *Elwes*, L. R., 3 Ex. 225; 37 L. J., Ex. 91.
(*i*) In *Hugall* v. *M'Lean* (reported as *M'Kean*), C. & E. 391.
(*k*) *Loader* v. *Kemp*, 2 C. & P. 375.
(*l*) *Goodson* v. *Goldsmith*, 2 C. & P. 555.
(*m*) *Johnstone* v. *Milling*, 54 L. T. 629.
(*n*) Ante, 184.
(*o*) *Beale and Taylor's case*, 1 Leon. 237.
(*p*) Three cases cited contra in many former editions of this work appear to have been so cited by mistake.
(*q*) If there be an express stipulation to repair, no implied stipulation to use in a tenant-like manner arises. *Standen* v. *Christmas*, 10 Q. B. 135.

which will be presently considered, but if the tenancy be at will or from year to year, more difficult considerations arise.

Covenants to repair, &c., when implied as Matter of Fact.

Sometimes a covenant as to repairs, cultivation, &c., may be implied from words used in other covenants in the lease (ante, p. 186), or from the recitals (ante, p. 188). But such covenants are implied and found as matter of fact, and are *not covenants implied by law* from the mere relation of the parties as landlord and tenant.

On implied new Tenancies. *Martin* v. *Smith.*

We have already seen that a person let into possession under a *void* lease, ex. gr. a lease for more than three years not made by deed, or holding over after the expiration of a lease and paying or agreeing to pay rent, becomes a tenant from year to year, *upon the terms of the lease*, so far as they are applicable to and not inconsistent with a yearly tenancy, so as to be liable as upon a covenant to repair (*r*).

Liability of Tenant at Will, or from Year to Year.

What is the extent of the implied liability of a tenant at will or of a tenant from year to year for repair, it is not easy to say. A tenant at will is clearly not liable for permissive waste (*s*), nor is a tenant from year to year (*t*).

It has been said twice at nisi prius that a tenant from year to year is bound to keep the demised premises "wind and water tight" (*u*): but in one case Lord Kenyon appears to have confined the tenant's obligation to repairing the consequences of his own acts, such as putting in windows or doors that have been broken by him (*x*); and in another, Gibbs, C.J., declared that it had always been held that a tenant from year to year is not liable to general repairs (*y*); while in another it was said that the tenant is not bound to rebuild or replace (*z*). There is moreover no reported case, so far as the Editor is aware, in which a tenant from year to year has been successfully sued for non-repair only, upon the implied agreement to keep premises "wind and water tight." But the two nisi prius dicta above adverted to appear to have been generally adopted (*a*), and the only question at the present day appears to be what meaning can be

(*r*) Ante, Chap. VI., Sect. 2. And see especially *Martin* v. *Smith*, L. R., 9 Ex. 50. As to agreement for lease, see *Walsh* v. *Lonsdale*, ante, p. 91.

(*s*) *Countess of Shrewsbury's case*, 5 Co. (vol. 3 of the 1826 edition), 13; Cro. Eliz. 779, 784.

(*t*) Post, Sect. 5.

(*u*) *Auworth* v. *Johnson*, 5 C. & P. 239, per Lord Tenterden, C.J., and see the note; *Leach* v *Thomas*, 7 C. & P. 327, per Patteson, J.

(*x*) *Ferguson* v. ———, 2 Esp. 590, cited as *Ferguson* v. *Black*, in *Horsefall* v. *Mather*, infra.

(*y*) *Horsefall* v. *Mather*, Holt, N. P. C. 7. In that case the action appears to have been for voluntary waste.

(*z*) *Wise* v. *Metcalfe*, 10 B. & C. at p. 314. This was an ecclesiastical dilapidations case, and only bears indirectly on the point.

(*a*) See for instance *Wise* v. *Metcalfe*, 10 B. & C. at p. 312; Chitty on Contracts, 13th ed., at p. 346, where it is said that "the tenant is liable if he omit to adopt reasonable and usual precautions to obviate the occurrence of great and manifest injury to the premises," putting as an example, that "if a window or tile were even accidentally broken he would be liable if he did not repair it, provided the plain consequences of his neglect would be a serious damage to the house from wet or the like."

CH. XVI. s. 2. *Implied Contract to Repair (by Tenant).*

Tenancy from Year to Year —*continued.*

given to them. On the whole it is considered that the expression ought to be construed strictly in favour of the tenant. To put an example, it would seem that the broken glass of windows need not be replaced by new glass, but that an exclusion of wet by boards or other unsightly modes would be sufficient.

### (b) *By Landlord.*

No implied Covenant by Landlord.

There is, in ordinary cases (*b*), no covenant or promise *implied by law* on the part of the lessor of an unfurnished (*c*) house or land (*d*) that it is reasonably fit for habitation, occupation or cultivation: nor that the house will endure during the term: nor that the lessor will do any repairs whatever (*e*).

Adjoining Houses.

Nor is there any implied covenant by the lessor of two adjoining houses, the occupiers of which are under covenant to repair, that he will keep either house in such state as to enable the covenants with respect to the other to be performed (*f*). Much less is there an implied covenant by the landlord to repair fences separating the demised land from his own (*g*).

Although in letting a furnished house the lessor impliedly promises that it is reasonably fit for occupation (*h*), in the absence of any agreement on the subject, a person who agrees to take a house unfurnished must take it as it stands, and cannot call on the lessor to put it into a condition which makes it fit for living in (*i*). Before a person takes, or agrees to take, a lease of a house for a long term, with the usual covenants to keep it in repair during the term, he should have the premises carefully examined and reported on by an experienced surveyor; otherwise he may unwittingly incur very serious liabilities, especially if the foundations are defective, or the house is so slightly and cheaply built as not to be likely to last during the whole term, without considerable repairs, which is not unfrequently the case. Even where the premises become in a dangerous state for want of substantial repairs, and the landlord has notice to that effect, there is no implied obligation on his part to do any such repairs (*k*).

(*b*) For exception in case of letting at certain low rents, see Housing of Working Classes Act, s. 14, and p. 185, ante.

(*c*) *Hart* v. *Windsor*, 12 M. & W. 68.

(*d*) *Sutton* v. *Temple*, 12 M. & W. 52; *Erskine* v. *Adeane*, 42 L. J., Ch. 835.

(*e*) Ante, 184; *Pomfret* v. *Ricroft*, 1 Wms. Saund. 321, 322, note (1); *Pindar* v. *Ainsley*, cited 1 T. R. 310, 312. As to fire, see *Lofft* v. *Dennis*, 1 E. & E. 474; 28 L. J., Q. B. 168.

(*f*) *Colebeck* v. *Girdlers' Co.*, 45 L. J., Q. B. 225.

(*g*) *Erskine* v. *Adeane*, 42 L. J., Ch. 835.

(*h*) *Smith* v. *Marrable*, 11 M. & W. 5; *Wilson* v. *Finch-Hatton*, 2 Ex. D. 336; 36 L. T. 373; ante, 184.

(*i*) *Chappell* v. *Gregory*, 34 Beav. 250.

(*k*) *Gott* v. *Gandy*, 2 E. & B. 845.

## Sect. 3.—*Remedies for Non-repair.*

### (a) *By exercise of Right of Entry to Repair.*

Right to enter to Repair.

A stipulation that the landlord may re-enter for the purpose of viewing the state of repair is very commonly inserted in leases, and a further stipulation is not unfrequently added, that the landlord may upon breach of the tenant's covenant himself execute necessary repairs at the tenant's expense. Without a distinct stipulation to that effect a landlord has no right to enter his tenant's premises to repair them (*l*): although the breach of the tenant be clear, although the landlord be liable to a forfeiture under a superior lease, and although the entry be by leave of sub-tenants, he commits a trespass which will be restrained by injunction (*m*). Where premises which were sub-let became out of repair, and the superior landlord gave notice to his immediate lessee to repair them at the peril of forfeiting his lease; and the sub-lessee, after receiving notice to repair, neglected to do so, whereupon the lessee, in order to avoid a forfeiture of his whole estate, entered on the premises, and put them in tenantable repair; it was held that though he might be a trespasser for so doing, yet that he might recover against his sub-tenant the whole expense so incurred, notwithstanding that the premises were afterwards entirely rebuilt before the action for the recovery of such expense was brought (*n*).

Liability to Third Persons.

Generally speaking, the tenant or occupier, and not the landlord, is liable to third persons for any accident or injury occasioned to them by the premises being in a dangerous condition from non-repair (*o*).

### (b) *By Action for Damages.*

By Action for Damages.

If the demise be under seal, the remedy for non-repair, &c. is by action on the covenant. In the case of reciprocal covenants cross-actions would have to be brought (*p*) before the Judicature Act, but a counter-claim may not be set up by the defendant. If the demise be not under seal, the remedy is by action on the simple contract.

Damages during Term, injury to Reversion.

An action for non-repair may be maintained by the landlord during the continuance of the term (*q*), and in such action the proper measure of damage is, not the amount that would be required to put the premises into repair, but the amount to which the reversion is

(*l*) *Barker* v. *Barker*, 3 C. & P. 557; *Neale* v. *Wyllie*, 3 B. & C. 533; 5 D. & R. 442; 27 R. R. 418; *Worcester School Trustees* v. *Rowlands*, 9 C. & P. 739.

(*m*) *Stocker* v. *Planet Building Society*, 27 W. R. 877—C. A., affirming decision of Jessel, M.R.

(*n*) *Colley* v. *Streeton*, 2 B. & C. 273; 26 R. R. 350.

(*o*) *Gwinnell* v. *Eamer*, L. R., 10 C. P. 658. See this question fully discussed, Chap. XIX., post.

(*p*) *Leeds* v. *Cheetham*, 1 Sim. 151; 5 L. J., Ch. 105; 27 R. R. 181.

(*q*) *Luxmore* v. *Robson*, 1 B. & A. 584; 19 R. R. 396.

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Damages—*contd.*

depreciated in marketable value by the premises being out of repair (*r*)—an amount which might be practically equivalent to nominal damages in the case of a lease having many years to run, but which would be larger and larger, the shorter the residue of the term happened to be.

Second Action.

The landlord is not bound to expend the damages recovered in repairing the premises (*s*), and yet continues to have the benefit of the covenant to repair, upon which he may sue again, if the tenant continue to break it; and if he has accepted a payment into court in a first action for not repairing during the term, he is entitled in a second action at the end of the term for not leaving in repair to recover the amount required to put the premises into repair less the sum paid into court in the first action (*t*).

Right to Jury in County Court.

If the case be tried in a county court, and the claim be for more than 5*l.*, either party has an absolute right to a jury by virtue of s. 101 of the County Courts Act, 1888, and rule 3 of the County Court Rules, 1889 (*u*).

Damages at End of Term.

Upon the execution of a writ of inquiry in an action for dilapidations, two surveyors were called on each side. Those called by the plaintiff estimated the dilapidations, the one at 119*l.*, the other at 124*l.* Those called for the defendant estimated them, the one at 65*l.* 15*s.*, the other at 68*l.* The jury returned a verdict for only 36*l.* 10*s.* The court ordered the inquisition to be set aside without costs, unless the defendant would consent to the verdict being entered for 65*l.* 15*s.* (*x*). In an action for non-repair, and leaving out of repair at the end of the term, the jury may give to the landlord not only the amount of the actual expense of the repairs, but also a compensation for the loss of the use of the premises whilst they are necessarily undergoing repair (*y*).

Substantial Damages, though Buildings about to be pulled down.

Although buildings are intended to be immediately pulled down and rebuilt either by or for an incoming tenant, the landlord may recover more than nominal damages against the outgoing tenant for not performing the covenant to leave in repair (*z*) ; and he may recover the exact amount at which the dilapidations may have been assessed at, on the ground that a right of action for such damages accrued at the end of the tenancy and that nothing done afterwards could affect

(*r*) *Smith* v. *Peat*, 9 Ex. 161 ; 23 L. J., Ex. 84 ; *Turner* v. *Lamb*, 14 M. & W. 412 ; *Worcester School Trustees* v. *Rowlands*, 9 C. & P. 734, 739 ; *Coward* v. *Gregory*, L. R., 2 C. P. 153 ; *Mills* v. *East London Union Guardians*, L. R., 8 C. P. 79 ; 42 L. J., C. P. 46.

(*s*) *Worcester School Trustees* v. *Rowlands*, 9 C. & P. at p. 639.

(*t*) *Henderson* v. *Thorne*, [1893] 2 Q. B. 164 ; 62 L. J., Q. B. 586 ; 69 L. T. 430 ; 41 W. R. 509.

(*u*) *Metcalf* v. *Birtle*, S. J., Feb 15th, 1890.

(*x*) *Weeding* v. *Mason*, 2 C. B., N. S. 382.

(*y*) *Woods* v. *Pope*, 6 C. & P. 782 ; 1 Bing. N. C. 467.

(*z*) *Rawlings* v. *Morgan*, 18 C. B., N. S. 776 ; 34 L. J., C. P. 185 ; 14 Jur., N. S. 564 ; 12 L. T. 348 ; 13 W. R. 746 ; *Morgan* v. *Hardy*, L. R., 17 Q. B. D. 770.

such right (*a*). This rule applies to a case where the landlord has relet on a covenant by a new tenant to put the premises in repair and such covenant has been performed (*b*).

Breach of Covenant in Sub-lease.

In an action for breach of covenant in a sub-lease to repair, whereby the plaintiff's term in the premises was forfeited, the plaintiff cannot recover the value of his term if the superior landlord has brought his ejectment for the non-repair, as well as for breach of other covenants not contained in the sub-lease, if it is not proved that the forfeiture was caused by the acts of the defendant; but he may recover the amount of dilapidations at the time of the ejectment, though his own term is determined (*c*). He may recover substantial damages for non-performance of the covenant to repair, &c. contained in the sub-lease, notwithstanding both he and the defendant have been ejected by the superior landlord for non-payment by himself of the rent reserved in the original lease (*d*); but if he do repairs himself to save a forfeiture, he cannot recover the cost of such repairs from the sub-tenant (*e*). Where the covenants differ from those in the original leases, and there is no covenant to indemnify the lessee against breach of covenants in the original lease, the lessee cannot recover the costs of an action brought against him by the original lessor for the mere dilapidations which he might have paid for before that action was commenced (*f*); or which he might have afterwards paid into court (*g*). A covenant to repair contained in a sub-lease, though in the same language as the covenant in the original lease, yet may be different in effect, owing to the sub-lease having been granted subsequently to the original lease, and when the premises had become in a different condition (*g*).

Measure of Damages. *Conquest* v. *Ebbetts.*

But the measure of damages for breach of the covenant to repair is not the same in the case of a sub-lease as in that of a direct lease. Where the sub-lessee has notice that there is a superior landlord the mesne landlord's liability over to the superior landlord must be taken into account, and the cost of putting the property into repair at the end of the term may properly be considered for that purpose (*h*).

Action by Lessee against Assignee.

If a lessee assign over, subject to the performance by the assignee of the covenants in the lease from the day of assignment, and one of the covenants is a general one to repair and keep in repair, on which

(*a*) *Inderwick* v. *Leach*, C. & E. 412; *Joyner* v. *Weeks*, infra.
(*b*) *Joyner* v. *Weeks*, [1891] 2 Q. B. 31; 60 L. J., Q. B. 510; 65 L. T. 16; 39 W. R. 583—C. A.
(*c*) *Clow* v. *Brogden*, 2 M. & G. 39.
(*d*) *Davies* v. *Underwood*, 2 H. & N. 570; 27 L. J., Ex. 113.
(*e*) *Williams* v. *Williams*, 43 L. J., C. P. 382; L. R., 9 C. P. 659; 30 L. T. 638; 22 W. R. 706.
(*f*) *Penley* v. *Watts*, 7 M. & W. 601; *Logan* v. *Hall*, 4 C. B. 598.
(*g*) *Walker* v. *Hatton*, 10 M. & W. 249; 2 Dowl., N. S. 263.
(*h*) *Ebbetts* v. *Conquest*, [1895] 2 Ch. 377; 64 L. J., Ch. 702; 73 L. T. 69; 44 W. R. 56; 12 R. 430—C. A. affirmed by House of Lords in *Conquest* v. *Ebbetts*, [1896] A.C. 490; 65 L. J., Ch. 808; 75 L. T. 36; 45 W. R. 50.

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the lessor afterwards recovers against the lessee, the latter can recover over against his assignee for those dilapidations only which have taken place after the assignment (*i*). Where an assignee covenanted to indemnify the lessee, and the lessee, being sued by the lessor, paid money into court, but incurred extra costs, it was held that these extra costs were recoverable under the covenant of indemnity, as being the necessary result of the breach (*k*).

Service out of jurisdiction.

Service on a defendant resident out of the jurisdiction, as in Scotland, may be ordered under Order XI., rule 6, of the Rules of the Supreme Court in an action on a breach of covenant to repair premises in England (*l*).

### (c) *Remedy for Non-repair by Re-entry.*

Entry or Ejectment for Non-repair, &c.

Unless there be a proviso for re-entry applicable to the covenants to repair, &c., a breach of such covenants will not warrant a re-entry for a forfeiture, but only an action for damages (*m*). Where there is such a proviso, the lessor or his assigns may re-enter or maintain an ejectment for the whole of the demised premises, if any part thereof be out of repair, at any time during the term; and might (at common law) without giving any previous notice to the lessee or his assignee, or sub-tenant, to repair (*n*), and the same rule applied at common law where there was merely an agreement for a lease, with a proviso for re-entry on non-performance of covenants (*o*). But this has been altered by sect. 14 of the Conveyancing Act, the effect of which has been already considered (ante, Chap. VIII., Sect. 6, p. 348).

Effect of Double Covenant to repair, and to repair after Notice.

*Baylis* v. *Le Gros.*

Where a lease contained a general covenant to repair and keep in repair the demised premises during the term, and another covenant to repair specific defects within three months after notice, and a proviso for re-entry on breach of any covenant; it was held that such covenants were perfectly distinct, and that the landlord might lawfully re-enter for a forfeiture created by the non-repair pursuant to the general covenant, without giving any previous notice to repair (*p*). And even where a notice is given, it will be taken to apply to the general and not to the specific covenant, if the words be general. Therefore, where the landlord gave the tenant a notice requiring him *forthwith* to put all the demised premises into repair, agreeable to the covenant in that behalf, it was held, that such notice would not prevent an ejectment being brought within three months afterwards for breach of the general covenant to repair (*q*). But if the

(*i*) *Hawkins* v. *Sherman*, 3 C. & P. 459.
(*k*) *Howard* v. *Lovegrove*, 23 L. T. 396.
(*l*) *Tassell* v. *Hallen*, [1892] 1 Q. B. 321; 61 L. J., Q. B. 159; 66 L. T. 196; 40 W. R. 221, approving *Kaye* v. *Sutherland*, 20 Q. B. D. 147, and Chap. XX., Sect. 4 (a), post.
(*m*) Cole Ejec. 403, 422.
(*n*) *Baylis* v. *Le Gros*, 4 C. B., N. S. 537.
(*o*) *Hayne* v. *Cummings*, 16 C. B., N. S. 421.
(*p*) *Baylis* v. *Le Gros*, 4 C. B., N. S. 537.
(*q*) *Roe* d. *Goatley* v. *Paine*, 2 Camp. 520; *Few* v. *Perkins*, L. R., 2 Ex. 92;

words be specific, the notice will be taken to give the time specified, and apply to the specific covenant to repair after notice. Therefore, where the landlord gave the tenant *notice to repair within three months* then next, it was held that such notice amounted to a waiver of any forfeiture during the three months for breach of the general covenant to repair, and that no ejectment could be maintained until after the expiration of that period (*r*): and where a lease contained a general covenant to repair, &c., with a proviso for re-entry *in case of non-repair for three months after notice*, or on breach of any other covenant, that no ejectment could be maintained for non-repair until after the expiration of a three months' notice (*s*). A lease from A. to B. contained a general covenant to repair; also a covenant to repair specific defects within two months after notice, in failure whereof A. might re-enter and do such repairs at B.'s expense, with power to distrain for the amount as for rent in arrear; also a proviso for re-entry on breach of any covenant. It was held, that a notice by A. to B. to do certain repairs, in default whereof A. would do them, and charge B. with the expense, pursuant to the lease, amounted to a waiver of any forfeiture for breach of the general covenant to repair committed prior to the expiration of the notice; and that after expiration of notice, although A. might enter and do the repairs at B.'s expense, yet he could not maintain ejectment for any previous breach of the general covenant to repair (*t*).

Non-repair is a continuing Breach.

Where there is a general covenant to repair and *keep* in repair during the term, non-repair is a *continuing* breach of covenant, for which an ejectment may be maintained, if the lease contain a proviso for re-entry applicable to such covenant (*u*). But a covenant to *put* in repair is not a covenant the breach of which is continuing (*x*). Acceptance of rent, which becomes due pending a notice to repair, is no waiver of a subsequent forfeiture occasioned by non-compliance with such notice (*y*). Acceptance of rent after the commencement of an ejectment is no waiver of the forfeiture for which such action was brought (*z*).

36 L. J., Ex. 62. In the latter case, the notice was to repair "in accordance with the *covenants*," in the plural.

(*r*) *Doe* d. *Morecraft* v. *Meux*, 4 B. & C. 606; 4 L. J., K. B. 4; 28 R. R. 426.

(*s*) *Doe* d. *Rankin* v. *Brindley*, 4 B. & Ad. 84.

(*t*) *Doe* d. *Rutzen* v. *Lewis*, 5 A. & E. 277; and see *Doe* d. *Pittman* v. *Sutton*, 9 C. & P. 706.

As to notice under Conveyancing Act in a case where there is a breach of covenant to repair after notice, see *Penton* v. *Barnett*, [1898] 1 Q. B. 276, and p. 344, ante.

(*u*) *Doe* d. *Hemmings* v. *Durnford*, 2 C. & J. 667; *Doe* d. *Baker* v. *Jones*, 5 Exch. 498; *Bennett* v. *Herring*, 3 C. B., N. S. 370.

(*x*) *Coward* v. *Gregory*, L. R., 2 C. P. 153.

(*y*) *Doe* d. *Rankin* v. *Brindley*, 4 B. & Ad. 84.

(*z*) *Doe* d. *Morecraft* v. *Meux*, 1 C. & P. 346, and (*r*) supra; *Jones* v. *Carter*, 15 M. & W. 725.

CH. XVI. s. 4.

## SECT. 4.—*Obligations to Cultivate.*

*Tenant's Obligation to Cultivate.*

Under what Circumstances the Liability arises.

The mere relation of landlord and tenant creates an implied obligation on the part of the tenant to manage and use a farm in a husbandlike manner according to the custom of the country where the premises are situated (*a*), which custom is incorporated in the lease or agreement unless it contains some express covenant or promise *inconsistent* with such custom and sufficient to exclude it (*b*).

Four-course System.

A covenant to cultivate a farm according to the custom of the country on the four-course system, means only so far as such custom is universally obligatory in that part of the country (*c*). In order to constitute such a custom, or, more properly speaking, usage, as is binding on the tenant, it is not necessary that it should have been immemorially adopted; it is sufficient if there be a general usage applicable to farms of a similar description (*d*). In an action against a tenant on a promise that he would occupy a farm in a good and husbandlike manner, according to the custom of the country; an allegation that he had treated the estate contrary to good husbandry and the custom of the country, is proved by showing that he had treated it contrary to the *prevalent* course of good husbandry in that neighbourhood; as by tilling half his farm at once when no other farmer tilled more than a third, though many tilled only a fourth; and it is not necessary to show any precise definite custom or usage in respect to the quantity tilled (*e*). The implied obligation to manage a farm in a husbandlike manner was held to be broken, when evidence was given of dung and compost having been carried off the premises, without any stipulation or agreement to that effect having been entered into (*f*).

Contracts respecting Mode of Tillage.

Covenants respecting the mode of tillage to be adopted by the tenant must necessarily vary so much in their terms, according to the agreement of the parties, that little can be said on the subject. They are generally framed in accordance with the custom of the country where the lands are situated, with such variations as the parties specially agree on. Such covenants are introduced, in nearly

(*a*) *Powley* v. *Walker*, 5 T. R. 373; 2 R. R. 619; *Legh* v. *Hewitt*, 4 East, 154. These cases decide that there is an obligation to cultivate properly, not that there is an obligation to continue cultivating in spite of losses certain to arise from low prices for agricultural produce and heavy expenses for agricultural labour. But it is submitted that such an obligation exists, though (see per Parke, B., in *Hutton* v. *Warren*, infra) it is not waste for a tenant to leave land uncultivated.

(*b*) *Hutton* v. *Warren*, 1 M. & W. 466; *Wigglesworth* v. *Dallison*, 1 Doug. 201; 1 Smith, L. C.; *Senior* v. *Armytage*, Holt, 197; 17 R. R. 627; *Clarke* v. *Roystone*, 13 M. & W. 752; *Wilkins* v. *Wood*, 17 L. J., Q. B. 319; 12 Jur. 583.

As to "custom of country," see Chap. XX., Sect. 5, post.

(*c*) *Newson* v. *Smythies*, 1 F. & F. 477; 3 H. & N. 840.

(*d*) *Dalby* v. *Hirst*, 1 B. & B. 224; 21 R. R. 577.

(*e*) *Legh* v. *Hewitt*, 4 East, 154.

(*f*) *Powley* v. *Walker*, 5 T. R. 373; 2 R. R. 619.

every instance, for the protection and benefit of the landlord, and to prevent the tenant from overcropping and deteriorating the property during the term, and leaving it in an impoverished state at the expiration thereof. Those of most common occurrence are the covenant not to break up pasture (which might be done for the purpose of the heavy crops derivable at first from land so broken up) or to pay an increased rent for every acre broken up; the covenant not to sell hay, &c., but to consume it on the land by cattle; and the covenant to leave all manure on quitting.

Not to Plough up Meadow.

Upon a covenant not to plough any ancient meadow, and, if done, to pay an additional yearly rent per acre, the increased rent is not a penalty, but a liquidated satisfaction fixed and agreed upon by the parties (*g*).

Not to Sell Hay.

A covenant not to sell or carry away from the demised premises any hay, straw or manure which should be grown or produced thereon, under the increased rent of 10*l.* for every ton so sold or carried away, and so in proportion for any greater or less quantity, but to consume the hay and straw by cattle, has been construed as a covenant giving the lessee the right to sell the hay and straw, on payment of the increased rent, and that, therefore, the breach was not well assigned (*h*). Where a lessee covenanted to leave fodder, &c., on the determination of his lease, and he became bankrupt, and his assignees refused the lease, it was held that they were not entitled to take the fodder (*i*). Where a farm lease contained a covenant by the lessee that "he should not nor would, during the last year of the term thereby granted, sell or remove from the said farm and lands any of the hay, straw and fodder which should arise and grow on the said farm and lands:" it was held, that the prohibition was not restricted to hay, straw and fodder which arose and grew on the farm in the last year of the term, but extended to that which had arisen and grown at any time during the term (*k*).

Contracts respecting Manure.

Where the outgoing tenant covenants with his landlord to leave the manure made by him on the farm, and sell it to the incoming tenant at a valuation to be made by certain persons, the effect of such covenant is to give the outgoing tenant the right of on-stand for the manure upon the farm, and the possession of and property in it remains in him in the meantime. Therefore if the incoming tenant remove and use it before such valuation, he is answerable to the outgoing tenant in trespass (*l*). A covenant by the lessee that he would sufficiently muck and manure the land demised with two

(*g*) *Rolfe* v. *Peterson*, 2 Bro. P. C. 436; 6 Id. 470; *Jones* v. *Green*, 3 Y. & J. 298.
(*h*) *Legh* v. *Lillie*, 6 H. & N. 165; 30 L. J., Ex. 25.
(*i*) *Ex parte Nixon*, 1 Rose, 445; *Ex parte Whittington*, Buck, 87.
(*k*) *Gale* v. *Bates*, 3 H. & C. 84; and see *Massey* v. *Goodall*, 17 Q. B. 310.
(*l*) *Beaty* v. *Gibbons*, 16 East, 116; 14 R. R. 320.

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sufficient sets of muck within the last six years of the term, the last set to be laid on the premises within three years of the expiration of the term, is satisfied with the tenant's laying on two sets of muck within the last three years of the term, if he should think proper so to do (*m*). A condition not to sell, cart, or convey away any dung, compost, or manure from a farm, is broken by the removal of the dung of two cows which had been sold by the tenant, but were permitted by him to remain on the premises, they being entirely provided by the buyer with provender from elsewhere (*n*).

Conversion of Farm into Market Garden.

The conversion into a market garden of, and the erection of glass-houses on, a farm demised by lease containing a covenant for management "in a good, proper and husbandlike manner according to the best rules of husbandry practised in the neighbourhood" has been held no breach of such covenant, so as to be restrainable by injunction (*o*).

## SECT. 5.—*Waste* (*p*).

### (a) *What is Waste.*

Definition of Waste.

Waste (vastum) is defined to be a spoil or destruction to houses, gardens, trees, or other corporeal hereditaments, to the injury of the reversion or inheritance, and it has two divisions of great practical importance, voluntary waste, and permissive waste.

Voluntary Waste.

Voluntary waste is actual or commissive, as by pulling down houses, or altering their structure,—the kind of damage which is sometimes provided against by express stipulation not to convert a house into a shop, &c.

Permissive Waste.

Permissive waste is a matter of negligence and omission only, as by suffering buildings to fall or rot for want of necessary reparations (*q*); the kind of damage which, where the contract of tenancy is in writing, is almost invariably provided against by express agreement to repair. It is not waste to omit to perform a covenant to put the demised premises into such repair as A. B. had previously put them into (*r*). The action for waste can only lie for that which would be waste, if there were no stipulation respecting it (*s*).

In addition to these two great divisions of waste, it is desirable to say a word or two about "meliorating waste" and "equitable waste."

Meliorating Waste.

Meliorating or ameliorating waste is such voluntary waste as improves the demised premises, as where a tenant puts a new front

(*m*) *Pownall* v. *Moores*, 5 B. & A. 416.
(*n*) *Hindle* v. *Pollitt*, 6 M. & W. 529.
(*o*) *Meux* v. *Cobley*, [1892] 2 Ch. 253; 61 L. J.. Ch. 449; 66 L. T. 86.
(*p*) For the law of Waste, generally, see Yool on Waste, &c. (1863, Maxwell).
(*q*) Co. Lit. 53; Wood's Inst. 521; Bac. Abr. tit. *Waste* (B.).
(*r*) *Jones* v. *Hill*, 7 Taunt. 393, 396; 18 R. R. 520.
(*s*) Id. 396.

to his house: in respect of such waste, it seems that unless substantial damages be proved, the tenant will not be interfered with by injunction. In *Doherty* v. *Allman* (*t*), where a lease was for 999 years, of which about 900 were unexpired, an injunction to restrain meliorating waste was refused. It appears too that if the landlord sue, and the jury give nominal damages only, the tenant is entitled to have judgment entered for himself, as was held in a case where the tenant converted three closes into garden ground and built upon them, and the jury assessed the damages at a farthing for each close (*u*).

No Injunction against.

No Damages.

Equitable waste consists in acts of gross damage, usually the cutting down ornamental timber by a tenant "without impeachment of waste," and is so termed because before the Judicature Act only a court of equity took cognizance of it. It is now, by s. 25, sub-s. 3, within the cognizance of any branch of the Supreme Court; but as it can generally be committed by tenants for life only, contracts of tenancy between a landlord and tenant being never made without impeachment of waste, it is only necessary to mention it here for the purpose of pointing the distinction. Tenants for life, however (see p. 650), were made liable by the Statute of Gloucester, and cases in which the liability of a tenant for life for waste is concerned will sometimes throw light upon the liability of a tenant under a landlord.

Equitable Waste.

Voluntary waste chiefly consists in felling timber trees (*x*), pulling down houses (*y*), opening mines or pits (*z*), or changing the course of husbandry (*a*). Whatever does a lasting damage to the freehold or inheritance is waste; therefore, removing wainscots, floors or other things once fixed to the freehold of a house, is waste (*b*); and if the windows be broken or carried away it is waste, although they were glazed by the tenant himself, for the glass is part of the house (*c*). If a house be destroyed by tempest, lightning, or the like, which is the act of God, it is not waste (*d*); but if the house be uncovered by tempest, it is said that a tenant for years must repair it, even though there be no timber growing upon the ground, for the tenant must at his peril keep the house from wasting (*e*). Waste may be done in houses by pulling them down, or suffering them to be

What Acts constitute Voluntary Waste.

(*t*) *Doherty* v. *Allman*, 3 App. Cas. 709; 39 L. T. 129, applied in the compensation case of *Pontypridd Improvements Co. and Macintosh Arbitration*, 61 L. J., Q. B. 164, to a rebuilding by a lessee having an unexpired term of fifty years. See also *Jones* v. *Chappell*, L. R., 20 Eq. 539, and *Meux* v. *Cobley*, supra, note (*o*).

(*u*) *Harrow School* v. *Alderton*, 1 B. & P. 86; 5 R. R. 546.

(*x*) Bac. Abr. tit. *Waste* (C. 2). See *Phillips* v. *Smith*, 14 M. & W. 589; *Channon* v. *Patch*, 5 B. & C. 897.

(*y*) Bac. Abr. tit. *Waste* (C. 5); Co. Lit. 53.

(*z*) Bac. Abr. tit. *Waste* (C. 3).

(*a*) Id. (C. 1).

(*b*) Id. (C. 6).

(*c*) Co. Lit. 53.

(*d*) Bac. Abr. tit. *Waste* (E.); Co. Lit. 53 a; Smith, L. & T. 261 (2nd ed.).

(*e*) Co. Lit. 53 a; Bac. Abr. tit. *Waste* (C. 5); Smith, L. & T. 262 (2nd ed.).

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uncovered, whereby the rafters or other timber of the house become rotten (*f*); but merely suffering them to be uncovered without rotting the timber, is not waste: or if the house be uncovered when the tenant comes in, it is no waste to suffer it to fall down (*f*), although it would be otherwise if the tenant were to pull it down, unless he re-erect it again forthwith (*g*); but if a house built *de novo* was never covered in, it is not waste to abate it (*h*). If a lessee permit the walls to decay for default of daubing or plastering, that is waste (*i*), and if he suffer the houses to be wasted, and then fell down timber to repair the same, it is double waste (*j*): it is also waste not to repair fences (*k*).

Waste in Warrens, Parks, &c.

If the tenant of a dovehouse, warren, park, fishpond, or the like, take so many that such sufficient store be not left as he found when he came in, it is waste (*l*); and to suffer the pale to decay, whereby the deer are dispersed, it is waste (*l*). If the lessee of a warren by charter or prescription plough the land, it is waste; but it is otherwise if it be only land stored with conies, and not a legal warren; and stopping and digging coney burrows is not waste in a warren (*m*).

Waste by digging Mines, &c.

Digging for gravel, lime, clay, brick-earth, stone or the like, or for mines of metal, coal, or the like, hidden in the earth, and not open when the tenant came in, is waste (*n*): but the tenant may dig for gravel or clay for the reparation of the house (though no pit were open at the time of the lease), as well as he may take convenient timber trees (*o*). If the pit or mines were open before, it is no waste if the tenant continue to dig them for his own use; for it has become the mere annual profit of the land (*p*).

By not repairing Sea-walls, &c.

It is waste to suffer a wall of the sea to be in decay, so as by the flowing and reflowing of the sea the meadow or marsh be surrounded, whereby it becomes unprofitable (*q*); but if it be surrounded suddenly by the rage or violence of the sea, as by tempest, without any default of the tenant, it is not waste (*r*): so if the tenant do not repair the bank or walls against rivers, or other waters, whereby the meadows or marshes are surrounded and become rushy and unprofitable, it is waste (*s*).

By changing the Nature of the Property.

If the tenant convert arable land into wood, or è converso, or meadow into arable, it is waste; for it changes not only the course

(*f*) See note (*e*) on p. 647.
(*g*) Co. Lit. 53 a.
(*h*) Co. Lit. 53 a [note 345].
(*i*) 2 Roll. Abr. 816, pl. 36, 37.
(*j*) Co. Lit. 53 b.
(*k*) *Cheetham* v. *Hampson*, 4 T. R. 318; 2 R. R. 397.
(*l*) Co. Lit. 53 b.
(*m*) Id.; *Moyle* v. *Moyle*, Owen, 66; *Lurting* v. *Conn*, 1 Ir. Ch. Rep., N. S. 273.
(*n*) Bac. Abr. tit. *Waste* (C. 3); Co. Lit. 53 b; *Viner* v. *Vaughan*, 2 Beav. 466.
(*o*) Co. Lit. 53 b.
(*p*) 1 Wood's Inst. b. 2, c. 5, s. 41; 2 Blac. Com. 282; Co. Lit. 53 b, 54 b; *Clavering* v. *Clavering*, 2 P. Wms. 388.
(*q*) Co. Lit. 53 a
(*r*) Id. 53 b; Bac. Abr. tit. *Waste* (C. 1).
(*s*) Co. Lit. 53 b; Callis on Sewers, 146.

of husbandry, but creates a difficulty in the proof of the title (*t*); and this would appear to be the case even where the act is done according to the custom of the country for the purpose of amelioration (*u*). If a tenant suffer arable land to lie fresh, and not manured, this is not waste, but ill-husbandry (*x*). If he pull down a malt-mill and build a corn-mill, it is waste (*y*): so if he convert a corn-mill into a fulling-mill, it is waste, though the conversion be to the lessor's advantage (*z*): so the conversion of a brew-house worth 120*l.* per annum into other houses worth 200*l.* per annum is waste (*y*). Converting two chambers into one, or è converso, or converting a hand-mill into a horse-mill, is waste (*a*).

By building a House. *Jones* v. *Chappell.*

It was laid down by Lord Coke, that if the tenant build a new house, it is waste; and if he suffer it to be wasted, it is new waste (*b*). But such is not the law at the present time. To build a new house on the demised land is not waste, unless it be an injury to the inheritance in the sense of destroying identity, "by what is called destroying evidence of the owner's title, and that is a very peculiar head of the law, which has not been extended in modern times" (*c*).

Construction of Leasing Power against Waste.

Where a power of leasing was given, so that no clause should be contained in the lease, giving power to the lessee to commit waste, or exempting him from punishment for committing it; it was held, that a lease was good, though it contained a stipulation that the lessee should erect a new dwelling-house, with liberty to pull down some outbuildings, and to use the materials in erecting the house (*d*).

Counter-claim in respect of Waste under Agricultural Holdings Act.

It was enacted by sect. 19 of the Agricultural Holdings Act, 1875, (38 & 39 Vict. c. 92), "where a tenant commits or permits waste," and claims compensation under that act in respect of an improvement, "then the landlord shall be entitled, by counter-claim, but not otherwise," to obtain compensation on his part, provided that the waste was not committed or permitted more than four years before the determination of the tenancy.

This act is repealed and replaced by the Agricultural Holdings Act, 1883, 46 & 47 Vict. c. 61, s. 6 of which provides that "in the ascertainment of the compensation" payable to the tenant under that act "there shall be taken into account, in reduction thereof, any sums due to the landlord in respect of" (amongst other things) "any waste

(*t*) *London* (*City*) v. *Greyme*, Cro. Jac. 182; Bac. Abr. tit. *Waste* (C. 1); Co. Lit. 53 b; Hob. 234; *Murphy* v. *Daly*, 13 Ir. Com. L. R. 239.

(*u*) *Simmons* v. *Norton*, 7 Bing. 640.

(*x*) 2 Roll. Abr. 814; *Hutton* v. *Warren*, 1 M. & W. 472.

(*y*) *Cole* v. *Green*, 1 Lev. 309; *S. C.*, nom. *Cole* v. *Forth*, 1 Mod. 95.

(*z*) *London* (*City*) v. *Greyme*, supra.

(*a*) Co. Lit. 53 a [note 344]. And see *Young* v. *Spencer*, 10 B. & C. 145; *Queen's College, Oxford* v. *Hallett*, 14 East, 489; 13 R. R. 293.

(*b*) Co. Lit. 53 a.

(*c*) *Jones* v. *Chappell*, L. R., 20 Eq. 539; 44 L. J., Ch. 658, per Jessel, M.R., citing *Doe* v. *Earl of Burlington*, 5 B. & Ad. 517.

(*d*) *Doe* d. *Earl of Egremont* v. *Stephens*, 6 Q. B. 208; Cole Eject. 427.

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committed or permitted by the tenant." This section prescribes, similarly to s. 19 of the Act of 1875, the limit of four years, the words being that, "nothing in this section shall enable a landlord to obtain under this act compensation in respect of waste by the tenant or of breach by the tenant committed or permitted in relation to a matter of husbandry more than four years before the determination of the tenancy;" and s. 7 provides for the landlord's counter-claim. See Chap. XXI., post.

### (b) *Remedies for Waste.*

At Common Law.

At common law an action for waste lay only against tenants by the curtesy, tenants in dower and guardians, whose estates were created by act of law (*e*). But tenants for life or years had an interest in the land by the act of the lessor, who might and ought to have provided against waste by some express covenant or condition; and such tenants were not liable at common law either for voluntary or permissive waste (*f*).

Statutes of Marlebridge.

The Statute of Marlebridge (52 Hen. 3, c. 23), s. 2, enacts that—

> Farmers during their terms shall not *make waste*, sale or exile (*g*) in houses, woods or men, nor of anything belonging to the tenements that they have to farm, *without special licence* had by writing of covenant, making mention that they may do it; which thing if they do and thereof be convict, they shall yield full damage, and shall be punished by amerciament grievously.

Statutes of Gloucester.

The Statutes of Gloucester (6 Edw. 1) by c. 5 enacted that a man should have a writ of waste against a tenant for term of life or years, and added that "he which shall be attainted of waste, shall lose the thing which he hath wasted, and moreover shall recompense thrice so much as the waste shall be taxed at." Read by itself the Statute of Gloucester plainly worked a forfeiture of the *demised premises* for waste, but the abolition of the writ of waste, along with real actions generally, by the Real Property Limitations Act, 1833, 3 & 4 Will. 4, c. 27, s. 36, was generally considered to carry with it the abolition of the special penalties of forfeiture and treble damages (*h*); and c. 5 of the Statutes of Gloucester has been expressly repealed by the Civil Procedure Acts Repeal Act, 1879, 42 & 43 Vict. c. 59.

Construction of Statutes.

Upon the two statutes two questions have from time to time arisen. The first question is whether permissive waste is within the statutes. It is laid down expressly by Lord Coke (*i*) that it is; and the considered judgment in *Yellowly* v. *Gower* (*k*), which

(*e*) *Greene* v. *Cole*, 2 Wms. Saund. 252; Smith, L. & T. 259 (2nd ed.).

(*f*) *Countess of Shrewsbury's case*, 5 Co. R. 13 a; Cro. Eliz. 777, 784; 2 Inst. 145, 299; Smith, L. & T. 259 (2nd ed.).

(*g*) "Vastum, vendicionem seu exilium non faciant."

(*h*) See Williams on Real Property, 31; 3 Steph. Com. 408.

(*i*) 2 Inst. 145.

(*k*) *Yellowly* v. *Gower*, 11 Ex. at p. 294. In *Harnett* v. *Maitland*, 16 M. & W. at p. 262, the point appears to have been treated as an open one.

has been said (*l*) to have stifled any doubt arising from three cases in the Common Pleas (*m*), which are there reviewed, puts it that "there is no doubt of the liability of tenants for terms of years, for they are put on the same footing as tenants for life, both as to voluntary and permissive waste." And although the question has been spoken of as an open one (*n*) there is express authority that tenants for years are so liable (*o*). Lord Coke's view (*p*) appears open to question, on the grounds (1) that the Statute of Marlebridge by the words *make* "waste, sale or exile," points to positive acts only, (2) that the special licence spoken of in that statute points to such acts only, being inappropriate to a mere omission to repair, and (3) that it is unreasonable to suppose that the Statutes of Gloucester would have prescribed so harsh a penalty as forfeiture for such mere omission. *Yellowly* v. *Gower* however would now be probably followed in a Court of First Instance (*q*), and it is submitted that even in a Court of Appeal it would be considered as having been too long accepted to be now overruled, whatever might be the opinion of a court upon the correctness of that judgment. The almost universal insertion of the express covenant to repair in leases very greatly diminishes the practical importance of the question in the present day: but it should be added that the remedies upon the covenants in a lease have been construed as cumulative upon the remedies for voluntary waste (*r*), and that if this construction and *Yellowly* v. *Gower* be correct, they would be cumulative upon the remedies for permissive waste also.

Liability of Tenants for Years for Permissive Waste.

*Davies* v. *Davies.*

The second question, which is of greater practical importance, is what tenants come within the statutes. The words of the Statute of Marlebridge are "farmers during their terms," and of c. 5 of the Statutes of Gloucester "him that holdeth for term of life or for term of years."

What Tenants within the Statutes.

(*l*) In the notes to *Greene* v. *Cole*, 2 Wms. Saunders, at p. 646.

(*m*) *Gibson* v. *Wells*, 1 B. & P. (N. R.) 290; 8 R. R. 801; *Horne* v. *Benbow*, 4 Taunt. 764; *Jones* v. *Hill*, 7 Taunt. 392; 18 R. R. 508.

(*n*) In *Woodhouse* v. *Walker*, L. R., 5 Q. B. D. at p. 407; per Lush and Field, JJ.; and in *Barnes* v. *Dowling*, 44 L. T. 809; in which latter case it was held that an *equitable* estate gave no right of action against a tenant for life for permissive waste. In *Avis* v. *Newman*, L. R., 41 Ch. D. 532, it was held by Kay, J., that the estate of a legal tenant for life is not liable for permissive waste.

(*o*) *Davies* v. *Davies*, 36 W. R. 399, and p. 6, ante, per Kekewich, J.

(*p*) "To doe, or make waste, in legall understanding in this place," says Lord Coke, in 2 Inst. 145, commenting on the Statute of Marlebridge, "includes as well permissive waste, which is waste by reason of omission, or not doing, as for want of reparation, as waste by reason of commission, as to cut downe timber, trees, or prostrate houses, or the like; and the same word hath the Statute (*sic*) of Gloucester, cap. 5, *que aver fait waste*, and yet it is understood as well of passive as of active waste, for he that suffereth a house to decay, which he ought to repaire, doth the waste." These words are said by Kay, J., in *Avis* v. *Newman*, L. R., 41 Ch. D. at p. 534, only to include permissive waste where there is an obligation to repair.

(*q*) But see *Avis* v. *Newman*, supra, per Kay, J.

(*r*) *Keenlyside* v. *Thornton*, 2 W. B. 1111.

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Tenant at Will not liable.

A tenant at will is not within the statute, and therefore not liable to an action upon the statute for either kind of waste (*s*); although if he *commit* waste, he thereby in effect determines his tenancy, and renders himself liable to an action of trespass at the suit of the landlord (*t*).

Nor Tenant from Year to Year.

Tenants from year to year are not considered tenants for years, but only as tenants at will (subject and entitled to the usual or agreed notice to quit); consequently they are not liable for either kind of waste under the statutes (*u*); although in the absence of any express stipulation as to repairs, &c., they are said to be bound to use the premises in a tenantable and proper manner, and to keep them wind and water tight, and *not to commit waste* (ante, p. 646). An "action on the case in the nature of waste" was, under the old terminology, said to lie against a tenant misbehaving in this matter, and such action lies against a tenant holding over in respect of acts of waste committed after a notice to quit (*x*).

Tenant in Common, &c.

A person who has a life interest by survivorship cannot sue for waste committed before his life interest vested (*y*). One tenant in common cannot maintain an action on the case, in the nature of waste, against another tenant in common (in possession of the whole, having a demise of the moiety from the first), for cutting down trees of proper age and growth for being cut; for it is no hurt to the inheritance. If, however, the trees were not fit to be cut, he might maintain such action (*z*). One tenant in common cannot maintain against another an action of trespass for cutting down in due season and carrying away the whole produce of the common property, viz. a crop of hay (*a*). But one tenant in common of a close is not entitled to dig and carry away the turf, as such act amounts to a destruction of the property, and therefore constitutes an ouster (*b*).

Joint Tenants.

Where a farm was demised to A. and B. jointly, and A. sub-let to C., and gave receipts for rent and a notice to quit in his name alone, it was held that A. and B. could not maintain a joint action against C. for pulling down a shed which stood on part of the demised premises (*c*).

Liabilities of Executor.

An action for waste lies, by virtue of the Civil Procedure Act, 1833, 3 & 4 W. 4, c. 42, s. 2, against an executor of a tenant for

(*s*) Co. Lit. 57 a; *Countess of Shrewsbury's case*, 5 Co. R. 13 a; Cro. Eliz. 777, 784; *Gibson* v. *Wells*, 1 B. & P. (N. R.) 290; 8 R. R. 801; *Harnett* v. *Maitland*, 16 M. & W. 254; 4 D. & L. 545.

(*t*) Lit. s. 71; *Countess of Shrewsbury's case*, supra.

(*u*) See *Auworth* v. *Johnson*, 5 C. & P. 239; *Torriano* v. *Young*, 6 C. & P. 8; *Leach* v. *Thomas*, 7 C. & P. 327; *Horsefall* v. *Mather*, Holt, N. P. C. 7; 17 R. R. 589.

(*x*) *Burchell* v. *Hornsby*, 1 Camp. 360.

(*y*) *Bacon* v. *Smith*, 1 Q. B. 345.

(*z*) *Martin* v. *Knowllys*, 8 T. R. 145.

(*a*) *Jacobs* v. *Seward*, L. R., 4 C. P. 328.

(*b*) *Wilkinson* v. *Haygarth*, 12 Q. B. 837.

(*c*) *Steel* v. *Western*, 7 Moore, 29; 24 R. R. 682.

waste committed by his testator within six calendar months before his death.

Measure of Damages for Waste. *Whitham* v. *Kershaw.*

The measure of damages in an action for waste is the diminution in the value of the reversion, less a discount for immediate payment (*d*), but it seems that in a very gross case "vindictive damages" may be given (*e*).

Injunction against Voluntary Waste.

In an action for commissive, or voluntary, waste, the plaintiff may claim a writ of injunction against the repetition or continuance of the injury complained of. It will be desirable to indorse the writ of summons accordingly, if an injunction be wished for (*f*): but the claim may be added afterwards by leave of the court or a judge (*g*), and an injunction may be granted by an interlocutory order in "any case in which it shall appear just or convenient" (*h*). Before the Judicature Act, such an application was usually made to the Court of Chancery (*i*). It seems that where a lessee commits acts of waste, for which damages merely nominal would be given, the High Court will not grant an injunction against him, if it appear that he does not contemplate committing any further waste, nor assert a right to commit it (*k*). The remedy by injunction is ordinarily the most efficient which can be adopted, as it prevents that injury which, by the other remedies, can only be compensated for after it is done.

Pulling down or altering House.

A lessee will be restrained from working mines by instroke from adjoining mines if he has covenanted to sink a pit, and work through that only; but not otherwise (*l*). He will also be restrained from pulling down a house, and building another which the landlord objects to (*m*), or from making material alterations in a dwelling-house, as by changing it into a shop or warehouse (*n*); or removing plate-glass windows from the shop or front of the house (*o*); or from throwing down inclosures, or pulling down houses (*p*); or from ploughing up meadow or pasture which has not been ploughed for twenty years (*q*), unless indeed a penal rent of so much per acre is reserved (*r*). So an injunction will be granted to restrain a tenant from year to year, under notice to quit, as in the case of a lessee

Ploughing up Pasture.

(*d*) *Whitham* v. *Kershaw*, 16 Q. B. D. 613; 54 L. T. 124; 34 W. R. 340—C. A.

(*e*) Ib. per Bowen, L.J.

(*f*) R. S. C., Ord. II., Rule 1; Appendix (A.), Part II., Sect. 4.

(*g*) R. S. C., Ord. III., Rule 2.

(*h*) Judicature Act, 1873, s. 25, sub-sect. 8.

(*i*) See *Smyth* v. *Carter*, 18 Beav. 78; *Duke of Beaufort* v. *Bates*, 31 L. J., Ch. 481.

(*k*) *Doran* v. *Carroll*, 11 Ir. Ch. R. 379.

(*l*) *Lewis* v. *Fothergill*, L. R., 5 Ch. Ap. 103.

(*m*) *Smyth* v. *Carter*, 18 Beav. 78.

(*n*) *Douglas* v. *Wiggins*, Johnson Ch. R. (American), 435; 2 Story Eq. Jur. s. 913.

(*o*) *Brocklesbury* v. *Munn*, W. Notes, 1870, p. 42 (not further reported).

(*p*) Com. Dig. tit. *Chancery* (D. 11); *Mayor, &c. of London* v. *Hedger*, 18 Ves. 355; *Hindley* v. *Emery*, L. R., 1 Eq. 52; 35 L. J., Ch. 6.

(*q*) Com. Dig. tit. *Chancery* (D. 11).

(*r*) *Woodward* v. *Gyles*, 2 Vern. 119; and see ante, p. 418.

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for a longer term, from doing damage and from removing crops, manure, &c., except according to the terms of his lease or the custom of the country (*s*). An injunction has been granted to restrain a tenant from year to year, his servants, agents and workmen "from pulling down, damaging or destroying any of the buildings upon the farm and premises; and from cutting down, injuring or destroying any of the timber or other trees, timberlike trees, bark, wood or underwood, hedges or fences now standing upon the said farm and premises; and from ploughing up any of the ancient meadow, or any of the old pasture land belonging to the said farm; and from sowing any part of the said farm and lands with mustard-seed or any other pernicious crop; and from removing off the said farm and lands any of the hay or straw, dung or manure produced or made thereon: and from doing any other waste or destruction to the said farm, lands and premises, or any part thereof," until, &c. (*t*). So an injunction has been granted against ploughing up pasture, where there was only a covenant to manage the farm in a husbandlike manner (*u*). Also to restrain a tenant from breaking up meadow for the purpose of building, contrary to an express covenant (*x*). Also to prevent a tenant from injuring fish-ponds (*y*), or a dovecote, or fixtures annexed to and forming part of the freehold; but not articles commonly called fixtures which are not so annexed (*z*), nor fixtures which the tenant is entitled to remove during the term, unless his lessor will purchase them according to the terms of the lease (*a*); but an injunction has been granted to restrain a tenant from removing trade fixtures, during the term, contrary to an express covenant in the lease (*b*).

Cutting down Trees, &c.

Fixtures.

No Injunction to Restrain permissive Waste.

It is well settled that no injunction will be granted against a tenant for life to restrain permissive waste (*c*) and no such injunction would be granted against a tenant under a landlord. Nor would the specific performance of a covenant to repair be enjoined (*d*). It is suggested however that if trees were wrongly cut down by a tenant, a mandatory injunction to plant new ones might possibly be granted.

(*s*) *Onslow* v. ——, 16 Ves. 173.
(*t*) *Pratt* v. *Brett*, 2 Madd. 62; 17 R. R. 187.
(*u*) *Drury* v. *Molins*, 6 Ves. 328.
(*x*) *Ld. Grey de Wilton* v. *Saxon*, 6 Ves. 106; 6 R. R. 457; *Kimpton* v. *Eve*, 2 V. & B. 349; 13 R. R. 116.
(*y*) *Earl Bathurst* v. *Burden*, 2 Bro. C. C. 64.
(*z*) *Kimpton* v. *Eve*, 2 V. & B. 349; 13 R. R. 116.
(*a*) *Rolleston* v. *New*, 4 K. & J. 640.
(*b*) *Bidder* v. *Trinidad Petroleum Co.*, 17 W. R. 53.
(*c*) *Powys* v. *Blagrave*, 4 De G. M. & G. 448.
(*d*) See Sect. 3 (d), ante.

## Sect. 6.—*Fences and Party-walls.*



Ownership of Agricultural Fences.

Where there are two adjacent fields, separated by a hedge and ditch, the ditch primâ facie belongs to the owner of the field in which the hedge is; and if there are two ditches, one on each side of the hedge, then the ownership of the hedge must be ascertained by proving acts of ownership (*e*). The rule about ditching is this—"No man making a ditch can cut into his neighbour's soil, but usually he cuts it to the very extremity of his own land; he is of course bound to throw the soil which he digs out upon his own land, and, often, if he likes it, he plants a hedge upon the top of it; therefore, if he cuts afterwards beyond the edge of the ditch, which is the extremity of his land, he cuts into his neighbour's land, and is a trespasser" (*f*): proof, therefore, of the ancient width of the ditch is evidence that the owner's land did not extend beyond the outer edge thereof (*f*). One tenant in common of a hedge may maintain trespass against his co-tenant if the latter grub it up; but not for a mere clipping of the hedge (*g*).

*Vowles* v. *Miller.*

Ownership of Party-walls.

The common use of a wall separating adjoining lands belonging to different owners (the origin of which wall is unknown), is primâ facie evidence that the wall and the land on which it stands belong to the owners of those adjoining lands, in equal moieties as tenants in common. Where such an ancient wall was pulled down by one of the two tenants in common, with the intention of rebuilding the same, and a new wall was built of greater height than the old one, it was held not to be such a total destruction of the wall as to entitle one of the two tenants in common to maintain an action of trespass against the other (*h*). But where a tenant in common of a wall took off the coping-stones and heightened it, and built a washhouse against it, the roof of which occupied the whole width of the top of the wall, and also let a stone into the wall, with an inscription on it stating that the wall and the land on which it stood belonged to him, it was held, that on these facts the jury might find an actual ouster of the co-tenant (*i*). Where a party-wall was built at the joint expense of the two adjoining proprietors, and half its thickness stood on the land of each, the property in the wall follows the land on which it stands, and the two proprietors are not tenants in common of the wall (*k*). In contemplation of law such wall constitutes two

(*e*) *Guy* v. *West*, 2 Selw. N. P. 1244 (13th ed.); Cole Ejec. 242, 243.
(*f*) *Vowles* v. *Miller*, 3 Taunt. 137.
(*g*) *Voyce* v. *Voyce*, Gow, 201.
(*h*) *Cubitt* v. *Porter*, 8 B. & C. 257; 6 L. J., K. B. 306; 32 R. R. 374; *Wiltshire* v. *Sidford*, Id. 259, n.; *Murley* v. *M'Dermott*, 8 A. & E. 138.
(*i*) *Stedman* v. *Smith*, 8 E. & B. 1; 26 L. J., Q. B. 314; and see *Doe* d. *Wawn* v. *Horn*, 3 M. & W. 333; 5 Id. 564.
(*k*) *Matts* v. *Hawkins*, 5 Taunt. 20; 14 R. R. 695; *Taylor* v. *Stendall*, 7 Q. B. 634; 3 D. & L. 161.

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distinct walls, and had to be so described under the old system of pleading (*l*). If a house or office be separated from other premises by a wall, and that wall belongs to the owner of the house or office, he is of common right bound to repair it; and an action will lie against him for any damages occasioned by his not doing so.

An action for not repairing fences, whereby another party is damaged, can, in ordinary cases, only be maintained against the occupier, and not against the owner of the fee, who is not in possession (*m*).

Action by Landlord against Tenant.

It is so notoriously the duty of the actual occupier of lands to repair the fences, and so little the duty of the landlord, that without any agreement to that effect, the landlord may maintain an action against his tenant for not so doing, upon the ground of the injury done to his inheritance (*n*). If two persons are possessed of adjoining closes, neither being under any obligation to fence, each must take care that his cattle do not enter the land of the other; but it may be doubted, if two persons have the concurrent possession of land, for the purpose that each may take profits of a special nature, and distinct from, but not inconsistent with, the right of the other, whether either one is bound to guard against casual damage, which, during and by fair enjoyment of his right, may happen to the other (*o*). A person entitled to the minerals under the land of another, with licence to make a shaft opening into it, is, in the absence of any stipulation to the contrary, under a legal obligation to the owner of the surface soil to fence the shaft so as to prevent its being a source of danger to his cattle which may be upon it, and is liable to an action for injury occurring to those cattle for want of such fencing (*p*). Where the owner of two adjoining closes (A. and B.) separated by a fence and gate, which had always been repaired by the occupier of B., sold A. to the plaintiff, and two years afterwards sold B. to the defendant; it was held, that the latter was not bound to repair the gate, unless he or his vendor had made some specific bargain with the plaintiff to that effect; and that the doing of occasional repairs was not evidence of such bargain (*q*).

Tenant must preserve Boundaries of Land demised.

A tenant is obliged to preserve the boundaries of the land demised to him, and if he permit them to be destroyed, so that his landlord's land cannot be distinguished from his own, he must either restore the land specifically, or give other land of equal value in

(*l*) *Murley* v. *M'Dermott*, 8 A. & E. 138, 143; Cole Ejec. 242.

(*m*) *Cheetham* v. *Hampson*, 4 T. R. 318; 2 R. R. 397; *Russell* v. *Shenton*, 3 Q. B. 449. See post, Chap. XIX.

(*n*) *Cheetham* v. *Hampson*, 4 T. R. 319; 2 R. R. 397; per Lord Kenyon, C.J.; and see *Whitfield* v. *Weedon*, 2 Chit. R. 685.

(*o*) *Churchill* v. *Evans*, 1 Taunt. 529; 10 R. R. 600.

(*p*) *In re Williams* v. *Groucott*, 4 B. & S. 149; 32 L. J., Q. B. 239.

(*q*) *Boyle* v. *Tamlyn*, 6 B. & C. 329; 5 L. J., K. B. 134; 30 R. R. 343.

lieu (*r*); and this obligation is not merely to leave the boundary distinct at the end of the term, but to keep it distinct during the term, the court having jurisdiction during the term to ascertain the boundary if the tenant has confused it (*s*), and the obligation extends to cases where there are several co-lessees (*t*).

Undermining of Party-wall.

A person has no right to undermine a party-wall between his own house, which he has pulled down, and his neighbour's, unless it can be done without injury to his neighbour's house; even although it is doubtful whether the interests of the parties in the wall are several or whether they are tenants in common of it (*u*). To an action of covenant for non-repair of a messuage, the defendant may plead performance, except as to the repairs of a party-wall, and that those were rendered necessary and were done under 14 Geo. 3, c. 78, and did not become necessary by the defendant's default, and that the defendant was not the owner of the improved rent (*x*).

Waste and Destruction of Fences.

Although a tenant from year to year is not bound to put the premises into repair, he is not, on the other hand, at liberty to do anything which amounts to waste, or to a breach of the rules of good husbandry; he is not therefore, entitled to cut and sell hedgerows, or, at least, not without making up the hedges and fences according to the course of good husbandry. If there be a quickset fence of white thorn, and the tenant stub it up or suffer it to be destroyed, that is destruction; but cutting quickset hedges is not waste, but "rather good husbandry, because they will grow the better" (*y*).

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## Sect. 7.—*Trees and Timber* (*z*).

### (a) *What is Timber.*

Definition of "Timber."

By the term *timber* is meant properly such trees only as are fit to be used in building and repairing houses; thus, oak, ash, and elm trees are considered timber in all places, and under whatsoever circumstances they are grown (*a*). But only trees of not less than six inches in diameter or two feet girth (allowing for irregularities of shape) appear to be reckoned or considered as "timber" (*b*)

By the Custom of the Country.

Many descriptions of trees, which are not generally considered as timber, are so in some places by the custom of the country, being

(*r*) *Att.-Gen.* v. *Fullerton*, 2 V. & B. 263; 13 R. R. 76.

(*s*) *Spike* v. *Harding*, 7 Ch. D. 871; 47 L. J., Ch. 323; 38 L. T. 385; 26 W. R. 420; in this case a reference was directed to Chambers to ascertain the boundaries.

(*t*) *Willis* v. *Parkinson*, 1 Swanst. 49.

(*u*) *Bradbee* v. *Governors of Christ's Hospital*, 4 M. & G. 714; 2 Dowl., N. S. 164.

(*x*) *Moore* v. *Clark*, 5 Taunt. 90.

(*y*) *Gage* v. *Smith*, Godb. 209.

(*z*) As to the Law of Trees and Woods generally, see an excellent Treatise by R. D. Craig, Q.C. (1866, Maxwell).

(*a*) Co. Lit. 53 a; Craig on Trees and Woods, 11.

(*b*) *Whitty* v. *Ld. Dillon*, 2 F. & F. 67.

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there used for the purpose of building; thus it has been laid down that horse-chestnuts, limes, birch, beech, asp, walnut trees, and the like, may under such circumstances be deemed timber, and are therefore protected by the law as such (*c*). It has been determined that in the county of York birch trees are timber, because they are used in that county for building sheep-houses, cottages, and such mean buildings (*d*): and it would seem that in Hampshire willows have been considered as timber by the custom of the country (*e*). Where beech is admitted to be timber by the custom of the country, the general rule of law applicable to timber trees in general attaches upon it, so as to give it the properties and privileges of timber at twenty years' growth; and therefore upon an issue whether certain beech trees in the county of Bucks were or were not timber according to the custom of the country, the inquiry is confined to the nature of the wood and the period of its growth, whether of twenty years; and no evidence can be received to qualify its character of timber by showing that it was not deemed to be such in the county unless the tree contained ten feet of solid wood (*f*). But beech trees of thirty years' growth might be cut and managed as "saleable underwood," so as to render them liable to poor rates under the Poor Relief Act, 1601, 43 Eliz. c. 2 (*g*).

Pollards.

Although pollards have been said not to be timber (*h*), yet Lord King inclined to think them timber, provided their bodies were sound and good; and in an action to recover the value of pollards under the description of timber and timberlike trees, the plaintiff recovered a verdict (*i*).

### (b) *Implied Rights as to Trees.*

Trees belong to Landlord, Bushes to Tenant.

The property in trees is vested in the owner of the inheritance of the land upon which they grow; for the property in trees, or of that which is likely to become timber, is in the landlord, and the property in bushes in the tenant, even when they are cut down by a stranger (*k*). If the tree grow near the confines of the land of two parties, so that the roots extend into the soil of each, the property in the tree

(*c*) *Duke of Chandos* v. *Talbot*, 2 P. Wms. 606; *Palmer's case*, Co. Lit. 53 a, note (10).

(*d*) *Countess of Cumberland's case*, Moore, 813.

(*e*) *Layfield* v. *Cowper*, 1 Wood, Ex. R. 330; *Gruffly* v. *Pindar*, Hob. 219.

(*f*) *Aubrey* v. *Fisher*, 10 East, 446; *Duke of Chandos* v. *Talbot*, 2 P. Wms. 606; Co. Lit. 53; Craig on Trees and Woods, 11.

(*g*) *Lord Fitzhardinge* v. *Pritchett*, B. & S. 216; L. R., 2 Q. B. 135; 36 L. J., M. C. 49. The provisions of the Act of Elizabeth, as to saleable underwoods, are repealed by the Rating Act, 1874. As to the rateability of plantations under that act, see Chap. XV., Sect. 5, ante.

(*h*) Plowd. 470; Craig on Trees and Woods, 12, 13; *Phillips* v. *Smith*, 14 M. & W. 589.

(*i*) *Rabbett* v. *Raikes*, Suffolk Sum. Ass 1803, cor. Macdonald, C.B.; *Channon* v. *Patch*, 5 B. & C. 893.

(*k*) *Berriman* v. *Peacock*, 9 Bing. 384.

belongs to the owner of that land in which the tree was first sown or planted (*l*), but formerly the parties in such a case were held to be tenants in common (*m*). A farmer who raises young fruit trees on the demised land, for filling up the orchards, is not entitled to sell them; but it is otherwise of a nurseryman by trade (*n*). Therefore a nurseryman, who has planted fruit trees in the way of his trade, may remove them, if not of larger growth than could be dealt with in his trade, even though they are producing fruit (*o*). A tenant, not being a gardener, cannot remove a border of box planted on the demised premises by himself, unless by special agreement with his landlord (*p*). A tenant of a garden may not plough up and destroy the strawberry beds, although he paid the preceding tenant for them (*q*).

Windfalls. Windfalls of sound timber trees belong to the landlord, but windfalls of trees which are not timber, and of decayed timber trees, belong to the tenant (*r*). The same rule will apply to trees severed by the act of a trespasser. *Herlakenden's case.*

### (c) *Express Contracts as to Trees.*

Exceptions and Reservations of Trees, &c. The effect and construction of exceptions and reservations (in a demise) of trees, &c., have been already considered (*s*). Woods, which were excepted out of the lease, but subsequently granted by the lessor to the lessee, have been held not to pass by an assignment of the lease (*t*).

Construction of Covenants as to Trees, &c. A covenant not to remove or grub up trees is broken by removing trees from one part of the premises to another: and so it is by taking away trees, even if the lessee plant a greater quantity than he takes away, unless those taken away were dead (*u*). A covenant to keep all the trees standing in an orchard, whole and undefaced, "reasonable use and wear only excepted," is not broken by cutting down trees past bearing, provided the landlord is likely to get back the premises at the end of the term in an improved condition (*x*); but a covenant to leave all the timber which is growing on the land when the lessee

Orchard.

(*l*) *Holder* v. *Coates*, Moo. & M. 112; 31 R. R. 224.

(*m*) *Waterman* v. *Soper*, 1 Ld. Raym. 737; *Masters* v. *Pollie*, 2 Roll. Rep. 141; *Anon.*, Id. 255.

(*n*) *Wyndham* v. *Way*, 4 Taunt. 316; 13 R. R. 607; *Penton* v. *Robart*, 2 East, 90; 6 R. R. 376.

(*o*) *Wardell* v. *Usher*, 3 Scott, N. R. 508.

(*p*) *Empson* v. *Soden*, 4 B. & Adol. 655.

(*q*) *Wetherell* v. *Howells*, 1 Camp. 227.

(*r*) *Herlakenden's case*, 4 Coke, 62; *Countess of Shrewsbury's case*, Moore, 812. And see *Channon* v. *Patch*, 5 B. & C. 897. In that case a lessor during the term cut down some oak pollards which were unfit for timber, and it was held that as a tenant for life or years would have been entitled to them, if they had been blown down, the lessor could not, by wrongful severance, acquire any right to them.

(*s*) Ante, 190; see also Smith L. & T. 133—136 (2nd ed.).

(*t*) Godb. 188.

(*u*) *Doe* d. *Wetherell* v. *Bird*, 6 C. & P. 195; 2 N. & M. 285.

(*x*) *Doe* d. *Jones* v. *Crouch*, 2 Camp. 449.

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took it, is broken if, at the end of the term, he cut it down, but leave it there, for that would be defeating the intent of the covenant, although a literal performance of it.

Timber Saplings and Underwood.

A lease was granted of a farm, and quarries of stone thereon, with liberty to work the quarries; out of this demise were reserved timber saplings and underwood growing on the premises: there was a covenant not to commit waste by cutting down saplings or underwood: it was held that the cutting down saplings and underwood for the necessary purpose of working a quarry on the premises was no breach of the covenant, there being no excess of the right that it was intended the tenant should exercise (*z*). Where there was a liberty in a lease, for the lessee to cut down and dispose of all timber and coppice, and also a proviso to give notice in writing to the lessor of his intention, that the latter might have the option of purchasing; and the lessee gave a bonâ fide notice, and the lessor disclaimed any intention of purchasing; it was held that the lessee might afterwards proceed to cut down the whole, without giving a fresh notice, at such seasons as suited his convenience, even though the lessor had in the meantime parted with his interest to another (*a*).

### (d) *Waste as to Trees.*

For what purpose Trees may be cut without Waste.

A tenant who is answerable for waste only, may cut down trees for the purposes of reparation without committing waste, either where the damage has accrued during the time of his being in possession, in the ordinary course of decay, or where the premises were ruinous at the time he entered; but if the decay happened by his default, to cut down trees to do the repair would be waste. And if a tenant having cut down trees for reparations, sell them, and afterwards buy them again and employ them about necessary reparations, it is waste by the sale (*b*): so, although he cut for repairs, if upon turning out unfit they are exchanged for others which are so applied (*c*). But the tenant may not cut timber for repairs which his lessor has covenanted to do (*d*). It is not waste for a tenant to cut timber for necessary botes (*e*).

What Acts amount to Waste.

Cutting down, destroying, or topping all trees which are timber either by the general law or by the particular custom of the country, is waste; so is the doing of any act which has the effect of causing a decay of the wood; and cutting down willows, beech, birch, ash, maple, or any trees of that description, which, though not timber, afford a defence or shelter for the house, has been considered destruc-

(*z*) *Doe* d. *Rogers* v. *Price*, 8 C. B. 894.
(*a*) *Goodtitle* d. *Luxmore* v. *Saville*, 16 East, 87; 14 R. R. 305.
(*b*) Co. Lit. 53, 220.
(*c*) *Simmons* v. *Norton*, 7 Bing. 640.
(*d*) Com. Dig. Pleader (3 O.), 14.
(*e*) Com. Dig. Pleader (3 M.), 12; Co. Lit. 53; Hob. 234; Fitz. N. B. 59 (N.); *Archdeacon* v. *Jenner*, Cro. Eliz. 604.

tion. Upon the same principle, cutting down or destroying fruit-trees growing in the garden or orchard is waste: but if such trees grow upon any of the ground which the tenant holds out of the garden or orchard, it is not waste (*f*): and it has been laid down, that suffering the germins, or young shoots springing from trees which have been felled, to be destroyed, is waste (*g*); and that if it be done after previous waste in felling the trees, is double waste (*h*). Cutting down willows and leaving the shoots to shoot afresh, has been held not to be waste, unless they are a shelter to the house or a support to the bank of a stream (*i*). In most places tenants may cut all trees, whether timber or underwood, which have, under the denomination of seasonable wood or sylva cædua, been cut within twenty years, without being guilty of waste (*k*). The cutting of hornbeams, hazels, willows, sallows, though of forty years' growth, is not waste, because they will never become timber (*l*). In some counties, especially in Kent, they are in the habit of cutting down wood as underwood, at twenty-six, twenty-eight, or thirty years, and which, if allowed to grow, would become valuable timber.

Cutting down Trees.

Waste can only be committed of the thing demised, and therefore if trees be excepted out of a demise, waste cannot be committed by cutting them down; and ejectment cannot be maintained as for waste thereby committed in or upon the demised premises (*m*).

No Waste by Cutting Down Excepted Trees.

## Sect. 8.—*Fixtures* (*n*).

### (a) *Generally.*

The word "fixtures" is used by different writers to express different meanings, but it is always applied to articles of a personal nature which have been affixed to land (*o*). It is a modern word, and is not to be found in the Termes de la Ley (*p*). In its most extensive sense it means anything annexed to the freehold in such a manner as to become parcel of it. But as between landlord and tenant it has generally a more confined meaning (*q*), and may

Meaning of "Fixtures."

(*f*) Co. Lit. 53 a; Id. note (6).

(*g*) 2 Roll. Abr. 825; *Gage* v. *Smith*, Godb. 210.

(*h*) Fitz. N. B. 59.

(*i*) *Phillips* v. *Smith*, 14 M. & W. 589.

(*k*) Godb. 4; 2 Roll. Abr. 815.

(*l*) Godb. 4, pl. 6.

(*m*) *Goodright* d. *Peters* v. *Vivian*, 8 East, 190; see also *Doe* d. *Rogers* v. *Price*, 8 C. B. 894, in which it was held upon the construction of a lease of a farm with quarries, trees being excepted, and the lessee covenanting not to commit waste by cutting them down, that the lessee might cut down reasonably for quarrying.

(*n*) The law of fixtures generally, not only as between landlord and tenant, but also as between other persons, is most ably treated of in Amos & Ferard on Fixtures (3rd ed., A.D. 1883). See also Brown on Fixtures (3rd ed., A.D. 1875), Herbert on the Law of Fixtures and Repairs as between Landlord and Tenant (A.D. 1898); and the notes to *Elwes* v. *Mawe* (3 East, 38; 6 R. R. 523) in 2 Sm. L. C.

(*o*) Amos & F. 1; Co. Lit. 53 a.

(*p*) *Wiltshire* v. *Cottrell*, 1 E. & B. 674; *Sheen* v. *Rickie*, 5 M. & W. 175; *Elliott* v. *Bishop*, 10 Exch. 507.

(*q*) *Hallen* v. *Runder*, 1 C., M. & R. 266; *Elliott* v. *Bishop*, 10 Exch. 508; *Ex parte Barclay*, 5 De Gex, M. & G. 403; 25 L. J., Bkt. 1.

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be divided into — 1. Tenant's fixtures; 2. Landlord's fixtures. "Tenant's fixtures" are personal chattels annexed to the freehold by the tenant during the term, either for the purposes of his trade (p. 667), or for mere ornament and convenience (p. 669), and which he has a right to sever and remove during the term, in the absence of any express stipulation (s. 8 (6), or local custom to the contrary. "Landlord's fixtures" are those put up by the landlord before or during the term or by any previous owner or tenant, or by any other person. The term also includes such fixtures put up by the tenant during the term as the tenant has no right to remove. All these constitute part of the freehold, and also part of the premises demised. In a more confined sense "landlord's fixtures" mean those fixtures which are on the premises at the time of the lease, and are demised therewith, and are usually specified in a schedule to the lease or agreement, to which may be added such erections and fixtures subsequently added by the tenant which he is not entitled to remove during the term.

"Tenant's Fixtures."

"Landlord's Fixtures."

Examples.

Sometimes machinery and other articles, and even buildings, may be so erected as not to be let into the soil, or annexed to it or to any building in such a manner as to become part of the freehold, or to lose their chattel character. Barns, granaries, sheds, or mills erected upon blocks, rollers, pattens, pillars, or plates, resting on brickwork, but not affixed to the freehold by being let into it, or united to it by mortar, nails, or otherwise, are not considered as fixtures, but only as chattels, and may be removed by a tenant during his term, notwithstanding they have sunk into the ground by their own weight (*r*). But a wooden windmill resting by its weight on a brick foundation does not constitute part of the freehold (*s*). So a wooden barn erected by a tenant on a foundation of brick and stone let into the ground, but the barn resting upon it by weight alone, is a mere chattel removable by the tenant on the expiration of his term, and for which he may afterwards maintain trover (*t*). So sheds or buildings called *Dutch barns*, having a foundation of brickwork in the ground, and uprights fixed in and rising from the brickwork, and supporting the roof which was composed of tiles, and the sides open, have been held removable (*u*), and so has a *varnish house* having a brick foundation let into the ground, and a chimney belonging to it, upon which a superstructure of wood used as a varnish manufactory, but merely placed upon a wooden plate laid upon the brick foundation (*x*), and a wooden

Barns, &c.

Barns.

(*r*) *Huntley* v. *Russell*, 13 Q. B. 572.
(*s*) *Rex* v. *Otley*, 1 B. & Ad. 161.
(*t*) *Wansbrough* v. *Maton*, 4 A. & E. 884.
(*u*) *Dean* v. *Allalley*, 3 Esp. 11; cited in *Elwes* v. *Mawe*, 3 East, 47; 6 R. R. 523.
(*x*) *Penton* v. *Robart*, 4 Esp. 33; 2 East, 88; Amos & F. 50; 6 R. R. 376.

stable standing upon blocks and rollers, or a shed standing upon brickwork let into the ground (*y*). Stills set in brickwork have been considered as fixed to the freehold, though vats supported by and resting on brickwork and timber, but not fixed in the ground, were not (*z*). Iron salt-pans fixed with mortar to a brick floor, with furnaces under them, may be removed by the lessees of salt springs (*a*); but where a lessee of salt springs was to pay rent according to the number of pans, and he covenanted to deliver up all *works* erected or to be erected at the end of the term; it was held that he could not remove iron salt-pans though merely resting on brickwork, and having iron rings in their sides, by which they were occasionally lifted up to be repaired (*b*). Where certain jibs, being parts of a machine, had been put up by the tenant during his term, and were capable of being removed without either injuring the other parts of the machine or the building, and had been usually valued between the outgoing and incoming tenant; it was held that these were the goods and chattels of the outgoing tenant, for which he might maintain trover (*c*). In all cases of this description, whatever may be the magnitude, or however substantial the nature of the erection, still if it is so constructed as not to be actually fastened to or let into the freehold, the tenant may always remove it, because the law considers it as a mere loose and moveable chattel (*d*). But a *conservatory* erected on a brick foundation, affixed to and communicating with rooms in a dwelling-house by windows and doors, cannot be removed by a tenant for years who erected it during his tenancy (*e*). So a *veranda*, the lower part of which is attached to posts fixed in the ground, cannot be removed (*f*). Nor greenhouses built in a garden, and constructed of wooden frames fixed with mortar to foundation walls of brickwork (*g*). Nor a boiler built into the masonry of a greenhouse; but it is otherwise with respect to the pipes of a heating apparatus connected with the boiler by screws (*g*). Gasaliers fixed to gas pipes cannot be removed; or, at all events, will pass by an assignment of the lease with all fixtures, &c. (*h*). It has been decided that an outgoing tenant has

Examples—*contd.*

Stills.

Salt-pans.

Conservatory.

(*y*) *Fitzherbert* v. *Shaw*, 1 H. Blac. 258. In *Martin* v. *Roe*, 7 E. & B. 237, a rector was held entitled to remove hothouses without incurring liability for dilapidations.

(*z*) *Horn* v. *Baker*, 9 East, 215; 9 R. R. 541; but see *Trappes* v. *Harter*, 2 C. & M. 153; cited 6 Exch. 313.

(*a*) *Lawton* v. *Salmon*, 1 H. Blac. 259, n.; 2 R. R. 764.

(*b*) *Earl of Mansfield* v. *Blackburn*, 6 Bing. N. C. 426.

(*c*) *Davis* v. *Jones*, 2 B. & A. 165; 20 R. R. 396; *Sunderland* v. *Newton*, 3 Sim. 450; 30 R. R. 186.

(*d*) *Hellawell* v. *Eastwood*, 6 Exch. 312; *Huntley* v. *Russell*, 13 Q. B. 572; *Wood* v. *Hewett*, 8 Q. B. 913; *Wansbrough* v. *Maton*, 4 A. & E. 884; *Martin* v. *Roe*, 7 E. & B. 237; *Parsons* v. *Hind*, 14 W. R. 860.

(*e*) *Buckland* v. *Butterfield*, 2 Brod. & B. 54; 22 R. R. 649; and see *West* v. *Blakeway*, 2 M. & G. 729; 9 Dowl. 846.

(*f*) *Penry* v. *Brown*, 2 Stark. 403; 20 R. R. 705.

(*g*) *Jenkins* v. *Gething*, 2 Johns. & H. 520.

(*h*) *Sewell* v. *Angerstein*, 18 L. T. 300.

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*Fixtures (General Definition of).*
Examples—*contd.*

no right to remove pillars of brick and mortar *built* on a dairy floor to hold pans, although such pillars are not let into the ground (*i*). It is necessary, in order to constitute a fixture, that the article in question should be let into or united to the land, or to some substance previously connected with the land. It is not enough that it has been laid upon the land, and brought into contact with it; something more than mere juxtaposition is required; as, that the soil shall have been displaced for the purpose of receiving the article, or that the chattel should be cemented, or otherwise fastened to some fabric previously attached to the ground (*k*). The screwing of a stocking-frame to the floor to keep it steady will not make it a fixture (*l*). Cotton spinning machines called "mules," some of which were fixed by screws to the wooden floor, and some by screws which had been sunk into holes in the stone flooring, and secured by molten lead, *merely to steady them for more convenient use as machines*, continue to be chattels, and as such are distrainable for rent (*m*). Whether a machine or any other article has been so fixed and attached to the freehold as to become parcel of it, is a question of fact depending on the circumstances of each case, and principally on two circumstances: first, the mode of annexation to the soil or fabric of the house, and the extent to which it is united to them, whether it can easily be removed integrè, salve et commodè, or not, without injury to itself or the fabric of the building; secondly, on the object and purpose of the annexation, whether it was for the permanent and substantial improvement of the dwelling, in the language of the Civil Law, perpetui usûs causâ, or in that of the Year Book, per un profit del inheritance (*n*), or merely for a temporary purpose, or the more complete enjoyment and use of it *as a chattel* (*o*). If machines be attached slightly, by screws or otherwise, so as to be capable of removal without the least injury to the fabric of the building or to themselves, and the object and purpose of the annexation was, not to improve the inheritance, but merely to render the machines steadier and more capable of convenient use as chattels, they do not become "fixtures" or part of the freehold, any more than a carpet would be which is attached to the floor by nails for the purpose of keeping it stretched out, or curtains, looking-glasses, pictures and other matters of an ornamental nature, which have been slightly attached to the walls of the dwelling-house *as furniture*, and which is probably the reason why

"Mules."
*Hellawell* v. *Eastwood.*

(*i*) *Leach* v. *Thomas*, 7 C. & P. 327; and see *Jenkins* v. *Gething*, 2 Johns. & H. 520.
(*k*) *Wansbrough* v. *Maton*, 4 A. & E. 884; *Huntley* v. *Russell*, 13 Q. B. 572.
(*l*) *Trappes* v. *Harter* 2 Cr. & M. 177; cited 6 Exch. 313.
(*m*) *Hellawell* v. *Eastwood*, 6 Exch. 295, 312.
(*n*) 20 Hen. 7, c. 13.
(*o*) *Hellawell* v. *Eastwood*, 6 Exch. 295.

they and similar articles have been held in different cases to be removable (*p*). Machines so attached would pass to the executor as chattels rather than to the heir as part of the freehold (*q*). Fixtures which a tenant may sever from the freehold and take away during his term are not distrainable for rent (*r*): but machines which have not been sufficiently annexed to constitute them part of the freehold are considered as mere goods and chattels, and may be so distrained (*s*).

Between what Classes of Persons Questions as to Fixtures arise.

Questions respecting the right to what are ordinarily called *fixtures*, principally arise between three classes of persons:— 1st. Between different descriptions of representatives of the same owner of the inheritance: viz., between his *heir* and *executor*. In the first case, i.e. as between heir and executor, the rule obtains with the most rigour in favour of the inheritance, and against the right to disannex therefrom, and to consider as a personal chattel anything which has been affixed thereto. 2ndly. Between the *executors of tenant for life or in tail*, and *the remainderman or reversioner*, in which case the right to fixtures is considered more favourably for executors than in the preceding case between heir and executor. The third case, and that in which the greatest latitude and indulgence has always been allowed in favour of the claim to have any particular articles considered as personal chattels as against the claim in respect of freehold or inheritance, is the case *between landlord and tenant* (*t*). Hence it may be received as a rule, that the decisions in favour of the executors of tenants for life, in tail, or in fee, as against the remainderman, reversioner, or heir, may in general be applied to cases between landlord and tenant, and are to be considered as governing authorities in support of a *tenant's* rights (*u*). But of course the converse does not hold.

General Rule as to Fixtures.

The general rule of law respecting fixtures is, that whatever is fixed to the freehold becomes part of it, and is subjected to the same rights of property as the land itself; the maxim being *Quicquid solo plantatur, solo cedit* (*x*). But the presumption that that which is annexed to the soil becomes part of the soil, may be rebutted by circumstances showing the intention of the parties to the contrary (*y*). Thus, where a chattel has been annexed by its owner to another's freehold, and may without injury be severed, it is not necessarily to be inferred from the annexation that such chattel becomes the

(*p*) Id.
(*q*) *Trappes* v. *Harter*, 3 Cr. & M. 177; cited 6 Exch. 313.
(*r*) *Dalton* v. *Whittem*, 3 Q. B. 961; *Darby* v. *Harris*, 1 Q. B. 895.
(*s*) *Hellawell* v. *Eastwood*, 6 Exch. 295.
(*t*) Per cur. in *Elwes* v. *Maw*, 3 East, 51; 2 Smith, L. C.; 6 R. R. 523.
(*u*) Amos & F. 50.
(*x*) *Minshall* v. *Lloyd*, 2 M. & W. 459; *Elliott* v. *Bishop*, 10 Exch. 507, Martin. B.; *Lancaster* v. *Eve*, 5 C. B., N. S. 717, 720; 28 L. J., C. P. 235; *Climie* v. *Wood*, L. R., 3 Ex. 257, 260; 4 Id. 328; 37 L. J., Ex. 158; 38 Id. 223.
(*y*) *Lancaster* v. *Eve*, supra.

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property of the freeholder. Whether in a particular case it has become so or not, may be a question on the evidence: and the jury may infer, from user or other circumstances, an agreement, when the chattel was annexed, that the original owner should have liberty to take it away again at any time, and to use it in the meantime for the purposes of an easement (*z*). When the owner of the inheritance annexes thereto fixtures (which would in the ordinary case of landlord and tenant be removable by the latter during his term), for a permanent purpose, and for the better enjoyment of his estate, they become part of the freehold (*a*). The principle upon which the rule of law, that fixtures pass with the soil, is relaxed in favour of trade, has no application where the parties who affix the machinery are themselves owners in fee of the soil (*b*). Nor where a conveyance or mortgage in fee is made of the building or land, to which trade or other fixtures are then or subsequently annexed (*c*). Even an assignment of a lease, with all fixtures, &c., will pass fixtures which the tenant might remove during the term (*d*).

General Rule as to Annexations by a Tenant. *Elwes* v. *Maw*.

The general rule of law, with respect to annexations made by a tenant during the continuance of his term, has been established from a very remote period (*e*). It is, that whenever the tenant has affixed anything to the demised premises during his term, he can never again sever it, without the consent of his landlord. The property, by being annexed to the land, immediately belongs to the freeholder; the tenant, by making it part of the freehold, is considered to abandon all future right to it, so that it would be waste in him to remove it afterwards. It therefore falls in with his term, and comes to the reversioner as part of the land. This is the rule recognized in the leading case of *Elwes* v. *Maw* (*f*), in which case the tenancy was agricultural, and the tenant removed the fixtures which he had erected at his own expense, without doing damage to the freehold.

Exceptions to General Rule.

But to this rule there are important *exceptions* with respect to fixtures erected by the tenant, (1) for mere ornament and convenience during his term (p. 669), (2) for the purposes of his trade (p. 667), and (3) by statute, under particular restrictions, for agricultural purposes (*g*). Whether the tenancy be for life, or for years, or from

(*z*) *Wood* v. *Hewett*, 8 Q. B. 913; *Lancaster* v. *Eve*, 5 C. B., N. S. 717; 28 L. J., C. P. 235.

(*a*) *Walmsley* v. *Milne*, 7 C. B., N. S. 115; 29 L. J., C. P. 97; *Fisher* v. *Dixon*, 12 Cl. & F. 312.

(*b*) *Mather* v. *Fraser*, 2 K. & J. 536.

(*c*) *Cullwick* v. *Swindell*, L. R., 3 Eq. 249; 36 L. J., Ch. 173; *Climie* v. *Wood*, L. R., 3 Ex. 257; 37 L. J., Ex. 158; affirmed L. R., 4 Ex. 328; 38 L. J., Ex. 223; 20 L. T. 1012; *Haley* v. *Hammersley*, 3 De Gex, F. & J. 587; 30 L. J., Ch. 771.

(*d*) *Sewell* v. *Angerstein*, 18 L. T. 300.

(*e*) See Year Book, 17 E. 2, p. 518; *Herlakenden's case*, 4 Co. 64.

(*f*) *Elwes* v. *Maw*, 3 East, 51; 2 Smith, L. C.; 6 R. R. 523.

(*g*) Landlord and Tenant Act, 1851, 14 & 15 Vict. c. 25, s. 3; Agricultural Holdings Act, 1883, 46 & 47 Vict. c. 61, s. 34, p. 671.

year to year, or only at will, makes no difference with respect to his right to remove fixtures, nor whether he holds under a lease by parol, or by writing, or under seal (except as to any stipulations on the subject therein contained). It is, however, to be observed, that every case, in which there is a right of severing a thing from the freehold by virtue of the law of fixtures, is considered as an exception to the general rule (*h*). Fixtures which may be removed by the tenant during his term constitute part of the freehold until severed therefrom (*i*). Until so severed they are not goods or chattels for which trover may be maintained (*k*). But sometimes a special action may be maintained for preventing a tenant or any person claiming under him from exercising his right to sever and remove the fixtures (*l*).

The exceptions to the general rule as to fixtures will be considered fully under the following heads, viz.:—

1. Fixtures for purposes of trade. 2. Fixtures for agricultural purposes. 3. Fixtures for ornament and convenience.

### (b) *Fixtures for Purposes of Trade.*

Exception in Favour of Trade. *Penton* v. *Robart.*

It is difficult to state the precise extent of the exception in favour of the removal of fixtures put up for the purposes of trade, so as to afford a safe guide as between landlord and tenant. "The old cases upon this subject," it is said in *Penton* v. *Robart*, "leant to consider as realty whatever was annexed to the freehold by the occupier; but in modern times the leaning has always been the other way, in favour of the tenant, in support of the interests of trade, which is become the pillar of the state. What tenant will lay out his money in costly improvements of the land, if he must leave everything behind him which can be said to be annexed to it? Shall it be said that the great gardeners and nurserymen in the neighbourhood of the metropolis, who expend thousands of pounds in the erection of greenhouses, hothouses, &c., are obliged to leave all these things upon the premises, when it is notorious that they are even permitted to remove trees, or such as are likely to become such, by the thousands, in the necessary course of their trade? If it were otherwise, the very object of their holding would be defeated" (*m*). The reason which induced the courts to relax the strictness of the old rules of law, and to admit an innovation in this particular instance,

(*h*) *Buckland* v. *Butterfield*, 2 Brod. & B. 54; 22 R. R. 649.

(*i*) *Lee* v. *Risdon*, 7 Taunt. 188; 17 R. R. 484; *Ex parte Lloyd*, 1 Mont. & Ayr. 508.

(*k*) *Green* v. *Cole*, 2 Wms. Saund. 259, c, note (*r*) (6th ed.); *Mackintosh* v. *Trotter*, 3 M. & W. 184; *Roffey* v. *Henderson*, 17 Q. B. 574; *Wilde* v. *Waters*, 16 C. B. 637.

(*l*) *London and Westminster Loan and Discount Co. (Limited)* v. *Drake*, 6 C. B., N. S. 798, 811; 28 L. J., C. P. 297.

(*m*) *Penton* v. *Robart*, 2 East, 88; 6 R. R. 376.

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was, that the commercial interests of the country might be advanced, by the encouragement given to tenants to employ their capital in making improvements for carrying on trade, with the certainty of having the benefit of their expenditure secured them at the end of their terms: *the benefit of the public* may be regarded as the principal object of the law in bestowing this indulgence (*n*). Whenever the following circumstances concur (and sometimes when they do not all concur) the tenant may remove the article: viz., things which a tenant has fixed to the freehold for the purposes of trade or manufacture may be taken away by him during his term, whenever the removal is not contrary to any express or implied stipulation in his lease or agreement (sub-s. (e)), or the custom of the country (*o*), and the articles were of a perfect chattel nature before they were put up, or have in substance that character independently of their union with the soil, and may be removed without material injury to the freehold, and without losing their essential character or value (*p*). Thus if a lessee for years set up a furnace for his advantage, or a dyer make his vats and vessels to occupy his occupation ("*pour occupier son occupation*") during the term, he may remove them: and so of a baker (*q*). So a soap-boiler, who for the convenience of his trade puts up vats, coppers, tables and partitions, may remove them during his term: or they may be taken under an execution against him (*r*). So a fire-engine or steam-engine set up by a tenant for the purpose of working a colliery may be removed by him during the term (*s*). Salt-pans erected by a tenant for the purpose of working salt-works let to him may be removed during the term (although it would be otherwise as between the heir and executor of a tenant in fee (*t*)), unless there be an express covenant to leave the salt-works in good repair at the end of the term (*u*). "Coppers and all sorts of brewing vessels cannot possibly be used without being as much fixed as fire-engines; and in brew-houses especially, *pipes* must be laid through the walls and supported by the walls; and yet, notwithstanding this, as they are laid for the convenience of trade, landlords will not be allowed to retain them" (*x*); or rather, it should be said, the tenants may remove them during their tenancy. Though a building may be raised on a brick foundation, and have a brick chimney, yet if the erection on such foundation is of wood, and the building used for the purpose of trade or manufacture, the tenant may remove it

Decisions as to Trade Fixtures.

(*n*) *Lawton* v. *Lawton*, 3 Atk. 14, 16.
(*o*) *Culling* v. *Tuffnall*, Bull. N. P. 34; *Wetherell* v. *Howells*, 1 Camp. 227; *Davis* v. *Jones*, 2 B. & A. 165; 20 R. R. 396; Amos & F. 44.
(*p*) *Fisher* v. *Dixon*, 12 Cl. & Fin. 312.
(*q*) Year Book, 20 Hen. 7, pl. 13.
(*r*) *Poole's case*, 1 Salk. 368.
(*s*) *Lawton* v. *Lawton*, 3 Atk. 13; *Ld. Dudley* v. *Ld. Warde*, Ambler, 114.
(*t*) *Lawton* v. *Salmon*, 1 H. Blac. 259, n.; 3 Atk. 16, *S. C.*; 2 R. R. 764.
(*u*) *Earl of Mansfield* v. *Blackburn*, 6 Bing. N. C. 426.
(*x*) Per Ld. Hardwicke, C., in *Lawton* v. *Lawton*, 3 Atk. 15.

before or at the end of his term (*y*). A steam-engine, to which a chimney necessarily belonged, has been held to be removable (*z*).

Extension of Removability of Trade Fixtures.

The principle in favour of buildings erected for the purposes of trade has been extended to many buildings which come by no means strictly under the term ; thus in the famous case of the cider-mill, although the mill was put up in part for the enjoyment of the real estate, yet as the making of cider was a species of trade, the mill was considered to fall within the general exception in favour of trade fixtures (*a*) ; but that case has been disapproved of by the House of Lords, and is not to be relied on (*b*). In the case of fire-engines and steam-engines in collieries, it was held that the getting and vending the coals so far partook of the nature of a trade, that the engines employed in the collieries might be deemed trading erections (*c*). The distinction is between *buildings* of a permanent nature and *machinery and fixtures* erected for the purposes of trade, the latter being removable, but the former not (*d*). It seems that the Landlord and Tenant Act, 1851, 14 & 15 Vict. c. 25, s. 3 (p. 672), does not extend to buildings erected *only for the purposes of trade.*

### (c) *Fixtures for Ornament and Convenience.*

What Erections for Ornament or Convenience may be removed.

Articles put up for ornament and convenience during the term have been long allowed to be taken away by the tenant at the expiration of his lease. They are considered rather as articles of fixed furniture, or of utility and domestic convenience, than as parts of the house or freehold (*e*) ; unless, indeed, the tenant leaves them annexed to the premises after the expiration of his term (*f*). Instances are to be found as far back as the Year Books (*g*) : but the relaxation of the general rule in these instances is an indulgence, which is an exception only, and, though to be fairly considered, is not to be extended (*h*). It is a privilege of a more limited nature than that in respect of trade fixtures (*i*), although such distinction does not appear to have been taken in many of the early cases (*k*). The principle upon which this exception to the general rule is founded appears to be that, as annexations of this nature must be

(*y*) *Penton* v. *Robart*, 2 East, 88 ; 4 Esp. 33 ; 6 R. R. 376.
(*z*) *Ld. Dudley* v. *Ld. Warde*, Ambler, 114 ; Bull. N. P. 34.
(*a*) *Lawton* v. *Lawton*, 3 Atk. 14.
(*b*) *Fisher* v. *Dixon*, 12 Cl. & Fin. 312 ; *Walmsley* v. *Milne*, 7 C. B., N. S. 115 ; 29 L. J., C. P. 97.
(*c*) *Lawton* v. *Lawton*, 3 Atk. 14 ; *Ld. Dudley* v. *Ld. Warde*, Ambl. 114 ; Bull. N. P. 34 ; *Minshall* v. *Lloyd*, 2 M. & W. 450.
(*d*) *Whitehead* v. *Bennett*, 27 L. J., Ch. 474 ; *Foley* v. *Addenbrooke*, 13 M. & W. 174.
(*e*) *Birch* v. *Dawson*, 2 A. & E. 37.
(*f*) *Lyde* v. *Russell*, 1 B. & Ad. 394.
(*g*) 8 Hen. 7, 12 ; 21 Hen. 7, 26 ; *Day* v. *Austin*, Owen, 70 ; Cro. Eliz. 374.
(*h*) Per Dallas, C.J., in *Buckland* v. *Butterfield*, 2 Brod. & B. 54 ; 22 R. R. 649.
(*i*) *Buckland* v. *Butterfield*, supra ; *Leach* v. *Thomas*, 7 C. & P. 327.
(*k*) *Beck* v. *Rebow*, 1 P. Wms. 94 ; *Squier* v. *Mayer*, 2 Freem. 249.

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generally designed for temporary purposes only, it would greatly incommode tenants in the enjoyment of their estates, if by every slight attachment to the freehold the property should be immediately changed, and pass over to the reversioner (*l*). Fixtures for ornament or convenience cannot be removed where the erection may be deemed a permanent improvement, and cannot be conveniently detached and removed without material injury or damage to the house

Conservatory.

or freehold; thus a conservatory erected on a brick foundation, affixed to, and communicating with rooms in, a dwelling-house, by windows and doors, may not be removed by a tenant for years, who has erected it during his tenancy: although he has a reversion in fee after the death of his lessor (*m*). So a *veranda*, the lower part of which is attached to posts fixed in the ground, may not be

Window-sashes.

removed (*n*). Window-sashes, which are neither hung nor beaded into the frames, but merely fastened by laths, nailed across the frames to prevent their falling out, are not fixed to the freehold (*o*):

Pump.

so a pump erected by a tenant during his term, and very slightly affixed to the freehold, is removable as a tenant's fixture (*p*). Erections of the description above mentioned also cannot be removed, if the removal would be of such a nature as to constitute waste, or if the premises could not be left in the same state as before the removal; at least the contrary of this was assigned by Lord Mansfield as a ground for removal, although the principle has not been adverted to in more modern decisions (*q*).

Summary of what may be removed.

The articles for ornament and convenience, which have been held to be removable, are:—hangings, tapestry and pier glasses, whether nailed to the walls or panels, or put up in lieu of panels (*r*); cornices (*s*); marble or other *ornamented* chimney-pieces (*t*); marble slabs (*u*); window blinds (*x*); wainscot fixed to the walls by screws (*y*); grates, ranges and stoves, although fixed in brickwork (*z*); iron backs to chimneys (*a*); beds fastened to the walls or

(*l*) Amos & F. (2nd ed.) 83; (3rd ed.) 116.

(*m*) *Buckland* v. *Butterfield*, supra; *West* v. *Blakeway*, 2 M. & G. 729; 9 Dowl. 846.

(*n*) *Penry* v. *Brown*, 2 Stark. 403; 20 R. R. 705.

Upon the same principle it has been held that ranges, ovens and set pots, affixed to a house built by the person against whom an execution has issued, cannot be taken by the sheriff under a writ of fi. fa.: *Wynne* v. *Ingleby*, 5 B. & A. 625; 24 R. R. 503.

(*o*) *Rex* v. *Hedges*, 1 Leach, C. C. 201; 2 East, P. C. 590, n.

(*p*) *Grymes* v. *Bowcren*, 6 Bing. 437.

(*q*) *Lawton* v. *Salmon*, 1 H. Blac. 259, n.; 3 Atk. 16, n.; 2 R. R. 764.

(*r*) *Squier* v. *Mayer*, 2 Freem. 249; 2 Eq. Cas. Abr. 430; *Beck* v. *Rebow*, 1 P. Wms. 94; *Buckland* v. *Butterfield*, 2 Brod. & B. 54; 22 R. R. 649.

(*s*) *Avery* v. *Cheslyn*, 3 A. & E. 75.

(*t*) *Lawton* v. *Lawton*, 3 Atk. 15; *Allen* v. *Allen*, Moseley, 113; *Leach* v. *Thomas*, 7 C. & P. 327; *Bishop* v. *Elliott* (in error), 11 Exch. 115, 120—122.

(*u*) *Allen* v. *Allen*, Moseley, 112.

(*x*) Amos & F. 110, 326, 371.

(*y*) *Lawton* v. *Lawton*, 3 Atk. 15; *Ex parte Quincey*, 1 Atk. 477; *Ld. Dudley* v. *Ld. Warde*, Ambler, 113; *Lee* v. *Risdon*, 7 Taunt. 191.

(*z*) *Lee* v. *Risdon*, 7 Taunt. 191; *Rex* v. *St. Dunstan*, 4 B. & C. 686.

(*a*) *Harvey* v. *Harvey*, 2 Stra. 1141; Amos & F. 74.

ceiling (*b*); fixed tables (*c*); furnaces and coppers (*d*); pumps (*e*); mash-tubs and fixed water-tubs (*f*); coffee and malt-mills (*g*); cupboards fixed with hold-fasts (*h*); book-cases standing on brackets and screwed to the walls (*i*); clock cases (*k*); iron ovens and the like (*l*).

Fixtures are removable only where no Damage to Freehold.

It must, however, be remarked, that things can be removed only when the separation will occasion but little or no damage to the freehold or to the articles removed (*m*). The question whether a fixture can be removed by a tenant without substantial injury to the premises is a question of fact, upon an issue whether the fixture is removable or not by law. A plea to an action by a landlord against his tenant for removing a cornice, stated that it was the property of the defendant; that it was fixed up by him with screws only, for the purpose of ornament; that he carefully removed it during the term, doing no unnecessary damage; and that he repaired all the damage done. The replication stated that it was affixed to the freehold of the house and was not removable by law. Issue on that question:—held that it was not a misdirection to leave it to the jury to say whether they were of opinion that the cornice was ornamental, and was so affixed to the freehold that it could be removed without substantial injury; and that if they thought so, and that it had been so removed, the tenant had a right to remove it. The question whether removable by law or not is a mixed question of law and fact (*n*). If the damages caused by the removal would be insignificant, they would not prevent the removal. It appears, however, to have been generally understood in practice that where ornamental or other fixtures are taken down, the tenant is liable to repair the injury the premises may suffer by the act of removal; and, in like manner, that where a fixture has been put up in substitution for an article which was attached to the premises at the time of the demise, the tenant, in taking down his own fixture, is bound to restore the former article, or to replace it by another erection of a similar description (*o*).

### (d) *Fixtures for Agricultural Purposes.*

No right of Removal at Common Law.

At common law there never was any right on the part of the tenant to remove fixtures erected by him for merely agricultural

(*b*) *Ex parte Quincey*, 1 Atk. 477.
(*c*) Amos & F. 246.
(*d*) *Squier* v. *Mayer*, 2 Freem. 249.
(*e*) *Grymes* v. *Bowcren*, 6 Bing. 437; 8 L. J. C. P. 140; 31 R. R. 460; 4 M. & P. 143.
(*f*) Amos & F. 61, 105.
(*g*) *R.* v. *Londonthorpe*, 6 T. R. 379.
(*h*) *Rex* v. *St. Dunstan*, 4 B. & C. 686.
(*i*) *Birch* v. *Dawson*, 2 A. & E. 37; 6 C. & P. 658.
(*k*) Amos & F. 247, citing Burn's Ecclesiastical Law, vol. iv., p. 411, 9th ed.
(*l*) *Wynne* v. *Ingleby*, 5 B. & A. 625; 24 R. R. 503.
(*m*) *Avery* v. *Cheslyn*, 3 A. & E. 75; *Leach* v. *Thomas*, 7 C. & P. 327.
(*n*) *Avery* v. *Cheslyn*, 3 A. & E. 75.
(*o*) *Martyr* v. *Bradley*, 9 Bing. 24; *Sunderland* v. *Newton*, 3 Sim. 450; 30 R. R. 186.

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*Elwes* v. *Mawe.*

No right of removal at common law.

purposes. So it was laid down in 1803 in the leading case of *Elwes* v. *Mawe* (*p*), in which it was held that a tenant, who had erected at his own expense, and for the more convenient occupation of his farm, a beast-house, carpenter's-shop, fuel-house, cart-house, and fold-yard, all built of brick, tiled, and let into the ground, was liable to an action for waste for (during his term) removing the same, even although he left the premises in the same state as when he entered. The court was of opinion that the extension to agriculture of the established privilege in favour of trade would be an innovation, and contrary to the current of legal authorities on the subject.

Removal under Landlord and Tenant Act, 1851.

This unjust rule was first sought to be remedied by the Landlord and Tenant Act, 1851, 14 & 15 Vict. c. 25, s. 3 (*q*), which enactment is confined to buildings, engines, and machinery erected or put up by the tenant at his own cost either for agricultural purposes, or for the purposes of trade and agriculture *with the previous consent in writing* of the landlord, and with respect to which the tenant has given to the landlord or his agent *one calendar month's previous notice in writing* of his intention to remove them during the tenancy, and does not apply to buildings, engines, or machinery erected *solely for the purposes of trade;* nor to articles affixed for mere ornament and convenience during the term.

Agricultural Holdings Acts.

The Agricultural Holdings Act of 1875 in theory went far beyond the above act, giving the tenant, subject to certain rights of pre-emption on the part of the landlord, the property in fixtures whether erected with the consent of the landlord or not, but as that act could be and in most cases was "contracted out of" by landlords, the practical effect was very small. The Agricultural Holdings Act, 1883 (which repeals the Act of 1875), has conferred the same rights in nearly similar terms to those used in the Act of 1875. This act also (as regards fixtures) can be excluded (see p. 673, post) by landlords, but neither does the act itself make special provision for such exclusion, nor, it is believed, has there been an exclusion in any large number of cases. Both acts are prospective only, the Act of 1875 applying to tenancies created between 14th February, 1876, and 1st January, 1884, and the Act of 1883 to tenancies created on or after 1st January, 1883.

Tenant's Right to Fixtures under Agricultural Act, 1875.

Sect. 53 of the Act of 1875 (*r*) gave the tenant an absolute property in all engines, machinery, or other

(*p*) *Elwes* v. *Mawe*, 3 East, 38; 2 Sm. L. C.; 6 R. R. 523.

(*q*) See the Act at length, post, App. A.

(*r*) The Act of 1875, 38 & 39 Vict. c. 92, applied, by sect. 56, to "every contract of tenancy [i.e. by sect. 4, to "every letting of land for a term of years or for lives, or for lives and years, or from year to year, or at will"] beginning after the commencement of the act [i.e. by sect. 2, the 14th February, 1876], unless the landlord and tenant agree in writing in the contract of tenancy, or otherwise," that the act, or any part of it, "shall not apply to the contract." As to tenancies current at the commencement of the act, if they were tenancies from year to year or at will, the act (by sect. 57) applied to them unless either party had excluded its operation by notice in writing.

fixtures "affixed" by him "to his holding," except steam-engines, for which he was not under the act or otherwise entitled to compensation, and which were not so affixed in pursuance of some obligation in that behalf, or instead of some fixture belonging to the landlord, provided (1) that rent, &c., were paid, (2) that no avoidable damage was done by removal, (3) that damage done by removal were made good, (4) that the landlord had a month's notice of the intention to remove, and (5) that the landlord had an option of purchase.

Tenant's Right.

The Act of 1883, by sects. 1, 54, and 61, applies to the following holdings only :

Agricultural Holdings Act, 1883.

"*Holdings, either wholly agricultural or wholly pastoral, or partly agricultural and partly pastoral, or wholly cultivated as market gardens, held under a landlord for a term of years or for lives, or for lives and years, or from year to year by a tenant holding no employment under such landlord*" (*s*).

To such tenants the 34th section of the Act of 1883, repeating with no very considerable alterations the repealed 53rd section of the Act of 1875, gives an absolute property in fixtures as follows :—

*Removability.*

Where, after the commencement of this act, a tenant affixes to his holding any engine, machinery, fencing, or other fixture, or erects any building for which he is not under this act or otherwise entitled to compensation, and which is not so affixed or erected in pursuance of some obligation in that behalf or instead of some fixture or building belonging to the landlord, then such fixture or building shall be the property of and be removable by the tenant before or within a reasonable time after the termination of the tenancy.

*Provisoes.*

Provided as follows :—

Rent.

1. Before the removal of any fixture or building the tenant shall pay all rent owing by him, and shall perform or satisfy all other his obligations to the landlord in respect to the holding :

Care in Removal.

2. In the removal of any fixture or building the tenant shall not do any avoidable damage to any other building or other part of the holding :

Making good Damage.

3. Immediately after the removal of any fixture or building the tenant shall make good all damage occasioned to any other building or other part of the holding by the removal :

Notice to Landlord.

4. The tenant shall not remove any fixture or building without giving one month's previous notice in writing to the landlord of the intention of the tenant to remove it :

Purchase by Landlord.

5. At any time before the expiration of the notice of removal, the landlord, by notice in writing given by him to the tenant, may elect to purchase any fixture or building comprised in the notice of removal, and any fixture or building thus elected to be purchased shall be left by the tenant, and shall become the property of the landlord, who shall pay the tenant the fair value thereof to an incoming tenant of the holding ; and any difference as to the value shall be settled by a reference under this act, as in case of compensation (but without appeal).

(*s*) Lely & Pearce's Agricultural Holdings, p. 18. See the application of the act discussed, post, Chap. XXI.

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Distinction between Act of 1875, and Act of 1883.

The only distinctions between this section and the repealed 53rd section of the Act of 1875 are, (1) that the Act of 1883 applies to buildings, whereas the Act of 1875 did not; (2) that the Act of 1883 does not repeat the qualification as to steam-engines contained in the Act of 1875; and (3) that the Act of 1883 expressly provides that the fixtures may be removed before or within a reasonable time after the end of the tenancy.

Can s. 34 of the Act of 1883 be "contracted out of?"

Can sect. 34 of the Act of 1883 be "contracted out of?" That is, can the landlord in the contract of tenancy or otherwise agree with the tenant that the tenant shall not have the benefit of it, or have the benefit of it subject only to further conditions than the section itself imposes? It is submitted that he can. *Cuilibet licet renunciare juri pro se introducto.* Any person may waive a remedial law introduced for his own benefit; and this provision as to fixtures appears to have been introduced for the benefit of the tenant as against the landlord, and upon no ground of public policy such as would bring into effect an exception to the general rule (*t*). Inasmuch, too, as the 55th section of the act avoids only contracts depriving a tenant of his right to claim *compensation*, it appears that the question of contracting out of the act was present to the mind of the legislature, and that the legislature deliberately abstained from avoiding contracts depriving the tenant of his right to fixtures also (*u*). If the section be contracted out of in the contract of tenancy itself, no consideration will be necessary, the tenancy itself being sufficient consideration; but if a contract of tenancy made after the commencement of the act already subsist, and it be desired to avoid the effect of section 34, this cannot be done without a consideration moving from the landlord to the tenant; that is, the landlord must give the tenant something in return for the tenant's giving up his advantages under section 34.

Difficulties of Construction arising on s. 34 of Act of 1883.

Conditions of Removal.

The 34th section of the Act of 1883 presents considerable difficulties of construction. It will be seen that the fixtures become the property of and removable by the tenant, *provided* that the tenant observes four conditions, and that the landlord does not exercise an option of purchase. If the conditions be not observed, do the fixtures revest in the landlord, so that he can sue the tenant or a purchaser from the tenant for them, or has he merely an action for damages against the tenant? It is submitted that in this respect, notwithstanding the practical hardship upon a purchaser, the section must be construed strictly in favour of the landlord, and that he may sue any person whatever in trover for fixtures severed in breach of the conditions.

(*t*) See Maxwell on Statutes (3rd ed.), p. 548, citing *Taylor* v. *Phillips*, 3 East, 155; 6 R. R. 575.

(*u*) See a similar opinion expressed in Amos & Ferard on Fixtures (3rd ed.), p. 93.

"Other Fixtures."

Another question is, whether the expression "other fixtures" includes ornamental or trade fixtures, or whether what is called the *ejusdem generis* rule is to operate so as to confine the operation of the expression to fixtures of the same kind with those already named, that is, agricultural fixtures. It is submitted that ornamental, but not trade, fixtures are included on the ground that for an agricultural tenant to have a house and ornamental fixtures therein might be considered to be in contemplation of the parties, whereas with trade fixtures it would be otherwise.

Time of Removal.

It will be observed, that by the first paragraph of the section, the fixtures are removable "before or within a reasonable time after the termination of the tenancy." The curious and uncertain period of removability at common law is spoken of hereafter (*x*). The statute appears to substitute for it a still more uncertain period to be determined by what may be deemed by a jury, or a judge if a case should be tried by a judge alone, to be reasonable in fact, and it seems that within such period a tenant who has quitted has by force of the statute a power of re-entry for the purpose of removing the fixtures.

Independently of the above acts, the agricultural tenant is left to the operation of the rule in *Elwes* v. *Maw* above referred to, so as to have no power of removal of agricultural fixtures (*y*).

Summary of what may be removed at Common Law.

Although an agricultural tenant cannot remove articles which are strictly of an agricultural nature, yet, if the object and purpose of the erections relate partly to trade of any description, the tenant may remove them (*z*); thus cider mills (*a*), machinery for working mines and collieries (*b*), and salt pans (*c*), have been considered removable: nurserymen have been allowed to remove trees and shrubs which they have planted for the purposes of sale (*d*), but not to plough up strawberry beds out of the ordinary course of management of the nursery-ground (*e*): and it would seem that the tenant cannot remove hothouses, greenhouses, forcing-pits and erections of that description (*f*), otherwise than as allowed by the Landlord and Tenant Act, 1851, 14 & 15 Vict. c. 25, s. 3 (*g*), or the Agricultural Holdings Act. In no case can private persons sell or remove fruit-trees, although planted by themselves (*h*); nor hedges, nor flowers, nor even a border of box (*i*).

(*x*) Post, Sub-s. (f).
(*y*) *Elwes* v. *Maw*, 3 East, 38 ; 2 Sm. L. C. ; 6 R. R. 523.
(*z*) Amos & F. 64—70, 343.
(*a*) 3 Atk. 40 ; disapproved of by the House of Lords in *Fisher* v. *Dixon*, 12 Cl. & Fin. 312 ; *Walmsley* v. *Milne*, 7 C. B., N. S. 115 ; 29 L. J., C. P. 97.
(*b*) *Lawton* v. *Lawton*, 3 Atk. 13 ; *Ld. Dudley* v. *Ld. Ward*, Ambler, 113.
(*c*) *Lawton* v. *Salmon*, 1 H. Blac. 260 ; 2 R. R. 764.
(*d*) *Wardell* v. *Usher*, 3 Scott, N. R. 508 ; Amos & F. 68, 343.
(*e*) *Wetherell* v. *Howells*, 1 Camp. 227.
(*f*) Amos & F. 70, 343 ; but see *Syme* v. *Harvey*, 24 Sc. Sess. Cas. 202.
(*g*) Ante, 672.
(*h*) *Wyndham* v. *Way*, 4 Taunt. 316 ; 13 R. R. 607, Heath, J. ; Com. Dig. tit. *Waste* (D. 3) ; Amos & F. 69, 344.
(*i*) *Empson* v. *Soden*, 4 B. & Ad. 655 ; Amos & F. 70.

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*Fixtures (Contracts respecting).*

Construction of express Contracts respecting Fixtures, as to Removal.

(e) *Contracts respecting Fixtures.*

It is a principle of law applicable to fixtures, as well as other things, that individuals, on entering into a contract, may agree to vary the strict position in which they would otherwise legally stand towards each other, where no absurdity or general inconvenience would result from the transaction (*k*). *Modus et conventio vincunt legem* (*l*). Therefore buildings erected for the purposes of trade, under leases containing covenants to yield up in repair, at the expiration of the term, all buildings which should be erected upon the demised premises, cannot be removed by the lessees, when the words of the covenant are general, and contain no exception of any particular sort of buildings (*m*). Where a lease contained a general covenant to repair and leave in repair, and lime-kilns were erected by the lessee during the term, it was held, that he could not remove them at the end of the term without committing a breach of covenant (*n*). So salt pans erected by a tenant during his term cannot be removed where the lease contains a covenant to leave the salt works in good repair at the end of the term (*o*). Where there was a covenant to keep in repair the premises, and all erections, buildings, and improvements erected on the same during the term, and to yield up the same at the end of the term, it was held to be broken by the removal of a veranda erected during the term, the lower part of which was affixed to the ground by means of posts (*p*). Where there is a covenant to yield up at the expiration of the term all erections and improvements made during the term, a greenhouse, the framework of which is laid on walls embedded in mortar, cannot be removed, although no damage is done to the walls by removing it (*q*). A lease contained covenants by the lessee to keep and leave in repair the demised premises, "together with all wainscots, *windows*, shutters, fastenings, &c., and other things which then were, or at any time thereafter should be, thereunto *affixed or belonging* (looking-glasses and furniture excepted), and together also with all sheds and other erections and *improvements* which should be erected, built or made upon the demised premises." An assignee of the lease during the term, removed an old shop window, and put up in its place a plate-glass front, but without in any manner

(*k*) Amos & F. 108, 345; *Dumergue* v. *Rumsey*, 2 H. & C. 777; 33 L. J., Ex. 88; *Stansfeld* v. *Mayor, &c. of Portsmouth*, 4 C. B., N. S. 120; 27 L. J., C. P. 124; *Bishop* v. *Elliott* (in error), 11 Exch. 113, 122; 24 L. J., Ex. 229; *Earl of Mansfield* v. *Blackburne*, 6 Bing. N. C. 426.

(*l*) 2 Co. R. 73; Broom's Max.; *Haslett* v. *Burt*, 18 C. B. 162, 893.

(*m*) *Naylor* v. *Collinge*, 1 Taunt. 19; *Thresher* v. *East London W. W. Co.*, 2 B. & C. 608; 2 L. J., K. B. 100.

(*n*) *Thresher* v. *East London W. W. Co.*, supra.

(*o*) *Earl of Mansfield* v. *Blackburne*, 6 Bing. N. C. 426.

(*p*) *Penry* v. *Brown*, 2 Stark. R. 403.

(*q*) *West* v. *Blakeway*, 2 M. & G. 729; 9 Dowl. 846.

fastening it to the premises, except by means of wedges: held, that this plate-glass front was either a "window" or an "improvement within the true meaning of the covenant, and therefore irremovable by the tenant at the end of the term, *although erected for the purposes of trade*" (*r*). Where by the terms of his lease or agreement the tenant renounces his ordinary right to remove any of his fixtures during the term, the sheriff cannot take them under an execution against him (*s*).

Renounced Fixtures cannot be taken in Execution.

A lease contained a covenant to yield up certain scheduled articles, together with all doors, wainscots, shelves, presses, dressers, drawers, locks, keys, bolts, bars, staples, hinges, hearths, chimney-pieces, mantel-pieces, chimney-jambs, foot-pans, slabs, covings, window-shutters, partitions, sinks, water-closets, cisterns, pumps and rails, water-tanks, *and other additions, improvements, fixtures and things* which were and should be anyways fixed or fastened upon the premises: held, that the general words could not be restricted (there being no assignable genus to which the enumerated articles belonged), and that the lessee could not make a marketable title even to articles in the nature of tenant's fixtures (*t*). So the lessee of an oil refinery who has covenanted to deliver up the premises at the end of the term, together with all doors, &c. (specifying numerous articles), and *all other things* which now are or at any time during the said term shall be fixed or fastened to the freehold, has no right to remove trade fixtures, and may be restrained from so doing (*u*). Where a colliery, with machinery and implements for working it, was leased for years, with a proviso for re-entry on non-payment of rent, and a covenant by the lessee, at the determination of the demise to deliver up the machinery and implements, conformably to an inventory annexed to the lease, of which a revaluation was to be made three months before the expiration of the demise; and the landlord recovered judgment in ejectment in Trinity term for a forfeiture for non-payment of the rent, but did not execute the writ of possession until the 8th of November, and the tenant committed an act of bankruptcy the next day; it was held, that the landlord was entitled to take possession of all the machinery and implements (some of which had been brought on the premises by the tenant during the term), although no previous valuation had been made (*x*). A lease of mines contained a covenant for the lessee to erect furnaces, iron-works, &c., and to repair and yield up the furnaces, fire-engines,

General words. *Wilson* v. *Whateley.*

(*r*) *Haslett* v. *Burt*, 18 C. B. 162, 893; 25 L. J., C. P. 201, 295.

(*s*) *Dumergue* v. *Rumsey*, 2 H. & C. 777; 33 L. J., Ex. 88.

(*t*) *Wilson* v *Whateley*, 1 J. & H. 436; 7 Jur., N. S. 908.

(*u*) *Bidder* v. *Trinidad Petroleum Co.*, 17 W. R. 153.

(*x*) *Storer* v. *Hunter*, 3 B. & C. 368; and see *Clark* v. *Crownshaw*, 3 B. & Ad. 804; *Horn* v. *Baker*, 9 East, 215; 9 R. R. 541; 26 R. R. 486; *Fairburn* v. *Eastwood*, 6 M. & W. 679.

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iron-works, dwelling-houses and all other erections, &c., to be erected, built or set up, except the iron-work, castings, railways, whimseys, gins, machines, and the movable implements and materials used in or about the said furnaces, fire-engines, iron-works, stone-pits and premises; and there was a power given to the lessor to purchase the excepted articles; it was held, that the lessee had a right to remove whatever was in the nature of a machine, or part of a machine, though fixed in brickwork, but not what was in the nature of a building or support of a building, although made of iron (*y*). A covenant to leave a water-mill with all fixtures, fastenings and *improvements*, was held to include a pair of new mill-stones, set up by the lessee during the term, although by custom they might have been removed (*z*). A covenant by a lessee that at the end of the term he would deliver up to the lessor the demised premises, "together with all locks, keys, bars, bolts, *marble and other chimney-pieces*, foot-pans, slabs, *and other fixtures and articles in the nature of fixtures*, which shall at any time during the said term be fixed or fastened to the said demised premises, or be thereto belonging," is confined to "landlord's fixtures," and does not prevent the lessee from removing or selling *trade and other tenant's fixtures* erected by himself during the term (*a*). In *Duck* v. *Braddyll* a lease was made of a cotton factory and machinery in consideration of 1,250*l.* paid on execution of the lease, and of rent for the first year 1,600*l.*, on the next day, and 350*l.* yearly afterwards. There were provisoes that the lessor might distrain the machinery for rent, and that when the rents reserved to be payable for the first year should have been paid, and all other covenants, &c., therein contained on the lessee's part had been fulfilled, the lessee should become absolutely entitled to the machinery. There was also a covenant to use the machinery on the premises and not elsewhere. It was held, that the property in the machinery passed to the lessee on the payment of the 1,600*l.*, and that it did not continue in the lessor until the end of the term (*b*). In conclusion upon this part of the subject,—before a tenant removes an article which he considers as a removable fixture, he should examine his right not only with reference to the general law of fixtures, but also as it may be affected by any express or implied contract by which he may be bound. Where a tenant renews or extends his term, he must be

(*y*) *Foley* v. *Addenbrooke*, 13 M. & W. 174; Amos & F. 90. And see *Rex* v. *Topping*, M'Clel. & Younge, 544; *Dumergue* v. *Rumsey*, 2 H. & C. 777.

(*z*) *Martyr* v. *Bradley*, 9 Bing. 24.

(*a*) *Bishop* v. *Elliott* (in error), 11 Exch. 113; 24 L. J., Ex. 229. The court below decided that the lessee had the right to sell only the trade fixtures: *Elliott* v. *Bishop*, 10 Exch. 496, 522; 24 L. J., Ex. 33; but the judges were much divided in opinion.

(*b*) *Duck* v. *Braddyll*, M'Clel. 217; 13 Price, 455.

careful to preserve his right to fixtures, for, without some express stipulation on the subject, he may lose his right at the expiration of his first term (*c*).

Contracts respecting Fixtures,—what things pass by.

Accepting the demise of a house containing fixtures, does not raise an implied contract to pay for the fixtures (*d*). By the grant of a house with the appurtenances all the fixtures pass, unless some intention to the contrary be expressed (*e*). But it is otherwise where, by an enumeration of particular fixtures in the conveyance, an intention is shown to exclude other: *expressio unius est exclusio alterius* (*f*). Upon the sale of a mill or factory, looms used in the mill are not within the words "steam-engines, boilers, shafting, piping, mill-gearing, gasometer, gas-pipes, drums, wheels, and all and singular other the machinery, fixtures, and effects fixed up, in, attached or belonging to the mill or factory or premises" (*g*). So looms standing upon a loom-foot, from which they may be removed at pleasure, will not pass by the general term of machinery, though they are worked by steam-power which is attached to the mill and mortgaged with it (*g*). A mortgage of a silk-mill was expressed to include "all those the steam-engines, boilers, steam-pipes, main-shafting, mill-gearing, millwrought work and other machinery and fixtures, whatsoever, then erected or set up or standing, &c., in or upon the mill or any part thereof:"—held, that all the machinery and fixtures used in the manufacturing of silk within the mill were included (*h*).

Contracts for sale of Fixtures not within Statute of Frauds. *Hallen* v. *Runder.*

Wherever, therefore, it is intended in contracts which concern the realty as well as the fixtures, that the latter should be paid for separately, a stipulation to that effect ought to be introduced. Contracts for the sale of fixtures are not within the Statute of Frauds, as they are not goods and chattels within the meaning of the statute, nor do they, although annexed to the freehold, constitute an interest in land (*i*). But a memorandum of the actual sale of fixtures requires a conveyance stamp, and it makes no difference that it is in the past tense (*k*). A reversionary interest in trade fixtures will pass by an agreement in writing, though not under seal (*l*). Where a lessee, who had power to remove a greenhouse fixed to the freehold, agreed to sell the lease, together with

(*c*) Post, Sect. 9; *Fitzherbert* v. *Shaw*, 1 H. Blac. 258; *Thresher* v. *East London Waterworks Co.*, 2 B. & C. 608, 614; 2 L. J., K. B. 100; 26 R. R. 486.

(*d*) *Goff* v. *Harris*, 5 M. & G. 573.

(*e*) *Colegrave* v. *Dias Santos*, 2 B. & C. 76; *Steward* v. *Lombe*, 1 Brod. & B. 506; 21 R. R. 700; *Boydell* v. *McMichael*, 1 C., M. & R. 177; *Longstaff* v. *Meagoe*, 2 A. & E. 167.

(*f*) *Hare* v. *Horton*, 5 B. & Ad. 715.

(*g*) *Hutchinson* v. *Kay*, 23 Beav. 413; 26 L. J., Ch. 457.

(*h*) *Haley* v. *Hammersley*, 3 De Gex, F. & J. 587; 30 L. J., Ch. 771; and see *Colegrave* v. *Dias Santos*, 2 B. & C. 76.

(*i*) *Hallen* v. *Runder*, 1 C., M. & R. 275; *Lee* v. *Risdon*, 7 Taunt. 191; 17 R. R. 484; *Pinner* v. *Arnold*, 1 Tyr. & Gr. 4; *Lee* v. *Gaskell*, L. R., 1 Q. B. D. 700.

(*k*) *Horsfall* v. *Hey*, 2 Exch. 778.

(*l*) *Petrie* v. *Dawson*, 2 C. & K. 138.

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the greenhouse and furniture, plants and crops for a certain sum, but was afterwards unable to obtain the lessor's consent to the assignment of the lease, which was necessary; it was held, that the contract was an entire one, and that the lessee could not sue for the price of the greenhouse (*m*).

Mortgage of Fixtures. *Meux* v. *Jacobs.*

It was held by the House of Lords, in *Meux* v. *Jacobs* (*n*), that the mortgage of a lease was a mortgage by implication of tenant's fixtures, whether affixed by the tenant before or after the mortgage; and it was pointed out that it did not require registration under the Bill of Sale Act, 1854, as against the holder of a bill of sale. As against such a person, the fixtures, although removable by the tenant as trade fixtures during the term, were held to continue chattels real, although as against trustees for creditors and execution creditors the Bill of Sale Act made them chattels personal.

Separate Mortgage of Fixtures.

And even as against trustees for creditors and execution creditors, a mortgage of fixtures did not require registration under the Bill of Sale Act, 1854, unless it gave power to the mortgagee to sell or take possession of the fixtures separately (*o*). If such power were given, the mortgage required registration, although there were no assignment of the fixtures in so many words (*p*).

Bills of Sale Acts.

Under the Bills of Sale Act, 1882 (45 & 46 Vict. c. 43), every bill of sale of "personal chattels" requires registration as therein mentioned, otherwise it is void. But by sect. 4 of the Bills of Sale Act, 1878, the term "personal chattels" (which included fixtures generally in the repealed Bill of Sale Act, 1854) means (inter alia) fixtures "*when separately assigned or charged*," "but shall not include fixtures (except 'trade machinery') when assigned together with a freehold or leasehold interest in any land or building to which they are affixed." The 5th section of the Act of 1878 contains an elaborate definition of "trade machinery" for the purpose of the Bills of Sale Acts.

Rights of Trustees in Bankruptcy.

It has been held that a steam-engine, erected for the purpose of working a colliery, to be used by the lessee of such colliery during his term, but to be held as the property of the landlord, subject to such use, did not pass to the assignees of the tenant on his bankruptcy (*q*); that fixtures which were by law removable as between landlord and tenant, part of which were erected before a mortgage, and part afterwards, passed to the mortgagee, and not

(*m*) *Sleddon* v. *Cruikshank*, 16 M. & W. 71.

(*n*) *Meux* v. *Jacobs*, L. R., 7 H. L. 481; 44 L. J., Ch. 481; 32 L. T. 171; 23 W. R. 526.

(*o*) *Ex parte Barclay, Re Joyce*, L. R., 9 Ch. 577; 43 L. J., Bank. 137; 30 L. T. 479; 22 W. R. 608, distinguishing *Ex parte Daglish*, L. R., 8 Ch. 1072.

(*p*) *Ex parte Daglish*, ubi supra. See also *Longbottom* v. *Berry*, L. R., 5 Q. B. 123; *Mather* v. *Fraser*, 2 K. & J. 536.

(*q*) *Coombs* v. *Beaumont*, 5 B. & Ad. 72. And see further Chap. VII., Sect. 11, ante.

to the assignees of the bankrupt mortgagor (*r*): and that where copper roller manufacturers, being seised in fee of a mill and land, erected thereon steam-engines, machinery, &c. for the purposes of their trade, and then mortgaged in fee the mill and land, with all fixtures, &c., and afterwards became bankrupt, the mortgagees were entitled to all the machinery, &c. fixed to the freehold, and that the deed did not require to be registered as a bill of sale under the Bill of Sale Act, 1854 (*s*). But a mortgage of trade fixtures without the mill or land to which they are annexed, was held to be a mortgage of personal chattels within the meaning of that act, as explained by sect. 7, which includes "fixtures and other articles capable of complete transfer by delivery" (*t*). And such fixtures will be deemed to be in the order and disposition of the mortgagor in the event of his bankruptcy whilst he remains in possession thereof (*u*). The registration of the mortgage under the Bill of Sale Act, 1854, was held to make no difference in this respect (*x*).

Bill of Sale.

It may be added, that even before the decision of the House of Lords in *Meux* v. *Jacobs*, above referred to, it had been held that by a mortgage of a mill, the stones, tackling and implements pass to the mortgagee (*y*); that an equitable mortgage of a leasehold public-house with the fixtures therein, consisting of ordinary house fixtures and trade fixtures, was sufficient to prevent any of them being in the order and disposition of the lessee on his becoming bankrupt (*z*); and that under an equitable mortgage, by the simple deposit of a lease unaccompanied by any memorandum, the tenant's fixtures will be included (*a*). And it was distinctly laid down in *Meux* v. *Jacobs*, that the distinction, at one time (*b*) supposed to subsist between mortgages of freeholds and leaseholds, as regards registration, is not maintainable (*c*). Words which would, in a mortgage in fee, pass trade fixtures, will also pass them in a mortgage by sub-lease, but in a mortgage by sub-lease the property in the fixtures giving the right to remove will not pass to the mortgagee unless an intention to that effect be apparent from the deed (*d*).

What passes by Mortgage.

The above cases, however, relate to the mortgagor's fixtures. The fixtures of the tenant of a mortgagor, brought by him upon the

Tenant's Fixtures do not pass by Mortgage.

(*r*) *Ex parte Reynel*, 2 Mont., D. & De G. 443; *Fletcher* v. *Manning*, 1 C. & K. 350; *Ex parte Cowell*, 17 L. J., Bank. 16.

(*s*) *Mather* v. *Fraser*, 2 K. & J. 536; 25 L. J., Ch. 361; *Boyd* v. *Shorrock*, L. R., 5 Eq. 72, 80; 37 L. J., Ch. 154.

(*t*) *Waterfall* v. *Penistone*, 6 E. & B. 876; 26 L. J., Q. B. 100.

(*u*) *Whitmore* v. *Empson*, 23 Beav. 313; 26 L. J., Ch. 364.

(*x*) *Badger* v. *Shaw*, 2 E. & E. 472; 29 L. J., Q. B. 73.

(*y*) *Place* v. *Fagg*, 4 Man. & R. 277; *Ex parte Bentley, Re West*, 2 Mont., D. & De G. 591.

(*z*) *Ex parte Barclay*, 5 De G., M. & G. 403; 25 L. J., Bank. 1.

(*a*) *Williams* v. *Evans*, 23 Beav. 239.

(*b*) See *Hawtrey* v. *Butlin*, L. R., 8 Q. B. 290, per Lush, J.

(*c*) And see *Ex parte Tweedy, Re Trethowan*, 46 L. J., Bank. 43.

(*d*) *Southport and West Lancashire Banking Co.* v. *Thompson*, 37 Ch. D. 64.

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demised premises after the mortgage, do not pass to the mortgagee, but may be removed by the tenant of the mortgagor (*e*).

### (f) *Removal of Fixtures.*

Extent of Right of Tenant to remove Fixtures.

The right of a tenant to remove tenant's fixtures is a power coupled with an interest (*f*), which follows his property in the fixtures as against the landlord (*g*), and may be assigned by deed (*h*). It continues only during his original term (*i*), and "during such further period of possession by him as he holds the premises under a right still to consider himself as tenant" (*k*). The meaning of this modification of the rule that tenant's fixtures vest in the landlord immediately on the determination of the term (*l*) is not very plain (*m*); but it seems clear that if the tenant quit the premises, and the landlord re-enter, the tenant's right to remove the fixtures is gone. Where steam-engines were removable by the lessee, and had not been removed previously to the lessor entering for a forfeiture, it was held, that trover could not be maintained for them (*n*). The right of the tenant is gone, too, where the landlord re-enters for a forfeiture by reason of the tenant having become a bankrupt (*o*), or where the landlord recovers possession under an ejectment for a forfeiture (*p*).

When Removal may be.

In *Penton* v. *Robart* (*q*), however, a sub-tenant, who remained in possession after recovery in ejectment both against the mesne landlord and himself, was held entitled to remove fixtures, the superior landlord recovering nominal damages only for breaking and entering, and the verdict being entered for the sub-tenant in respect of the trespass de bonis asportatis. This very strong case in favour of the tenant (*r*) is strenuously argued by Mr. Amos (*s*) to form no exception to the general rule in favour of the landlord; but it has been expressly dissented from in an Irish case (*t*), and more than

(*e*) *Sanders* v. *Davis*, 15 Q. B. D. 218; 54 L. J., Q. B. 576; 33 W. R. 655.

(*f*) *Poole's case*, 1 Salk. 368; *Minshall* v. *Lloyd*, 2 M. & W. 460.

(*g*) See *Cumberland Union Banking Co.* v. *Maryport Hematite, &c. Co.*, [1891] 1 Ch. 415.

(*h*) *Hallen* v. *Runder*, 1 C., M. & R. 266; *London and Westminster Loan and Discount Co.* v. *Drake*, 6 C. B., N. S. 798, 811; 28 L. J., C. P. 297.

(*i*) *Ex parte Quincey*, 1 Atk. 477; *Lee* v. *Risdon*, 7 Taunt. 191; 17 R. R. 484; *Colegrave* v. *Dias Santos*, 2 B. & C. 76; *Minshall* v. *Lloyd*, 2 M. & W. 450, 460.

(*k*) *Weeton* v. *Woodcock*, 7 M. & W. 14.

(*l*) See *Lyde* v. *Russell*, 1 B. & Ad. 394, in which case the tenant *had quitted possession*, and failed to recover severed fixtures from the landlord in trover.

(*m*) *Leader* v. *Homewood*, 5 C. B., N. S. 546; 27 L. J., C. P. 316; and see the question discussed by Kindersley, V.-C., in *Gibson* v. *Hammersmith R. Co.* (32 L. J., Ch. 337), in which the defendants were held bound, under the Lands Clauses Act, to give compensation for trade fixtures.

(*n*) *Minshall* v. *Lloyd*, 2 M. & W. 450; *Mackintosh* v. *Trotter*, 3 M. & W. 184.

(*o*) *Pugh* v. *Arton*, L. R., 8 Eq. 626; 38 L. J., Ch. 619.

(*p*) *Minshall* v. *Lloyd*, 2 M. & W. 450; *Mackintosh* v. *Trotter*, 3 M. & W. 184; but see *Sumner* v. *Bromilow*, infra (*d*).

(*q*) 2 East. 88.

(*r*) See *Heap* v. *Barton*, 12 C. B. 278; per Jervis, C.J.

(*s*) Amos & F. 102.

(*t*) *Deeble* v. *McMullen*, 8 Ir. C. L. Rep. 355.

once questioned in England (*u*), and appears to be bad law, as seems to follow from the criticism of Charles, J., in *Barff* v. *Probyn* (*x*). In that case a tenant held over because an incoming tenant failed to pay him for fixtures as agreed for, and removed the fixtures while still in possession, but after having been sued in ejectment, Charles, J., held, in an action by the landlord for wrongful removal and conversion, that no inference of a subsisting tenancy could be drawn, and that the tenant was a trespasser at the time of removal, but that the landlord was entitled only to recover the auction or breaking-up value of the fixtures.

No Action against Mortgagees of Lessor.

Removable fixtures not removed become part of the freehold, even though they remain on the premises by the parol consent of the lessor; and though such consent might give the tenant a right of action for the value of the fixtures against the lessor if he should subsequently refuse to permit their removal, it will give no such right as against mortgagees of the lessor who were no parties to it, in event of their refusal (*y*).

Right to unsevered Fixtures.

On the whole it seems that, unless the landlord does some act to create what has been called an "excrescence of the term," the right to unsevered fixtures vests in the landlord on the determination of a term certain; but that a court might possibly hold that abstaining from issuing a writ of ejectment is equivalent to an overt act by the landlord (*z*).

Removal by Tenant of Tenant for Life, or at Will.

If the term be an uncertain one, as if the lessor be a tenant for life, or if the tenancy be at will (*a*), it seems clear that the tenant will be allowed a reasonable time, after the expiration of his estate, to remove "tenant's fixtures." For no laches can be imputed to such a tenant in not having availed himself of the privilege of severance during the term; neither can a gift to the landlord be implied (*b*).

Head-lease and sub-lease. *Porter* v. *Drew*.

In *Porter* v. *Drew* (*c*) a sub-lease of a nursery ground contained a covenant by the sub-lessee to deliver up all *landlord's* fixtures at the end of the term. The head lease contained a covenant (unknown to the sub-lessee) that the lessee would deliver up not only all landlord's fixtures, but also all *trade* fixtures at the end of the term of the head-lease. It was said that a covenant in the sub-lease that the sub-lessee would be allowed by the mesne landlord, apart from the head-lease, to remove trade fixtures might not unreasonably be implied, but the court was clearly of opinion that there was no implied covenant in the sub-lease that the head-lease did not contain the covenant to deliver up the trade fixtures.

(*u*) In *Weeton* v. *Woodcock*, 7 M. & W. 14, by Alderson, B., and in *Leader* v. *Homewood*, 27 L. J., C. P. 316.

(*x*) *Barff* v. *Probyn*, 64 L. J., Q. B. 557; 73 L. T. 118—tried without a jury.

(*y*) *Thomas* v. *Jennings*, 66 L. J., Q. B. 5; 75 L. T. 274; 45 W. R. 93, per Hawkins, J.

(*z*) See per Charles, J., in *Barff* v. *Probyn*, supra.

(*a*) See as to Tenant at Will, 242, ante.

(*b*) Amos & F. 107.

(*c*) *Porter* v. *Drew*, 5 C. P. D. 143; 49 L. J., C. P. 482; 42 L. T. 151; 28 W. R. 672.

CH. XVI. s. 8. *Fixtures (Removal of).*

A reasonable time for removal after the expiration of the term will also be allowed in the case of a stipulation in the lease that the tenant may remove the fixtures "at the expiration of the term" (*d*).

Special Agreement.

Surrender.

The surrender of a lease, it may be added, will not prejudice the rights of a purchaser of fixtures before the surrender (*e*). Where the purchaser of lands brought an ejectment against a tenant from year to year, and the parties entered into an agreement that judgment should be signed for the plaintiff, with a stay of execution till a given period; it was held, that the tenant could not in the interval remove buildings, &c. from the premises which he had himself erected during his term, and before the action was brought (*f*). Where the landlord during the term, by letter, declined to buy the tenant's fixtures, but added, "I have no objection to your leaving them on the premises and making the best terms you can with the incoming tenant," it was held that such letter did not operate as a valid licence (it not being under seal); and that if the new tenant refused to pay for the fixtures so left, or to permit them to be removed, no action of *trover* would lie for them, whilst they remained unsevered from the freehold (*g*). Where the tenant has a legal right to remove fixtures after the end of his term, and is prevented from doing so by the landlord or incoming tenant, the action should be for preventing the plaintiff from exercising his right to sever and remove the fixtures (*h*). But the value of fixtures severed during the tenancy, and of other goods left behind, may (after a sufficient demand and refusal) be recovered in trover (*i*). But it is otherwise with respect to fixtures which were left unsevered on the expiration of the tenancy (*k*).

How the Removal must be effected.

It appears to be generally understood in practice that where trading as well as ornamental fixtures may be removed, and are accordingly taken down, the tenant is liable to repair any injury the premises may sustain by the act of removal; and in like manner, it would seem, that where a fixture has been put up in substitution for an article which was attached to the premises at the time of the demise, the tenant, on taking down his own fixture, is bound to restore the former article, or to replace it by another erection of a similar description (*l*). It has been held, that in removing engines,

(*d*) *Stansfield* v. *Mayor of Portsmouth*, 4 C. B., N. S. 120; 27 L. J., C. P. 124; and see *Sumner* v. *Bromilow*, 34 L. J., Q. B. 130; 11 Jur., N. S. 481; *Pugh* v. *Arton*, supra.

(*e*) *Saint* v. *Pilley*, L. R., 10 Ex. 137; *London and Westminster Discount Co.* v. *Drake*, 6 C. B., N. S. 798; 28 L. J., C. P. 297.

(*f*) *Fitzherbert* v. *Shaw*, 1 H. Blac. 258; *Heap* v. *Barton*, 12 C. B. 274.

(*g*) *Roffey* v. *Henderson*, 17 Q. B. 574; *Leader* v. *Homewood*, 5 C. B., N. S. 546.

(*h*) *London and Westminster Loan and Discount Co.* v. *Drake*, 6 C. B., N. S. 805, 811.

(*i*) *Leader* v. *Homewood*, 5 C. B., N. S. 546, 548.

(*k*) *Wilde* v. *Waters*, 16 C. B. 637.

(*l*) Amos & F. 89.

&c. partly fixed in brickwork, which a tenant has by the terms of his lease a right to remove, he may disturb such brickwork as is necessary, and is not bound to restore it to a perfect state, but that he is liable for unnecessary disturbance of brickwork (*m*).

### (g) *Remedies respecting Fixtures.*

Landlord's Remedies for the wrongful Removal of Fixtures.

When fixtures which have become part of the realty, and irremovable according to law, have been removed, the landlord may maintain an action on the case in the nature of waste: for such removal amounts to an injury to the reversion, which the law considers waste (*n*). Where such waste amounts to a breach of covenant, the landlord may sue either in case, or on the covenant, at his election (*o*). He may also, before the removal, apply to the High Court for an injunction to prevent the removal (*p*). Although a landlord cannot maintain an action of trespass for entering the premises during the occupation of the tenant, because occupation is necessary to maintain that form of action; yet immediately upon the severance of the fixtures from the realty, they become mere chattels, and he may maintain an action of trespass for taking them away, for the property is vested in him from the time of severance (*q*); again, where the fixtures have been unlawfully severed from the freehold and carried away, or otherwise converted or disposed of, the landlord may maintain an action of trover for their value (*r*).

Remedies to recover the Value of Fixtures.

Fixtures being often the subject of contracts, actions may be brought for any breach of such contracts by either of the parties (*s*). These actions generally arise either from the breach of contracts respecting the care and disposition of fixtures during the existence of a tenancy, or upon contracts for the sale of fixtures. A lessee cannot even during his term maintain trover for fixtures attached to the freehold (*t*). If a landlord, during the term, severs fixtures from the freehold and distrains them, the tenant may maintain trover for them (*u*). But where a tenant leaves fixtures at the end of his term and the landlord afterwards severs them, the tenant cannot maintain trover for them (*x*). Where a tenant assigned his lease by

(*m*) *Foley* v. *Addenbrooke*, 13 M. & W. 174.

As to recovery in specie of chattels (an altar stone and sacred relics) removed during the term with the privity of the tenant, see *Petre* v. *Ferrers*, 61 L. J., Ch. 426; 65 L. T. 568.

(*n*) *Hitchman* v. *Walton*, 4 M. & W. 409; *Smith* v. *Render*, 27 L. J., Ex. 83.

(*o*) *Kinlyside* v. *Thornton*, 2 W. Blac. 1111; *Kerne* v. *Benbow*, 4 Taunt. 764; *Martyr* v. *Bradley*, 9 Bing. 24.

(*p*) Amos & F. 281—287.

(*q*) *Farrant* v. *Thompson*, 5 B. & A. 826; Amos & F. 352.

(*r*) *Hitchman* v. *Walton*, 4 M. & W. 409.

(*s*) *Martyr* v. *Bradley*, 9 Bing. 24; *Watson* v. *Lane*, 11 Exch. 769; 25 L. J., Ex. 101.

(*t*) *Mackintosh* v. *Trotter*, 3 M. & W. 184; *Roffey* v. *Henderson*, 17 Q. B. 574.

(*u*) *Dalton* v. *Whittem*, 3 Q. B. 961; *Clarke* v. *Holford*, 2 C. & K. 540.

(*x*) *Lyde* v. *Russell*, 1 B. & Ad. 394.

CH. XVI. s. 8. *Fixtures (Remedies respecting).*

way of mortgage, but continued in possession and became bankrupt, whereupon the assignees removed fixtures which by the lease were to be yielded up at the end of the term to the lessor; it was held, that the mortgagee might maintain trover against the assignees (*y*). If a lessee, who is possessed of tenant's fixtures, mortgage his term with the fixtures and afterwards becomes bankrupt, the mortgagee may recover in trover the value of the fixtures from the assignees, who have removed and converted them (*z*). Where the assignees of a bankrupt mortgagor who had vested in his mortgagee an immediate interest in fixtures, severed and sold them; it was held, that the mortgagee was entitled to recover from the assignees the value of the fixtures estimated as between outgoing and incoming tenant (*a*). A lessee of a house containing fixtures, executed an assignment of the premises by way of mortgage, not mentioning the fixtures: he afterwards assigned the premises and all his estates and effects, to trustees; the trustees being in treaty for a sale of the fixtures, the mortgagee, whose principal and interest were due, took forcible possession of the house, and refused, on demand, to deliver up the fixtures; the trustees brought trover; and it was held, that they could not recover for them (*b*).

Remedies to recover Damages for an improper Sale of Fixtures.

If an incoming tenant purchase as fixtures from the outgoing tenant property which in fact belongs to the landlord, he may recover back the money he paid for it, in an action against the outgoing tenant for money had and received; and in such action it will be no defence that the outgoing tenant was not aware that the articles belonged to the landlord, having bought them himself from a preceding tenant; he, however, has his remedy against such preceding tenant (*c*). But there is no *implied* warranty of title in the contract of sale of a *personal chattel*, the maxim being *caveat emptor;* and therefore, in the absence of fraud, a vendor is not liable for a defect of title, unless there be an express warranty, or an equivalent to it, by declaration or conduct (*d*). Where the owner of the goodwill and fixtures of a public-house allowed another person to represent himself as such to the landlord, whereupon they let the house to him and he sold the house and fixtures to a bonâ fide purchaser; it was held, that the real owner of the fixtures had estopped himself from recovering the fixtures of the purchaser (*e*).

(*y*) *Hitchman* v. *Walton*, 4 M. & W. 409.
(*z*) *Boydell* v. *M'Michael*, 1 C., M. & R. 177; *Thompson* v. *Pettit*, 10 Q. B. 101; *Horsfall* v. *Hey*, 2 Exch. 778.
(*a*) *Thompson* v. *Pettit*, supra.
(*b*) *Longstaff* v. *Meagoe*, 2 A. & E. 167.
(*c*) *Robinson* v. *Anderton*, Peake, 94.
(*d*) *Morley* v. *Attenborough*, 3 Exch. 500; *Ormrod* v. *Huth*, 14 M. & W. 651, 664; *Burnby* v. *Bollett*, 16 M. & W. 644; *Sims* v. *Marryat*, 17 Q. B. 281.
(*e*) *Gregg* v. *Wells*, 10 A. & E. 90; and see *Freeman* v. *Cooke*, 2 Exch. 654; 6 D. & L. 187; *Clarke* v. *Hart*, 6 H. L. Cas. 633, 644, 655.

Sect. 9.—*Survey and Valuation of Dilapidations and Fixtures.*

Ch. XVI. s. 9.

*Survey and Valuation of Dilapidations, &c.*

Right of Landlord to enter the Premises to Survey, &c.

A landlord has no legal right during the term to enter upon the demised premises to view their condition, or the dilapidations, wants of repair, mode of cultivation, &c., except in pursuance of some power or authority in that behalf contained in the lease or agreement, or the written or oral leave of the tenant (*f*). For any such unauthorized entry he would be liable to an action of trespass at the suit of the tenant. When, as frequently is the case, there is a covenant or proviso in the lease or agreement that the landlord may enter so many times during the year to survey the premises, and to require the necessary repairs to be done, he may select any days in the year as he thinks fit, whether they be the worst or the best time for doing repairs (*g*). But a covenant for a landlord to be allowed to come into a house to see the state of its repair "at convenient times" is not broken by his not being allowed to go into some of the rooms, if the tenant has had no previous notice of his coming (*h*).

Estimate of Dilapidations.

Towards the end of the term, some respectable and competent surveyor or architect (to be mutually agreed on) should be employed on behalf of both landlord and tenant to ascertain what defects and wants of repairs exist *contrary to the covenants or stipulations in the lease or agreement*, and the sum it will take to do what is necessary. He should, of course, be furnished with the lease or agreement, or a copy; and he should be acquainted with the law as to the construction of covenants to repair and leave in repair, &c. (*i*). He should decide fairly and impartially between the parties, in like manner as an arbitrator. He should make a schedule of the repairs, &c., necessary to be done (stating them in detail), with an estimate of the sum it will take to do such repairs, &c. Such schedule and estimate should be written upon an appraisement stamp (*k*). When the appraisement is not made on behalf of both parties, but merely for the private information of the party procuring it to be made, it does not require any stamp (*l*). The charges of and incident to such survey and appraisement should be expressly provided for by agreement between the parties and the person employed. In some cases the decision of the valuer may be reviewed by the court, in the same manner as ordinary arbitrations (*m*).

(*f*) Ante, 639.

(*g*) *Hill* v. *Barclay*, 16 Ves. 403; 11 R. R. 147.

(*h*) *Doe* d. *Wetherell* v. *Bird*, 6 C. & P. 195.

(*i*) Ante, 626 et seq.

(*k*) Stamp Act, 1891, and Sched. tit. *Appraisement*, post, Appendix A.

See a very full form of specification illustrating "a few matters arising" under the ordinary covenant to leave in repair, in Tarbuck's Handbook of House Property, 2nd ed., p. 74.

(*l*) *Atkinson* v. *Fell*, 5 M. & S. 240; *Jackson* v. *Stopherd*, 2 Cr. & M. 361, 367; Amos & F. 357; Stamp Act, 1891, and Sched. tit. *Appraisement*, Exemption 1.

(*m*) See *Re Hopper*, L. R., 2 Q. B. 367; 36 L. J., Q. B. 97.

CH. XVI. s. 9.
*Survey and Valuation of Dilapidations, &c.*

Amount of Damages.

It is usual and desirable that the tenant should, instead of executing the required repairs himself, pay the estimated cost of them to the landlord. What this cost is to be must depend almost entirely on the judgment of the surveyor. For the modern practice of surveyors, the reader is referred to the useful "Handbook of House Property," by Mr. E. L. Tarbuck, architect and surveyor, of which a second edition was published in 1880.

Valuation of Fixtures.

The valuation of any fixtures to be paid for by the landlord at the end of the term may be made in like manner. But, as a general rule, a landlord is not obliged to pay for any fixtures whatever, except such as he has expressly contracted to take and pay for at the end of the term, or for which he is liable according to the custom of the country.

If, after such valuations have been made and paid for, the incoming tenant discover that he has paid for too much, or for things not included in the valuation, he cannot recover the over-payments in an action for money had and received, especially where he had not given any notice of the errors, and demanded back the money before action (*n*).

Valuations between Outgoing and Incoming Tenants.

Valuations between outgoing and incoming tenants of fixtures, &c., should be made in like manner as between landlord and tenant; but the incoming tenant should take especial care to ascertain that he will have a good title *as against the landlord*, to any fixtures he purchases from the outgoing tenant (*o*); for it is to be remembered that an outgoing tenant, unless the holding be agricultural, has *only a right to remove his own fixtures during his term* (*p*); and even if the holding be agricultural, before or within a reasonable time after the termination of the tenancy, and he cannot, by agreement or otherwise, convey to the incoming tenant (without the landlord's concurrence) a greater right or title than he himself possesses. Consequently, if the tenant's fixtures are permitted to remain affixed to the demised premises when the old tenancy ends and the new one commences, they will belong to the landlord as parcel of the freehold, notwithstanding that the incoming tenant has paid for them to the outgoing tenant their full value as fixtures. To prevent this, the fixtures so purchased should be specified in a schedule to the new lease, and an express provision inserted therein that the tenant shall be at liberty at any time during the term to remove and dispose of them (inter alia) as tenant's fixtures. An outgoing tenant, who has quitted possession, has no right to re-enter on the incoming tenant to remove any fixtures whatever (*q*).

(*n*) *Freeman* v. *Jeffries*, L. R., 4 Ex. 189.

(*o*) *Elliott* v. *Bishop*, 10 Exch. 496; 11 Exch. 113; 24 L. J., Ex. 33; *Burt* v. *Haslett*, 18 C. B. 162, 893.

(*p*) Ante, 682.

(*q*) *Leader* v. *Homewood*, 5 C. B., N. S. 546; 27 L. J., C. P. 316.

Surveyor's Remuneration.

The surveyor is to be paid according to his labour, and not according to the amount of bills he looks over, or the amount of money expended, or to be expended (*r*); although a commission of 5 per cent. on the sum laid out, when such was proved to be the usage, has been allowed (*s*). If a surveyor make an estimate, which turns out to be incorrect to a considerable amount, and consequently entirely useless, through his omitting to take reasonable precaution in forming his judgment, he is not entitled to recover anything for his plans, specifications or estimates made for the work (*t*); but this is a dangerous ground of defence, it being a question for the jury whether the work done was of *any* use or value to the defendant (*u*). It is frequently better to pay the sum demanded (as agreed) and afterwards bring a cross-action for the negligence and want of due care and skill. Where in making the valuation the surveyor acts as an appraiser within the meaning of 46 Geo. 3, c. 43, and 8 & 9 Vict. c. 76, by which latter an annual duty of two pounds is imposed, he cannot recover his charges unless duly licensed as an appraiser or as an auctioneer (*x*) or house agent (*y*).

Customary Fee.

"The customary fee for estimating dilapidations is five per cent. upon the estimate, but not less than two guineas, exclusive of travelling expenses, time in going to distant parts, and ultimate trouble. An umpire sometimes charges five guineas a day" (*z*).

(*r*) *Upsdell* v. *Stewart*, Peake, 193; 3 R. R. 685.

(*s*) *Chapman* v. *De Tastet*, 2 Stark. 291; 19 R. R. 625; *Maltby* v. *Christie*, 1 Esp. 340.

(*t*) *Moneypenny* v. *Hartland*, 1 C. & P. 352; 2 Id. 378; *Whitty* v. *Ld. Dillon*, 2 F. & F. 67.

(*u*) *Farnsworth* v. *Garrard*, 1 Camp. 38; 10 R. R. 624; *Braccy* v. *Carter*, 12 A. & E. 373.

(*x*) *Palk* v. *Force*, 12 Q. B. 660.

(*y*) 24 & 25 Vict. c. 21.

(*z*) Tarbuck's Handbook of House Property, 2nd ed., p. 85 (A.D. 1880).

# CHAPTER XVII.

## ORDINARY PARTICULAR COVENANTS.


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## SECT. 1.—*Insurance against Fire.*

### (a) *Liability in case of Fire.*

Accidental Fire.

Building Act, s. 86.

AT common law tenants were not answerable to their landlords for accidental or negligent burning, and by the Building Act, 14 Geo. 3, c. 78, s. 86, no action may be maintained against any person in whose house, any fire shall *accidentally begin*, nor shall any recompense be made by such person for any damage suffered thereby; provided "that no contract or agreement made between landlord and tenant shall be hereby defeated or made void." This enactment is not, like the greater part of the statute in which it is contained, of a local and personal nature, or confined to the metropolis, but extends to the whole kingdom (*a*). It does not apply where the fire is lighted intentionally, and mischief results to a neighbour: nor where the fire is produced by negligence (*b*), nor will it affect any express covenant or agreement to repair, &c., because of the proviso above mentioned.

### (b) *Covenant to Insure.*

Usual Form of Covenant to Insure, &c.

Leases of premises comprising houses or other buildings, frequently contain a covenant on the part of the lessee, to insure the demised buildings to the full value, or some proportion thereof, or to not less than a fixed amount, in an insurance office to be approved by the lessor, either in the joint names of the lessor and lessee, or in the name of the lessor or of the lessee; and

(*a*) *Ex parte Goreley, In re Barker*, 34 L. J., Bkt. 1; 10 Jur., N. S. 1085. See also *Filliter* v. *Phippard*, 11 Q. B. 355.

(*b*) *Filliter* v. *Phippard*, 11 Q. B. 355; *Vaughan* v. *Taff Vale R. Co.* (in error), 5 H. & N. 679.

*Covenant to Insure.*

to keep the same so insured during the term: and to produce the policy and show the receipt for the premium for the current year to the lessor or his agent on request (*c*); and to lay out and expend all insurance monies received in rebuilding or repairing the demised premises as may be necessary. Usually it is further stipulated that if the insurance monies received prove insufficient, the tenant is to make up the deficiency out of his own money—a stipulation rather severe upon the tenant, especially in the cases where the landlord nominates the insurance office—and sometimes that if the tenant omit to insure, the landlord may do it, and recover the amount paid, by distress or otherwise, as for rent in arrear, a stipulation which, looking to the very great loss against which insurance is intended to provide, and the very slight amount of the premium for insurance, appears quite reasonable.

Policy of Insurance is Contract of Indemnity.

*Darrell* v. *Tibbits.*

A policy of fire insurance is a contract of indemnity, and upon payment of the amount of loss, the insurer is entitled to be put into the place of the assured. If, therefore, a landlord insure against a loss (such as by explosion covered by a covenant of the tenant to repair containing an exception for fire only), and the demised premises being damaged by gas, the tenant reinstates them in pursuance of the covenant, the insurers can recover the insurance money back from the landlord (*d*).

14 Geo. 3, c. 78, s. 83.

Laying out of Insurance Money in Rebuilding.

The 83rd section of the Building Act, 14 Geo. 3, c. 78, provides for the application of insurance money to rebuilding as follows :—

In order to deter ill-minded persons from wilfully setting their house or houses or other buildings on fire, with a view of gaining to themselves the insurance money, whereby the lives and fortunes of many families may be lost or endangered, Be it enacted that it shall and may be lawful to and for the respective governors or directors of the several insurance offices for insuring houses or other buildings against fire, and they are hereby authorized and required *upon the request of any person or persons interested in or entitled unto* any house or houses or other building which may be burnt down, demolished or damaged by fire, or (without such request) upon any grounds of suspicion that the owner or owners, occupier or occupiers, or any person or persons who shall have insured such house or houses or other buildings, shall have been guilty of fraud, or of wilfully setting their house or houses or other buildings on fire, to cause the insurance money to be laid out and expended, as far as the same will go, towards rebuilding, reinstating or repairing such house or houses or other buildings so burnt down, demolished or damaged by fire; unless the party or parties claiming such insurance money shall within sixty days next after his, her or their claim is adjusted, give a sufficient security to the governors or directors of such insurance office, that the same insurance money shall be laid out and expended as aforesaid; or unless the said insurance money shall be, in that time, settled and disposed of, to and

(*c*) *Penniall* v. *Harborne*, 11 Q. B. 368. 50 L. J., Q. B. 33; 42 L. T. 797; 29 W. R. 66—C. A.

(*d*) *Darrell* v. *Tibbits*, 5 Q. B. D. 560;

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amongst all the contending parties, to the satisfaction and approbation of such governors or directors of such insurance office respectively.

Laying out Insurance Money in Rebuilding.

This enactment is still in force (*e*). It is not limited to the metropolitan district, but is applicable to the whole kingdom (*f*). To entitle a landlord or other owner to the benefit of it, he must make a distinct request to the insurance office to apply the policy money in rebuilding, before they have settled with the tenant insuring; and in no case is the landlord or owner entitled to rebuild himself and claim the policy money (*g*). His remedy appears to be by a mandamus, after a sufficient request and refusal (*g*). A tenant seems to be clearly included in the words "person interested" (*h*). A tenant from year to year insuring is not limited in his claim on the insurance company to the extent of his interest in the property insured (*g*). Trade fixtures put up by a tenant and removable by him are not within the words "houses or other buildings," as used in this section (*i*). A purchaser of property insured for does not, by the mere fact of purchase, acquire a right to the insurance monies (*k*). And where a fire policy has been assigned, the insurers, in the absence of express contract to do so, are not bound upon the application of the assignee to pay him upon the policy (*l*).

Covenant to Insure runs with Land.

The covenant to insure seems to be a covenant that runs with the land (*m*).

Under a covenant to insure in such office as the lessor or his assigns should direct, an assignee of the reversion cannot take advantage of a direction given by the lessor before assignment, which had not been obeyed, so as to work a forfeiture after the assignment, the lessee not having had notice of the assignment nor any direction from the assignee (*n*).

Breach of Covenant to Insure is committed by failure to Insure for ever so short a Time.

Where a lessee has covenanted to insure and keep insured the buildings demised, or any part thereof, it will be a breach of the covenant if he permit them to remain uninsured, although it be only for a short period of time, and no fire or damage happen. Thus, where a lessee covenanted to keep premises insured, and omitted to pay the premium till after the expiration of fifteen days beyond the year, but at the end of the month he paid the premium, which was accepted by the company, as reviving the insurance from the former year; it was held, that the covenant was broken, the premises

(*e*) 18 & 19 Vict. c. 122, s. 109.

(*f*) *Ex parte Goreley, In re Barker*, 34 L. J., Bkt. 1; 10 Jur., N. S. 1085.

(*g*) *Simpson* v. *Scottish Union Insurance Co.*, 1 H. & M. 618; 32 L. J., Ch. 329.

(*h*) See ante, 438, where the effect of the enactment upon the rule of *Leeds* v. *Cheetham*, 1 Sim. 146, is noticed.

(*i*) *Ex parte Goreley, In re Barker*, supra.

(*k*) *Poole* v. *Adams*, 33 L. J., Ch. 639; 12 W. R. 683.

(*l*) *London Investment Co.* v. *Montefiore*, 9 L. T. 588.

(*m*) See *Vernon* v. *Smith*, 5 B. & A. at p. 9, per Best, J. And see ante, 174; 24 R. R. 527.

(*n*) *Crane* v. *Batten*, 2 Com. L. R. 1696; 23 L. J., Q. B. 220.

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having in fact remained uninsured from the expiration of the fifteen days to the time the premium was paid (*o*). But where a lessee, having covenanted to keep 800*l.* insured on the premises, effected an insurance containing a memorandum, that in case of the death of the insured the policy might be continued to his personal representative, provided an indorsement to that effect was made upon it within three months after his death, and died, and an indorsement continuing the policy to his personal representative was made after the expiration of the three months, it was held to be no breach of the covenant to insure (*p*). Where a lessee covenants to insure and keep insured the buildings demised, and to deposit the policy with the lessor, the covenant does not mean that he is to effect one policy and keep that policy on foot, but that the premises shall always be kept insured by one policy or another: and it is a breach if they are uninsured at any one time, and a continuing breach for any portion of the time they are uninsured (*q*).

Objection to Title for Non-insurance.

A purchaser of a leasehold may object to the vendor's title on the ground that he has incurred a forfeiture by omitting for the space of a month to pay the annual premium of insurance pursuant to his covenant, although it does not appear that the lessor has taken advantage of the forfeiture (*r*). But a defect of this sort may sometimes be provided against by a special condition of sale (*s*).

Continuing Breach.

*Doe* v. *Gladwin.*

The breach of a covenant to insure is a continuing breach. Where there was a covenant to insure and continue insured the premises in the joint names of the lessor and the lessee, but the lessee effected an insurance in his own name alone, and showed the policy to the lessor, who approved of it, and afterwards accepted rent; it was held, that there was a continuing breach of the covenant, and that the acceptance of rent waived the previous breaches only (*t*). A breach of covenant is committed if the lessee covenants to insure the buildings from time to time and at all times, and leaves a part uninsured for two months after the execution of the lease, or even less (*u*); although the greater part of the premises were already insured at the requisite amount by a policy expiring at the end of two months, and on its expiration a new policy was effected covering all the premises, which were then insured at the stipulated amount (*v*). So, where there was a covenant by the tenant to insure in the names

(*o*) *Doe* d. *Pitt* v. *Shewin*, 3 Camp. 134; *Wilson* v. *Wilson*, 14 C. B. 616; 23 L. J., C. P. 137; *Doe* d. *Darlington* v. *Ulph*, 13 Q. B. 204; 18 Id. 106.

(*p*) *Doe* d. *Pitt* v. *Laming*, 4 Camp. 73.

(*q*) *Doe* d. *Flower* v. *Peck*, 1 B. & A. 428; *Hyde* v. *Watts*, 12 M. & W. 254; 1 D. & L. 479; *Doe* d. *Baker* v. *Jones*, 5 Exch. 498; Cole Ejec. 429.

(*r*) *Wilson* v. *Wilson*, 14 C. B. 616; *Palmer* v. *Gosen*, 25 L. J., Ch. 841.

(*s*) *Howell* v. *Kightley*, 8 De Gex, M. & G. 325; 25 L. J., Ch. 864.

(*t*) *Doe* d. *Muston* v. *Gladwin*, 6 Q. B. 953; Cole Ejec. 429.

(*u*) *Penniall* v. *Harborne*, 11 Q. B. 368; *Doe* d. *Darlington* v. *Ulph*, 13 Q. B. 204; 18 L. J., Q. B. 106.

(*v*) *Penniall* v. *Harborne*, supra.

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of three lessors and the insurance was made in their names jointly with the tenant, it was held a breach of the covenant (*x*). Where the lessee was to insure, with a proviso that if he did not the lessor might, it was held, that the lessor could not recover in ejectment for a forfeiture, if by his conduct he had led the lessee to believe the premises were insured by himself (*y*).

Action against Sub-lessee.

Where the performance of a covenant to insure in a sub-lease did not necessarily include a performance of the corresponding covenant in the original lease, and the premises were uninsured, and the original lessor entered for breach of the covenant to insure, and there was no general covenant in the sub-lease to indemnify against the covenants in the original lease, the lessee failed to recover against the sub-lessee damages for the term which he had lost by the non-insurance (*z*).

Relief against Forfeiture for Non-insurance.

Relief against forfeiture for non-insurance, formerly provided for by the Law of Property Amendment Act, 1859, 22 & 23 Vict. c. 35, sects. 4, 5, 6, and 9, and s. 2 of the Common Law Procedure Act, 1860, is now regulated by s. 14 of the Conveyancing Act, 1881 (set out ante, Chap. VIII., Sect. 6 (b)), which repeals the above sections, and also sects. 7 and 8 of the Act of 1859, by which the lessor obtained the benefit of an informal insurance, and the purchaser of a lease was protected from forfeiture for non-insurance.

## SECT. 2.—*Not to Assign or Sub-let without Licence.*

### (a) *Covenants and Conditions against.*

Such Covenants not common and usual.

*Church* v. *Brown.*

It seems to be settled, although there were some early decisions to the contrary (*a*), that under an agreement for a lease "with common and usual covenants" the lessor is not entitled to have a covenant inserted not to assign or sub-let without his licence (*b*). Even an agreement for a lease to contain a covenant not to sub-let and to hold on other covenants of a ground lease which contained a proviso for re-entry on breach of covenants generally, but did not contain a covenant not to sub-let, has been held not to entitle the lessor to a proviso for re-entry on breach of the covenant not to sub-let (*c*).

Whether Licence must be in writing.

A covenant or proviso that the lessee shall not set, let, or assign over the whole or part of the premises without leave in *writing*, will

(*x*) See note (*v*) on p. 693.

(*y*) *Doe* d. *Pitman* v. *Sutton*, 9 C. & P. 706; Cole Ejec. 430.

(*z*) *Logan* v. *Hall*, 4 C. B. 598.

(*a*) *Morgan* v. *Slaughter*, 1 Esp. 8; 5 R. R. 715; *Folkingham* v. *Croft*, 3 Anst. 700; 4 R. R. 844; and see *Haberdashers' Co.* v. *Isaac*, 3 Jur., N. S. 611, Wood, V.-C.

(*b*) *Hampshire* v. *Wickens*, 7 Ch. D. 555, and 129, ante; *Church* v. *Brown*, 15 Ves. 258, 271: 10 R. R. 74.

(*c*) *Crawley* v. *Price*, L. R., 10 Q. B. 302; 33 L. T. 203; 23 W. R. 874.

not be affected by an *oral* licence to let part (*d*). But the licence need not be in writing, unless that be expressly required by the terms of the lease; and if when a written licence is necessary, the lessor gives a parol licence on purpose to ensnare the lessee (and that can be proved), a court of equity will relieve on the ground of fraud (*e*), this being an exception to the general rule (*f*). Where lessees, holding with a covenant not to assign without written consent, sold their interest to a person who entered with the consent of the lessor, but never took a formal assignment, it was held that no breach of the covenant had been committed (*g*).

Vendor must procure Licence.

If the vendor of a lease, in which there is a covenant not to assign without licence, contract to assign his interest, it is incumbent on him, and not on the purchaser, to procure the lessor's licence for the assignment (*h*); although he seems not to be bound to take legal proceedings to obtain it (*i*). Where A. assigned to B. a lease of a farm from C., which contained a covenant not to assign without C.'s consent, and B. agreed to assign the lease to D.'s nominee, D. to pay the expenses of the assignment and 180*l.* on a certain day for the improvements and manure; to take the crops at a valuation, and to have immediate possession; it was held, that to support an action on this agreement, B. must show that he had obtained C.'s consent to the assignment, though D. had taken possession of the premises, had cut down the crops, and had paid part of the 180*l.* to B. (*k*).

Agreement for Sub-lease.

Where in an agreement for a sub-lease it was provided that the sub-lease should contain the like conditions and stipulations as were contained in the original lease, and the original lease contained a covenant not to assign without the lessor's consent, it was held that the sub-lessor's consent was the consent to be required (*l*).

"Running with Land."

The covenant not to assign or sub-let without licence seems to run with the land, so as to be binding on the assigns of the lessee (*m*).

(*d*) *Roe* d. *Gregson* v. *Harrison*, 2 T. R. 425; 1 R. R. 513.

(*e*) *Richardson* v. *Evans*, 3 Mad. 218.

(*f*) See *Hill* v. *Barclay*, 18 Ves. 56; 11 R. R. 147.

(*g*) *West* v. *Dobb*, L. R., 5 Q. B. 450; 39 L. J., Q. B. 190; 23 L. T. 76; 18 W. R. 1167 (Ex. Ch.).

(*h*) *Lloyd* v. *Crispe*, 5 Taunt. 249; 14 R. R. 744; *Mason* v. *Corder*, 7 Taunt. 9; 17 R. R. 427; *Barker* v. *Banks*, 2 F. & F. 213; *Davis* v. *Nisbett*, 10 C. B., N. S. 752; 31 L. J., C. P. 6.

As to payment of rent upon an agreement for sub-lease, see *Brook* v. *Fletcher*, 37 L. T. 100.

(*i*) *Lehmann* v. *M'Arthur*, L. R., 3 Ch. 496; 16 L. T. 196; 15 W. R. 551.

(*k*) *Mason* v. *Corder*, 7 Taunt. 9; 17 R. R. 427.

(*l*) *Williamson* v. *Williamson*, L. R., 9 Ch. 729; 43 L. J., Ch. 738; 31 L. T. 291, C. A.; approved and distinguished in *Haywood* v. *Silber*, 30 Ch. D. 404; 54 L. T. 108; 34 W. R. 104, C. A., in which it was held that on a contract for a sub-lease, to contain all usual covenants, including a covenant not to assign without the consent of the sub-lessor, together with the covenants in the original lease (one of which was that the lessee would not assign without the consent of the lessors), the sub-lessee was bound to submit to the insertion of a covenant not to assign without the head-lessor's consent,—so that two consents would have to be required.

(*m*) *Williams* v. *Earle*, L. R., 3 Q. B. 739; 37 L. J., Q. B. 231. But see *West*

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### (b) *Licence to Assign or Sub-let.*

*Dumpor's case.*

The unreasonable doctrine of *Dumpor's case*, that a licence to assign or sub-let operated as a total waiver of the condition against assigning, or sub-letting, such condition being considered as an entire thing, not capable of being waived or released as to part only (*n*), was never overruled. It was, however, abrogated by the Law of Property Amendment Act, 1859, 22 & 23 Vict. c. 35, which, it will be observed, applies to all kinds of licence. By sect. 1 of this act—

22 & 23 Vict. c. 35, s. 1.
Licence to Assign or Sub-let extends only to Permission actually given.

Where any licence to do any act which without such licence would create a forfeiture, or give a right to re-enter, under a condition or power reserved in any lease heretofore granted or to be hereafter granted, shall at any time after the passing of this act be given to any lessee or his assigns, every such licence shall, unless otherwise expressed, extend only to the permission actually given, or to any specific breach of any proviso or covenant made or to be made, or to the actual assignment, underlease, or other matter thereby specifically authorized to be done, but not so as to prevent any proceeding for any subsequent breach (unless otherwise specified in such licence); and all rights under covenants and powers of forfeiture and re-entry in the lease contained shall remain in full force and virtue, and shall be available as against any subsequent breach of covenant or condition, assignment, under-lease, or other matter not specifically authorized or made dispunishable by such licence, in the same manner as if no such licence had been given; and the condition or right of re-entry shall be and remain in all respects as if such licence had not been given, except in respect of the particular matter authorized to be done.

For the extension of the principle of this enactment to waiver, see Act of 1860, s. 6, p. 703, post. The 2nd section of the Act of 1859 provides that a licence given to one co-lessee to assign or under-let part only of the demised property is to operate as a licence to such co-lessee only, and is as follows :—

Licence as to part to one Co-lessee, is not Licence to other Co-lessees.

Where in any lease heretofore granted or to be hereafter granted there is or shall be a power or condition of re-entry on assigning or under-letting or doing any other specified act without licence, and a licence at any time after the passing of this act shall be given to one of several lessees or co-owners to assign or under-let part only of the property, or to do any other such act as aforesaid in respect of part only of such property, such licence shall not operate to destroy or extinguish the right of re-entry in case of any breach of the covenant or condition by the co-lessee or co-lessees, or owner or owners, of the other shares or interests, in the property, or by the lessee or owner of the rest of the property (as the case may be), over or in respect of such shares or interests or remaining property, but such right of re-entry shall remain in full force over or in respect of the shares or interest or property not the subject of such licence.

v. *Dobb*, L. R., 4 Q. B. 634, and 175, ante, as to whether assigns are bound *if not named*. As to leases after Conv. Act, 1881, see s. 58 of that Act, p. 177, ante.

(*n*) *Dumpor's case*, 4 Co. R. 119 b; 1 Smith, L. C.

This section has not much operation in practice. The effect of a severance of the term is stated at p. 275, ante.

Qualified Form of Covenant not to Assign.

In recent times the covenant frequently takes the qualified form that the lessees will not assign without the consent of the lessor, "such consent not to be unreasonably withheld."

"Arbitrary" refusal of Consent. *Treloar* v. *Bigge.*

Where the covenant was not to assign without consent, "such consent not being arbitrarily withheld," it was held, that the effect of these words was not to give the lessee a right of action for an arbitrary refusal of consent, but merely to allow him, in case of an arbitrary refusal, to assign without consent. And in the same case the majority of the court intimated that a refusal grounded on an expectation that the property would be required by a public body under the Lands Clauses Consolidation Act was not arbitrary (*o*).

Assignment to Corporation.

In a subsequent case, where the qualification was, that the consent was not to be "unreasonably refused, or refused to a person of responsibility and respectability," the court held that under the circumstances the lessors were justified in refusing consent to an assignment of a lease to a corporation for objects other than those for which the lease had been granted (*p*).

Stipulation against withholding consent to Assignment to responsible Tenant. *Hyde* v. *Warden.*

It has been said too, that where, as it very commonly does, the lease stipulates that consent shall not be withheld from an assignment or under-lease to a respectable and responsible tenant, and an assignee or under-lessee is in fact respectable and responsible, there is no breach by an assignment or under-lease without consent obtained (*q*), or even without consent asked (*r*). But the Court of Appeal was of the contrary opinion in the carefully considered case of *Barrow* v. *Isaacs*, in which a landlord ejected a tenant for forfeiture in sub-letting to a tenant of undeniable respectability (*s*).

Refusal because lessor desires possession. *Bates* v. *Donaldson.*

The withholding of a licence which was "not to be unreasonably withheld in the case of any respectable or responsible person who might be the proposed assignee" was held in *Bates* v. *Donaldson* (*t*) to be unreasonable where it was caused by the desire of the lessee to obtain possession of the premises for himself.

Where the consent is not to be withheld, except on reasonable objection, it has been said, that if the rent be large, strong reason

(*o*) *Treloar* v. *Bigge*, L. R., 9 Ex. 151; 43 L. J., Ex. 95; 22 W. R. 843; followed with approval by Hall, V.-C., in *Scar* v. *House Property and Investment Society*, 16 Ch. D. 387; 50 L. J., Ch. 77; 43 L. T. 531; 29 W. R. 192, in which the words were "but such consent not to be unreasonably withheld."

(*p*) *Harrison* v. *Barrow-in-Furness Corporation*, 63 L. T. 834; 39 W. R. 250, per Romer, J.

(*q*) *Hyde* v. *Warden*, 3 Ex. D. at p. 81—C. A.

(*r*) Per Huddleston, B., in *Burford* v. *Unwin*, C. & E. 494.

(*s*) *Barrow* v. *Isaacs*, [1891] 1 Q. B. 417; 60 L. J., Q. B. 179; 64 L. T. 686; 39 W. R. 338—C. A.

(*t*) *Bates* v. *Donaldson*, [1896] 2 Q. B. 241; 65 L. J., Q. B. 578; 74 L. T. 651; 44 W. R. 659; 60 J. P. 596—C. A.

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should be shown for the refusal, in view of the heavy burden of rent upon the lessee (*u*).

Pecuniary Consideration for Licence.

The very serious question whether a pecuniary consideration can be required for the licence does not appear to have been considered by the courts, nor does the risk of such consideration being required appear to have been expressly guarded against in the precedents of conveyancers. It is believed that a consideration is very seldom required in practice, but the question whether it is to be requirable is not one which ought to be left in uncertainty when the lease is being settled. Upon the covenant as framed in the unqualified form, it is conceived that the requirement of a pecuniary consideration for the licence is perfectly legal, although it might perhaps be argued that only a reasonable, and not a prohibitory, consideration can be required (*v*).

Prohibition of Fine for Licence, by Conv. Act, 1892, Sect. 3.

Now, however, the requirement of a fine is in ordinary cases practically prohibited by s. 3 of the Conveyancing, &c., Act, 1892, 55 & 56 Vict. c. 13, which is as follows:—

> In all leases containing a covenant, condition, or agreement against assigning, under-letting, or parting with the possession, or disposing of the land or property leased without licence or consent, such covenant, condition, or agreement shall, *unless the lease contains an express provision to the contrary*, be deemed to be subject to a proviso to the effect that no fine or sum of money in the nature of a fine shall be payable for or in respect of such licence or consent; but this proviso shall not preclude the right to require the payment of a reasonable sum in respect of any legal or other expense incurred in relation to such licence or consent.

Is this Prohibition Retrospective?

It is conceived that this section is not retrospective, so as to apply to leases made before the passing of the Act, i.e., before the 20th June, 1892. The general rule is that statutes have not a retrospective operation (*x*); there appears to be nothing in the section to take it out of the general rule, and the analogy of ss. 10—12 of the Conveyancing Act, 1881 (ante, p. 267), with which the Act of 1892 is to be read, points in favour of a prospective operation only.

"Fine" does not include money required to be deposited as security.

*Cosh's Contract, In re.*

The words "fine, or sum of money in the nature of a fine," mean money which is to go irrevocably into the pocket of the lessor, and do not include money deposited as security for the performance of an agreement and repayable by the lessor on agreement performed. This was held by the Court of Appeal in *Cosh's Contract, In re* (*y*), where the lease was a building one granted under a building contract relating also to other property than that demised, and containing an

(*u*) *Shephcard* v. *Hong Kong, &c. Corporation*, 20 W. R. 459, per Malins, V.-C.

(*v*) See *Hilton* v. *Tipper*, 18 L. T. 626; 16 W. R. 888.

The words "such consent not being arbitrarily withheld," or like words, are now frequently inserted, and it is conceived that they exclude a pecuniary consideration.

(*x*) See Hardcastle on Statutes, 2nd ed., at p. 370, citing *Reid* v. *Reid*, 31 Ch. D. 408, and other cases.

(*y*) *Cosh's Contract, In re*, [1897] 1 Ch. 9; 66 L. J., Ch. 28; 75 L. T. 365; 45 W. R. 117—C. A., affirming Stirling, J

absolute covenant not to assign without licence, which licence the lessors refused unless the lessee would deposit with them 200*l.* as a further security for the performance by him of the unperformed part of the building contract (*z*).

### (c) *Breach of Covenant not to Assign, &c.*

Breach by a Lease amounting to an Assignment.

A covenant not to *assign* without licence is broken upon the execution by the lessee (without licence) of any deed whereby he parts with the demised premises *for the whole of the residue of his term;* although such deed purports to be merely a lease or sub-lease for an equal or longer term, at a different rent, payable to himself, and contains other and different covenants and stipulations than those in the original lease (*a*).

Nature of Assignment.

In order that an assignment shall create a forfeiture, the instrument must be valid and effectual in point of law and not void as an act of bankruptcy (*b*).

Advertisement.

An advertisement to sub-let or assign is not a breach of contract, if no actual sub-lease or assignment be made (*c*).

Sub-lease.

A covenant not to assign or otherwise part with the premises, or any part thereof, for the whole *or any part of the term*, is broken by a sub-lease (*d*); but a covenant "not to assign, transfer, set over, or otherwise do or put away the lease or premises," is not (*e*).

Covenant against Sub-letting restrains Assignment.

A covenant against sub-letting will restrain an assignment (*f*).

Letting Lodgings.

Letting lodgings has been held not to be a breach of a covenant not "to grant any under-lease for any term whatsoever, or let, assign, transfer, set over, or otherwise part with" without the licence of the lessor; for "the covenant," said Lord Ellenborough, "can only extend to such under-letting as a licence might be expected to be applied for; and whoever heard of a licence from a landlord to take in a lodger?" (*g*). But the same learned judge ruled otherwise where the covenant was not to let the premises, or any part thereof (*h*), and the ruling itself has been questioned in a later case (*i*), where land was suffered to be occupied by more persons than one. On principle it would seem that if the covenant be not

(*z*) See note (*y*) on p. 698.

(*a*) Ante, Chap. VII., Sect. 4.

(*b*) *Doe* d. *Lloyd* v. *Powell*, 5 B. & C. 308; 2 Y. & J. 372; 4 L. J., K. B. 159; 29 R. R. 253.

(*c*) *Gourlay* v. *Duke of Somerset*, 1 V. & B. 68; 13 R. R. 234.

(*d*) *Doe* d. *Holland* v. *Worsley*, 1 Camp. 20; 6 R. R. 303.

(*e*) *Crusoe* d. *Bleneowe* v. *Bugby*, 2 W. Blac. 766; 3 Wils. 234; *Kinnersley* v. *Orpe*, 1 Doug. 55; *Church* v. *Brown*, 15 Ves. 258; 10 R. R. 74.

(*f*) *Greenway* v. *Adams*, 12 Ves. 395.

(*g*) *Doe* d. *Pitt* v. *Laming*, 4 Camp. 77; 15 R. R. 728. As to whether letting lodgings is a "trade," see 706, post.

(*h*) *Roe* v. *Sales*, 1 M. & S. 297.

(*i*) *Greenslade* v. *Tapscott*, 1 Cr., M. & R. 59, per Parke, B. Both in *Pitt* v. *Laming* and *Roe* v. *Sales* exclusive possession was granted.

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to sub-let the premises or any *part*, the letting lodgings would be a breach, otherwise not.

Permission to use, given by Lessee remaining in possession.

So long as the lessee remains in possession, he may permit another person to use the demised premises without committing a breach of a covenant "not to assign, under-let or part with the possession of the demised premises" (*k*).

Equitable Mortgage by Deposit of Lease.

A covenant "not to alien, sell, assign, transfer, set over or otherwise part with the lease or premises" was ruled, before the Judicature Act, not to be broken by a deposit of the lease as a security for a loan (*l*); and there appears to be some authority for saying that section 24 of that act has not effected any alteration of the law in this respect (*ll*).

Assignment by operation of Law—no breach.

An assignment by operation of law, and not by the voluntary and immediate act of the party, as where leasehold premises are assigned to a railway company under the compulsory powers of their act (*m*), is no breach of a covenant against alienation.

Taking Lease in Execution.

A lease taken in execution on a warrant of attorney to confess a judgment given by the lessee, is not a forfeiture of the lease under a covenant by such lessee "not to let, set, assign, transfer, make over, barter, exchange, or otherwise part with the indenture," &c., for there is a distinction between those acts which a party does voluntarily, and those which pass in invitum (*n*); but where it was found by verdict, that the tenant gave such a warrant of attorney to a creditor for the express purpose of enabling such creditor to take the lease in execution under the judgment, it was held to be in fraud of the covenant; and the landlord, under the clause of re-entry, recovered the premises in ejectment from a purchaser under the sheriff's sale (*o*). Where a lease contained a clause of re-entry, in case the term should be extended or taken in execution, and the sheriff entered the premises during the term, under a writ of extent against the lessee at the suit of the crown, held an inquisition, and seized the lessee's interest into the King's hands; it was held, that this was a taking in execution within the latter clause of the proviso, and therefore that the term was forfeited (*p*).

Bankruptcy of Lessee.

Where the lessee becomes a bankrupt, the operation of the Bankruptcy Law, by which the property becomes vested in the trustees

(*k*) *Peebles* v. *Crosthwaite*, 13 T. L. R. 198—C. A.

(*l*) *Doe* d. *Pitt* v. *Hogg*, 4 D. & R. 226; 1 C. & P. 160, per Abbott, C.J., whose ruling was upheld by the court. As to effect of equitable mortgage of lease, see *Moores* v. *Choat*, 8 Sim. 508, and ante, 275.

(*ll*) See Foa on Landlord and Tenant, 2nd ed. at p. 208, citing *Joseph* v. *Lyons*, 15 Q. B. D. 280—C. A.

(*m*) *Slipper* v. *Tottenham and Hampstead Junction R. Co.*, L. R., 4 Eq. 112, 114; 36 L. J., Ch. 841. And see *Baily* v. *De Crespigny*, L. R., 4 Q. B. 180.

(*n*) *Doe* d. *Mitchinson* v. *Carter*, 8 T. R. 57; *Croft* v. *Lumley*, 6 H. L. Cas. 672; 27 L. J., Q. B. 321.

(*o*) *Doe* d. *Mitchinson* v. *Carter*, 8 T. R. 300; 4 R. R. 586.

(*p*) *Rex* v. *Topping*, M'Clel. & Y. 544; 29 R. R. 539.

in bankruptcy, does not create a breach of the contract against alienation without licence (*q*); and what is more, the trustees in bankruptcy have a right to assign the lease over (*r*). But a lease may be made subject to a proviso for re-entry by the lessor, in the event of the lessee becoming bankrupt; and such proviso is valid as against his trustee (*s*).

Marriage of Lessee.

The marriage of a female lessee was no breach of a condition against alienation (*t*), even before the Married Women's Property Act, 1882.

Bequest of the Term.

Whether a bequest of the term (to any other person than the lessee's executor) is a breach of the covenant not to assign without licence is a point not precisely determined by authority. Where the lessee, having covenanted "not to assign over the term without the lessor's consent first had in writing," bequeathed the term without any such consent obtained, it was held not to be such an assignment as was a breach of the covenant (*u*). And in a later case, Bayley, J., treated it as settled that "a devise of the term by the lessee is not a breach of the covenant not to assign" (*x*). But the contrary has no doubt been held (*y*). On principle it would seem that the opinion of Bayley, J., is correct: that assignment and such like words apply only to transfer *inter vivos;* and that if the lessor desire to exclude a specific devise of the term, he must do so by express words (*z*). In any event the whole estate of the lessee is liable for breaches of covenant, &c.

Assignment by one Partner to another. *Varley* v. *Coppard.*

If two partners be assignees of a lease containing a covenant not to assign without licence, it is a breach of this covenant for one of them to assign all his interest to the other, and such an assignment is not authorized by the original licence to the lessee to assign to the two (*a*); but where there was a lease to two partners as joint tenants, with a covenant not to assign or part with possession without consent of the lessor, and upon dissolution one of the partners remained in sole possession, intending to take an assignment which was not in fact executed, it was held that there was no breach of the covenant (*b*).

(*q*) *Wadham* v. *Marlow*, 1 H. Blac. 438, n.; 8 East, 314, n.; 4 Doug. 54; 9 R. R. 456.

(*r*) *Doe* d. *Goodbehere* v. *Bevan*, 3 M. & S. 353, 360, 361; 16 R. R. 293.

(*s*) *Roe* d. *Hunter* v. *Galliers*, 2 T. R. 133; 1 R. R. 455. See Chap. VII., Sect. 11.

(*t*) *Anon.*, Moor, 21.

(*u*) *Fox* v. *Swann*, Style, 483.

(*x*) *Doe* d. *Goodbehere* v. *Bevan*, 3 M. & S. 353; 16 R. R. 293. In *Doe* d. *Evans* v. *Evans*, 8 A. & E. 719, the point was argued on one side only (that the bequest was a breach), and the court abstained from saying anything about it.

(*y*) See Bac. Abr. tit. *Leases*, p. 886; *Berry* v. *Taunton*, Cro. Eliz. 331; *Dumper* v. *Syms*, Id. 815, and other cases cited, Cole Ejec. 437.

(*z*) In *Lloyd* v. *Crispe*, 5 Taunt. 549; 14 R. R. 744, express words *allowed* a specific devise.

(*a*) *Varley* v. *Coppard*, L. R., 7 C. P. 505; 26 L. T. 882; 20 W. R. 972.

(*b*) *Corporation of Bristol* v. *Westcott*, 12 Ch. D. 461; 41 L. T. 117; 27 W. R.

CH. XVII. s. 2.
*Covenant not to Assign or Sub-let.*

Evidence of Assignment.

Where the covenant was, not to assign the whole or any part of the lands demised without the lessor's consent, and the lessor entered into part himself, and then the lessee assigned; it was held to be a breach of the covenant, notwithstanding the lessor's entry (*c*). Suffering, without consent, persons to use portions of the land for the purpose of raising a potato crop, is a breach of the stipulation not to suffer any part of the land to be occupied by any other person without the consent of the landlord, although it be proved to be the custom of the country for farmers to pursue that course (*d*). It was at one time held, that where there is a right of re-entry upon assignment or sub-letting, if a person be found on the premises appearing as tenant, it is primâ facie evidence of a sub-letting, and that the defendant must show, whether the person was a tenant or merely a servant (*e*); but it has since been decided that it is not sufficient to prove the defendant, a stranger, in possession of the demised premises, and his declaration that they were demised to him by another stranger, even if the tenant had covenanted not to part with the possession (*f*).

Measure of Damages for Breach of Covenant.

*Lepla* v. *Rogers.*

There is but little authority on the measure of damages. In a case (*g*), where the assignment was an assignment over by an assignee, it was laid down that the measure is such a sum as will, as far as money can, put the plaintiff in the same position as if he had still the defendant's liability, instead of the liability of another of inferior pecuniary ability, for breaches both past and future, but there did not seem to be any special damage in that case. Recently, however, in *Lepla* v. *Rogers* (*h*), where the lessee sub-let the demised premises to a person who intended, as he knew, to use them and did use them as a turpentine distillery, with the result that they were damaged by fire arising from such user, Hawkins, J., held that the loss caused by the fire was the natural result of the breach of a covenant not to assign or sub-let without consent of the lessor, such consent not to be unreasonably or capriciously withheld to a responsible assignee or sub-tenant, so as to be recoverable as damages, and laid down that for such loss to be recoverable, it was not necessary that it should be the inevitable result of the breach of covenant.

841, C. A., affirming decision of Bacon, V.-C. The consent of the lessor had been stipulated for between the partners on dissolution, but had not in fact been applied for.

(*c*) *Collins* v. *Sillye*, Style, 265.

(*d*) *Greenslade* v. *Tapscott*, 1 C., M. & R. 55.

(*e*) *Doe* d. *Hindley* v. *Rickarby*, 5 Esp. 4.

(*f*) *Doe* v. *Payne*, 1 Stark. R. 86; 18 R. R. 747. As to the effect of Declarations by Occupiers, see Cole Ejec. 232.

(*g*) *Williams* v. *Earle*, L. R., 3 Q. B. 730, and p. 174, ante.

(*h*) *Lepla* v. *Rogers*, [1893] 1 Q. B. 31; 68 L. T. 584; 5 R. 57.

(d) *Forfeiture, and Waiver of Forfeiture.*

The lease commonly provides for a forfeiture in case of the breach of the covenant against alienation, and such forfeiture is expressly excepted from the relief grantable under sect. 14 of the Conveyancing Act (ante, Chap. VIII., Sect. 6 (b) ). We have already seen in what case a forfeiture is saved by an assignment to a respectable tenant (ante, p. 697).

No relief against Forfeiture.

Where a forfeiture has been incurred by breach of a covenant against alienation, the receipt of rent which becomes due at a later period will amount to a waiver of the forfeiture, if the lessor then knows of the breach (*i*). In an ejectment for breach of a condition not to sub-let, it was proved that the plaintiff asked the defendant what he would take for his land, and on the defendant naming a price said, "Then let it, and I shall know what it will produce next year." It was held, that this was a waiver of the forfeiture, for breach of such condition (*k*).

By Acceptance of subsequent Rent.

We have already seen (ante, p. 696) that a licence to assign or sub-let extends only, by virtue of s. 1 of the Law of Property Amendment Act, 1859, to the permission actually given. The principle of that enactment is extended to waiver by s. 6 of the Law of Property Amendment Act, 1860, 23 & 24 Vict. c. 38, as follows:—

Restriction on effect of Waiver of Forfeiture.

> Where any actual waiver of the benefit of any covenant or condition in any lease, on the part of any lessor, or his heirs, executors, administrators or assigns, shall be proved to have taken place after the passing of this act in any one particular instance, such actual waiver shall not be assumed or deemed to extend to any instance or any breach of covenant or condition, other than that to which such waiver shall specially relate, nor to be a general waiver of the benefit of any such covenant or condition, unless an intention to that effect shall appear.

Inasmuch as before this enactment a lessor who had a right of re-entry on the breach of a covenant not to sub-let, did not, by waiving his right on one sub-letting, lose his right to re-enter on a subsequent sub-letting (*l*), it appears to have declared rather than altered the law.

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Sect. 3.—*For Residence on the Premises.*

Effect of Covenant to reside.

A covenant by the lessee to reside constantly upon the demised premises, is sometimes inserted in leases, especially in agricultural leases, and a lease for so long as the lessee continues to occupy

(*i*) *Roe* v. *Harrison*, 2 T. R. 425; 1 R. R. 513; *Harvie* v. *Oswel*, Cro. Eliz. 572; *Goodright* d. *Walter* v. *Davids*, Cowp. 803.

(*k*) *Doe* d. *Henniker* v. *Watts*, 8 B. & C. 308.

(*l*) *Doe* d. *Boscawen* v. *Bliss*, 4 Taunt. 735; *Doe* d. *Bryan* v. *Bancks*, 4 B. & A. at p. 408; 23 R. R. at p. 323.

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becomes forfeited upon his ceasing to occupy (*m*). Such a covenant has been recognized as a fair and proper covenant (*n*); but it certainly is not a common covenant or condition, except in agricultural leases. It runs with the land into whosesoever hands it comes; and is therefore binding upon assigns, although they be not mentioned (*o*).

## SECT. 4.—*Against Particular User.*

Object of Covenant against particular Trades.

In leases of houses in towns a covenant is frequently inserted, to restrain the lessee from carrying on or permitting or suffering the premises to be used for carrying on obnoxious trades. The real object in all these cases is to prevent the lowering of the tenement in the scale of houses, by the exercise, whether wholly or partially, of those trades which, in the judgment of the lessor, are likely to [be a nuisance to the neighbourhood, or to] prevent tenants from afterwards taking the premises, and consequently depreciate their value at a future period (*p*).

Covenants against Trade run with the Land.

Such covenants affect the occupier of the demised premises and run with the land so as to bind "assigns" not therein mentioned (*q*), or at all events so as to bind in equity assigns who have actual or constructive notice of them (*r*). But a covenant by the lessor not to build a public-house within half a mile of the demised premises does not run with the land, and cannot be sued on by assignees of the lease (*s*). Any such covenant must be fortified by a proviso for re-entry, otherwise the breach of it will not support an ejectment, but only an action for damages (*t*), or claim for a writ of injunction (*u*).

How far "usual covenants."

Covenants in restraint of trade in a trading locality are not generally considered usual covenants (*x*); but whether they are so or not is a question of fact, and where the defendant agreed to purchase the lease of a public-house described as held "under common and usual covenants," and the lease was found to contain a proviso for re-entry upon any business but that of a publican being carried on, the plaintiff succeeded in enforcing the agreement upon evidence that the proviso for re-entry was inserted in at least

(*m*) *Doe* d. *Lockwood* v. *Clarke*, 8 East, 185; 3 R. R. 430; see also *Doe* d. *Duke of Norfolk* v. *Hawke*, 2 East, 481.

(*n*) *Ponsonby* v. *Adams*, 2 Bro. P. C. 431.

(*o*) *Tatem* v. *Chaplin*, 2 H. Blac. 133; 3 R. R. 360; *Sewell*, app., *Taylor*, resp., 7 C. B., N. S. 160. See ante, 173.

(*p*) See *Gaskell* v. *Spry*, 1 B. & A. 619; 19 R. R. 404.

(*q*) *Wilkinson* v. *Rogers*, 2 De Gex, J. & S. 62; 12 W. R. 119, 284.

(*r*) *Jay* v. *Richardson*, 30 Beav. 563; *Wilson* v. *Hart*, L. R. 1 Ch. App. 463; 13 W. R. 988; *Catt* v. *Tourle*, L. R., 4 Ch. App. 654; 38 L. J., Ch. 655.

(*s*) *Thomas* v. *Hayward*, L. R., 4 Ex. 311; 38 L. J., Ex. 175; 20 L. T. 814.

(*t*) Cole Ejec. 432.

(*u*) See *Wilson* v. *Hart* and *Catt* v. *Tourle*, supra.

(*x*) *Wilbraham* v. *Livesey*, 18 Beav. 206; *Probert* v. *Parker*, 3 Myl. & K. 280, and see 128, ante.

six out of ten leases of public-houses (*y*). A person agreed to take land for ninety years at a certain rent, and to build glass-houses, and *not to use* the premises for any other purpose than a glass manufactory; it was held, that this agreement did not warrant the insertion of a covenant in the lease, compelling the tenant *to carry on* the business of a glass manufacturer during the whole term (*z*). A promise cannot be implied, from the mere fact of a lessee having entered into an agreement for a sub-tenancy, that he had power to let "without restriction as to the purposes for which the premises should be used" (*a*).

Illegal Trades.

A lease made for the express purpose of using the premises to boil oil and tar, contrary to the provisions of the Building Act (25 Geo. 3, c. 77), was held void, though the intended use of the premises was not mentioned in the lease (*b*). So where a house is knowingly let or assigned for the purposes of a brothel, although it contains an express covenant not to use it as a brothel (*c*). Where A. procured B. to grant him a lease of premises, by means of a false representation that he intended to carry on a certain lawful trade therein, and having obtained possession, converted the premises into a common brothel, whereupon B. forcibly expelled him; it was held, that A. might maintain ejectment: the fraudulent misrepresentation and the subsequent illegal use of the premises not being sufficient at law to avoid the lease (*d*).

Advertisements.

The erection of wooden hoardings for the purpose of advertisement is a breach of a covenant not to "erect or make any building or erection on any part of the demised premises" (*e*); but the exhibition of a large advertisement across the front of the demised premises is not a breach of a covenant not to do anything which may grow to the injury, annoyance, disturbance or inconvenience of the landlord (*f*).

Covenant for Private House.

The putting up of a blind in a window with the words "A. B. Coal Office," is a breach of a covenant to use the house as a private dwelling-house only (*g*), and putting up a similar blind or brass plate is a breach of covenant not "to affix any outward mark or show of business" (*h*). The covenant to use as a private dwelling-house only is also broken by the erection of a studio "with necessary

(*y*) *Bennett* v. *Womack*, 3 C. & P. 96; 7 B. & C. 627; 6 L. J., K. B. 175; 31 R. R. 270.

(*z*) *Doe* d. *Marquis of Bute* v. *Guest*, 15 M. & W. 160.

(*a*) *Jackson* v. *Cobbin*, 8 M. & W. 790; 1 Dowl., N. S. 96.

(*b*) *Gaslight Co.* v. *Turner*, 5 Bing. N. C. 666; 6 Id. 324.

(*c*) *Smith* v. *White*, L. R., 1 Eq. 626; 35 L. J., Ch. 454.

(*d*) *Feret* v. *Hill*, 15 C. B. 207; and see E., B. & E. 814, 815.

(*e*) *Pocock* v. *Gilham*, C. & E. 104, per Mathew, J.

(*f*) *Our Boys' Clothing Co.* v. *Holborn Viaduct Land Co.*, 12 T. L. R. 344, per Romer, J.

(*g*) *Wilkinson* v. *Rogers*, 12 W. R. 119, per Romilly, M.R.; and see post, 708.

(*h*) *Evans* v. *Davis*, 10 Ch. D. 747; 48 L. J., Ch. 223; 39 L. T. 391; 27 W. R. 285.

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rooms connected therewith" in the garden (*i*), but not by a sale by auction of the furniture of the house (*k*).

A covenant that no buildings except dwelling-houses shall be built on land, has been held broken by the erection of a wall (*l*), but not by the erection of a stable with a bedroom over it (*m*).

Occupation of Shop during business hours only.

Though the letting be merely for a day-time occupation, there is no liability upon the landlord to guard the premises during the night. This was ruled by Cave, J., in a case where a shop in an arcade was let for occupation during the business hours only, of a jeweller tenant, and thieves broke in during the night and stole jewellery (*n*), and the principle of the ruling would seem to apply however unprotected the demised premises may be.

Lodging-house.

We have seen (ante, 699) to what extent the letting of lodgings is a breach of a covenant not to sub-let; it does not seem to be settled by any case how far such a letting is a breach of a covenant not to exercise a business, &c., but it is submitted that although much may often depend on the wording of a covenant and the particular facts, the majority of covenants against business, &c., would be so construed to bar the letting of lodgings as ordinarily carried on.

Lessee bound by restrictive Covenants of Lessor.

*Fielden* v. *Slater.*

"Constructive notice" may bind the lessee by the restrictive covenants of his lessor, although he has no actual knowledge of them. Thus, where a house was granted to B. in fee, and A. covenanted with the grantor that he would not use it "as an inn, public-house, or tap-room, or for the sale of spirituous liquors or beer," and afterwards demised the house to B., who sold wine and spirits in bottle as a grocer, it was held, that though B. had no knowledge of A.'s covenant with the grantor he was put upon inquiry, was fixed with constructive notice of the covenant, and could be restrained by injunction from selling *spirits* (*o*). And in one case Jessel, M.R., went so far as to say that even an express representation by a lessor that there were no restrictive covenants affecting the demised property would not do away with the effect of "constructive notice" (*p*).

Sub-lessee bound by Restrictive Covenants of Head Landlord.

On similar principles, it has been held that a sub-lessee is bound by the restrictive covenants entered into by a head landlord when he purchased the freehold, although neither the mesne landlord nor the sub-lessee has actual notice of them (*q*); but the sub-lessee is

(*i*) *Patman* v. *Harland*, 17 Ch. D. 353; 50 L. J., Ch. 642; 44 L. T. 728; 29 W. R. 707, per Jessel, M.R., who said however that "a fair and reasonable adjunct" might be erected.

(*k*) *Reeves* v. *Cattell*, 24 W. R. 485.

(*l*) *Bowes* v. *Law*, L. R., 9 Eq. 636; 39 L. J., Ch. 433; 22 L. T. 267; 18 W. R. 640. (Damages only awarded, as no substantial injury.)

(*m*) *Russell* v. *Baber*, 18 W. R. 1021.

(*n*) *Espir* v. *Todd*, 1 C. & E. 154.

(*o*) *Fielden* v. *Slater*, L. R., 7 Eq. 523; 38 L. J., Ch. 379; 20 L. T. 112; 17 W. R. 485.

(*p*) *Patman* v. *Harland*, 17 Ch. D. at p. 356. See also *Nicoll* v. *Jenning*, 30 W. R. 95.

(*q*) *Thornewell* v. *Johnson*, 50 L. J., Ch. 641; 44 L. T. 768.

not bound to take active steps to compel the enforcement of a restrictive covenant, as was held in *Hall* v. *Ewin* (*r*), which has been already noticed.

Restrictive Covenant as to one of a block of houses.

In *Spicer* v. *Martin* (*s*), Spicer had acquired the fee of a block of houses in Cromwell Road from the Exhibition Commissioners by conveyances containing covenants by him to use the houses as private dwelling-houses only. He let one of the houses to Martin by a long lease containing a similar restrictive covenant, after informing Martin that the other houses were let by leases containing (as the fact was) similar restrictive covenants. Martin, being informed that the other houses were about to be sold by Spicer for an hotel, sued Spicer and the intending purchasers, and the House of Lords held that he could restrain Spicer from authorizing any of the houses being used for the purposes of trade (*s*).

*Spicer* v. *Martin.*

Covenant against Trade of Butcher.

A covenant in a lease, that the lessee shall not exercise the trade of a butcher upon the premises, is broken by selling there raw meat by retail, although no beasts are slaughtered (*t*). So a covenant not to carry on the business of a pork-butcher on the demised premises, nor to use them for the sale of pork, is broken by the exposure there of carcases of pigs for sale, although such carcases are cut up and contracts for the sale thereof completed elsewhere in the neighbourhood (*u*).

School.

Where a lessee of a house and garden covenanted with the lessor not to use or exercise, or permit or suffer to be used or exercised, upon the demised premises, or any part thereof, any trade or business whatsoever, &c., without the licence of the lessor, &c., and afterwards, without the licence of the lessor, assigned the lease to a schoolmaster, who carried on his business in the house and premises; it was held that such assignment was a breach of the covenant (*x*). But a school has been held not to be a nuisance within the meaning of a general covenant against nuisances (*y*). A covenant not to carry on "any public business" in a house, but that it should "be used solely as a private dwelling-house," is broken by using it as a day-school and dancing academy, notwithstanding that the next-door neighbours make no complaints (*z*), and in *German* v. *Chapman* (*a*) it was held by the Court of Appeal that a

*German* v. *Chapman.*

(*r*) *Hall* v. *Ewin*, 37 Ch. D. 74, and 277, ante.

(*s*) *Spicer* v. *Martin*, 14 App. Cas. 12; 58 L. J., Ch. 589; 60 L. T. 546; 37 W. R. 689, affirming 34 Ch. D. 1—C. A., and approving principles defined by Hall, V.-C., in *Renals* v. *Cowlishaw*, 9 Ch. D. at p. 129; and applied in *Hudson* v. *Cripps*, [1896] 1 Ch. 265, and p. 728, post.

(*t*) *Doe* v. *Spry*, 1 B. & A. 617.

(*u*) *Doe* v. *Elsam*, Moo. & M. 189.

(*x*) *Doe* d. *Bish* v. *Keeling*, 1 M. & S. 95; 14 R. R. 405; *Kemp* v. *Sober*, 1 Sim., N. S. 517.

(*y*) *Harrison* v. *Good*, L. R., 11 Eq. 338; 40 L. J., Ch. 294; 24 L. T. 263; 19 W. R. 346.

(*z*) *Wickenden* v. *Webster*, 6 E. & B. 387; *Johnstone* v. *Hall*, 3 K. & J. 414; 25 L. J., Ch. 462.

(*a*) *German* v. *Chapman*, 7 Ch. D. 271; 47 L. J., Ch. 250; 37 L. T. 685; 26 W. R. 149—C. A., reversing decision of Bacon, V.-C., 37 L. T. 265.

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covenant—of even date with a conveyance of sale—that no building to be erected on the four acre plot of land sold "should be used or occupied otherwise than as a private residence only, and not for any purpose of trade" was broken by the erection of a boarding-school large enough to accommodate 100 girls, but supported by voluntary contributions, being an "Institution for the Education of the Daughters of Missionaries." *Rolls* v. *Miller* (*b*), in which the words were "trade or business," is to the like effect.

*Rolls* v. *Miller.*

Hospital.

A hospital, the patients of which make small payments according to their means, is a "business" within a covenant by lessee "not to carry on any trade, business or dealing whatsoever, or anything of the nature thereof" upon the demised premises (*c*). This was held in a case where the hospital was a "throat and chest" hospital, and the covenant also contained the words, "or suffer any act or thing which may be or grow to the annoyance, damage, injury, prejudice, or inconvenience of the neighbouring premises," upon which words also there was held to have been a breach of the covenant, so that the case might be supported on another ground. In another case the covenant was not to carry on the business of a tallow-chandler and other special business, or any other noisome or offensive business, or suffer anything which should grow to the annoyance, nuisance, grievance, or damage of the lessor or the inhabitants of the neighbouring houses, and a hospital for the treatment of diseases of the nose, ear, skin, eye, fistula, and other diseases was held to come within these words (*d*), on the express ground that the question depended on the construction of the latter part of the covenant, and that "annoyance" had a wider meaning than nuisance. In the same case it was held that pecuniary damage need not be made out, and that the words "neighbouring houses" were not confined to houses on the lessor's own estate (*e*).

User of House for Hospital.

The user of a house for an hospital association, established without a view to profit, to provide accommodation for patients able and willing to pay for it, is an infringement of a covenant not to use the house for the exercise "or carrying on of any art, trade or business, occupation or calling" (*f*).

Shop.

*Wilkinson* v. *Rogers.*

In *Wilkinson* v. *Rogers* a lease of a house contained a covenant to use the house as a private dwelling-house only, provided that if any

(*b*) *Rolls* v. *Miller*, 27 Ch. D. 71; 53 L. J., Ch. 682; 50 L. T. 597; 32 W. R. 806—C. A. (Home for Working Girls).

And see *Hobson* v. *Tulloch*, [1898] 1 Ch. 424: 67 L. J., Ch. 205; 46 W. R. 331 (user as boarding-house for scholars attending school in neighbourhood kept by owner of house held to convert house from "private residence" to business of boarding-house), per Romer, J.

(*c*) *Bramwell* v. *Lacy*, 10 Ch. D. 691; 48 L. J., Ch. 339; 40 L. T. 361; 27 W. R. 463.

(*d*) *Todheatly* v. *Benham*, 59 L. T. 28; 36 W. R. 688, per Kekewich, J. (injunction not to be enforced for 6 months); aff. by C. A., 40 Ch. D. 88; (only 14 days further allowed).

(*e*) Ib. in C. A.

(*f*) *Portman* v. *Home Hospitals Association*, 27 Ch. D. 81, n.; 50 L. T. 599, per Jessel, M.R.

adjoining house of the lessor should be "converted into a shop," the lessee might convert the demised premises to a similar use. The lessee used the house as a coal office and set up as a defence that an adjoining house had been used for the exhibition of photographs, but without structural alteration. Romilly, M.R., granted an injunction, being of opinion that structural alteration was essential to conversion into a shop so as to bring the proviso into force (*g*). The Court of Appeal dissolved it on the ground that no substantial injury was being done, but expressed the opinion that a house might without breach of covenant be converted into a shop by mere user as such without structural alteration (*h*).

"Offensive Trade."

A lease containing a covenant not to carry on certain specified trades or businesses, or "any offensive trade," is not forfeited by using the premises as a private lunatic asylum (*i*), or for the business of a licensed victualler (*k*), or for the deposit of lucifer matches (*l*).

"Business."

Payment by inmates to the lessee is not essential to constitute a business; nor does payment necessarily make that a business which without payment would not be a business (*m*).

Retail of Beer, Wine, &c.

Carrying on the business of a "retail brewer" has been held to be no breach of a covenant not to carry on the business of a common brewer or retailer of beer (*n*). More recently, a covenant made in 1854 not to use the trade or calling of a seller by retail of "wine, beer, spirits, or spirituous liquors," was held not to be broken—or at any rate broken so far as to justify an injunction (*o*)—by the sale of wine and spirits in bottle by a grocer, under an act passed in 1861 (24 & 25 Vict. c. 21), on the ground that, at the time the covenant was made, this would not have been a selling by retail (*p*). But in a still more recent case the lessee of a theatre at Stratford bought in 1880 land adjoining the theatre which was subject to a covenant that the trade of an inn-keeper, victualler, or retailer of wine, spirits, or beer should not be carried on there. On this land he erected a building which afforded convenient egress from the theatre, but on each floor of which he set up a counter for selling wine, spirits and beer. The counter could not be approached from the outside, but any person who paid for admittance to a play at the theatre could purchase refreshments thereat. The lessee of the theatre was restrained, at the suit of purchasers of other lots

(*g*) *Wilkinson* v. *Rogers*, 12 W. R. 119.

(*h*) *Wilkinson* v. *Rogers*, 2 De G., J. & S. 62; 12 W. R. 284.

(*i*) *Doe* d. *Wetherell* v. *Bird*, 6 C. & P. 195; 2 A. & E. 161.

(*k*) *Jones* v. *Thorne*, 1 B. & C. 715.

(*l*) *Hickman* v. *Isaacs*, 4 L. T. 285. Here the words were "noisome or offensive."

(*m*) *Rolls* v. *Miller*, 27 Ch. D. 71, ante, note (*b*).

(*n*) *Simons* v. *Farren*, 1 Bing. N. C. 126, 272.

(*o*) See per Cotton, L.J., in *Buckle* v. *Fredericks*, infra.

(*p*) *Jones* v. *Bone*, L. R., 9 Eq. 674; 39 L. J., Ch. 405; 23 L. T. 304; 18 W. R. 489; distinguishing *Fielden* v. *Slater*, supra, 706. See also *Pease* v. *Coats*, L. R., 2 Eq. 688.

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Retail of Beer, W and Spirits—*cont.*

bought from the same vendors (*q*); and though the case is not strictly one on the relationship of landlord and tenant, it has a strong indirect bearing upon that relationship, and was followed in a landlord and tenant case in which the tenant covenanted not to use the demised premises as a coffee house, and carried on a business mainly consisting of the sale of tea and coffee in packets as groceries, but consisting also of the sale of cups of tea and coffee, with bread and butter, eggs, sandwiches, and pork pies, to be consumed on the premises (*r*).

Application of Beer Acts, &c., to Licences prior thereto.

It is expressly provided by statute that any covenant in a lease "between any landlord and tenant" against the trade of a victualler or publican being carried on "in any house mentioned or comprised" in the lease, or against the house being used as a "public-house or ale-house," shall apply to every person licensed to sell beer or cider under the Beer Act, 1830, 11 Geo. 4 & 1 W. 4, c. 64, s. 31, and likewise to every person licensed to sell wine *to be consumed on the premises* under the Refreshment Houses Act, 1860, 23 & 24 Vict. c. 27, s. 44.

"Vintner."

The expression "vintner" in such a covenant has been held to apply to a person selling wine not to be drunk on the premises (*s*).

Beer-shop.

A covenant not to use a house as a *beer-shop* or public-house has been held to be broken by the sale of beer *not to be drunk on the premises* (*t*), to which kind of sale, however, a covenant not

Beer-house.

to use a house as a *beer-house* had previously been held not to extend (*u*), and has also subsequently been held not to extend (*x*). In construing a covenant not to carry on any offensive trade or business on premises demised, much will depend on the situation of the premises: and it is particularly worthy of consideration, whether such trade as that complained of was carried on there at the time of the demise; for if it were, it could scarcely be thought to come within the covenant (*y*).

Club.

The sale of wines, &c., in a working man's club to its members, where the rules provide for the purchase of liquor and its distribution amongst members at fixed prices for consumption on the premises, is not a breach of a covenant that the premises shall not be used for the sale of wines, malt or spirituous liquors (*z*). The

(*q*) *Buckle* v. *Fredericks*, 44 Ch. D. 244; 62 L. T. 884; 38 W. R. 742—C. A.

(*r*) *Fitz* v. *Iles*, [1893] 1 Ch. 77; 62 L. J., Ch. 258; 68 L. T. 108; 2 R. 132—C. A.

(*s*) *Wells* v. *Attenborough*, 24 L. T. 312.

(*t*) *St. Albans* (*Bishop of*) v. *Battersby*, 3 Q. B. D. 359; 47 L. J., Q. B. 571; 38 L. T. 685; 26 W. R. 678; affirmed in *London and Suburban Co.* v. *Field*, C. A., 16 Ch. D. 645; 44 L. T. 444.

(*u*) *London and North Western R. Co.*, v. *Garnett*, L. R., 9 Eq. 26; 39 L. J., Ch. 25; 21 L. T. 352; 18 W. R. 246.

(*x*) *Holt* v. *Collyer*, 16 Ch. D. 718; 50 L. J., Ch. 311; 44 L. T. 211; 29 W. R. 502, per Fry, J.

(*y*) *Gutteridge* v. *Maynard*, 7 C. & P. 129, per Tindal, C.J.

(*z*) *Ranken* v. *Hunt*, 10 R. 249.

playing of "chemin de fer" in a club is a breach of an agreement by a lessee "not to permit games of baccarat, hazard, or roulette to be played on the premises, but to use the same as a private club only, and so to carry on the club as not to contravene any laws of the land for the time being in force (*a*). A covenant not to use otherwise than as a private club is broken by advertised boxing entertainments (*b*).

Business of "Ladies' Outfitting."

A covenant not to carry on the business of a "ladies' outfitter" would not be broken by carrying on a business in the course of which some of the articles the sale of which constitutes part of the business of a "ladies' outfitter" would be sold (*c*).

Waiver of Forfeiture.

If a lessee exercise a trade upon the demised premises, by which his lease is forfeited, the landlord does not, by merely lying by and witnessing the act for six years, waive the forfeiture, some positive act of waiver being necessary; but if he permit the tenant to expend money in improvements to adapt them to that trade, it would be evidence for the jury of his consent to their being so used (*d*). If rent be received for twenty years, with full knowledge of the breach of covenant, and without any objection, a licence *under seal* may be presumed and found by the jury (*e*). Where there is a covenant against carrying on a particular trade without a written licence, the mere fact of the lessor's suffering the tenant to carry on one trade on the premises will not afterwards authorize his carrying on another without a written licence (*f*).

Continuing Breach.

A covenant not to carry on or suffer upon the demised premises during the term any specified trades or businesses, or any trade or business whatever, is a covenant of a *continuing nature*, and broken from day to day so long as any prohibited trade or business is carried on (*g*), but where a plumber was found to be in occupation of the demised premises, and the landlord had received two quarters' rent with knowledge of the occupation, it was said that the waiver by receipt of rent must be taken to extend to some *term*, and that the plumber must be supposed to have had at least a tenancy from year to year, so that an ejectment could not be sustained (*h*).

(*a*) *Fairtlough* v. *Whitmore*, 64 L. J., Ch. 386; 72 L. T. 354; 43 W. R. 421; 13 R. 402, per Stirling, J.

(*b*) *Seaward* v. *Paterson*, 13 T. L. R. 525, per North, J.

(*c*) *Stuart* v. *Diplock*, 43 Ch. D. 343; 59 L. J., Ch. 142; 62 L. T. 333; 38 W. R. 223—C. A.

(*d*) *Doe* d. *Sheppard* v. *Allen*, 3 Taunt. 78; *Doe* d. *Boscawen* v. *Bliss*, 4 Taunt. 735; *Doe* d. *Bryan* v. *Bancks*, 4 B. & A. 401; 23 R. R. 318.

(*e*) *Gibson* v. *Doeg*, 2 H. & N. 615; 27 L. J., Ex. 37; *Bridges* v. *Longman*, 24 Beav. 27.

(*f*) *Macher* v. *Foundling Hospital*, 1 V. & B. 188; 23 & 24 Vict. c. 38, s. 6.

(*g*) *Doe* d. *Ambler* v. *Woodbridge*, 9 B. & C. 376; Cole Ejec. 433.

(*h*) *Griffin* v. *Tomkins*, 42 L. T. 459; see *Walrond* v. *Hawkins*, L. R., 10 C. P. 42, ante, 345 (*a*), for the ratio decidendi of this case.

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A covenant by a landlord of an eating-house not to let any house in the same street as the demised premises "for the purpose of carrying on the business of an eating-house" will not be construed to oblige the landlord to enforce a covenant by the lessee of an adjoining house not to carry on any business without the consent of the lessor, unless it be shown that the adjoining house was let with the intention of allowing the prohibited business to be carried on (*i*).

Covenant by Landlord not to let Adjoining House for similar Trade.

*Kemp* v. *Bird.*

Sale by Auction.

*Toleman* v. *Portbury.*

A lease of a house in a town not unfrequently contains a covenant that the lessee will not permit a sale by auction therein without the consent of the lessor. Such a covenant was held broken where the lessee gave a bill of sale on his goods, with power to the grantee to sell by auction in default of payment, although the lessee had mortgaged the house by a sub-lease, and executed a general assignment for the benefit of his creditors (*k*). A covenant to use a house as a private house only is not broken by a sale by auction of the furniture (*l*).

Erection of Screen.

The erection of a permanent wooden trellis-work screen is a breach of the lessee's covenant not to erect any building except a stable or coach-house, and also a breach of a covenant not to do anything which might be an annoyance to a tenant of the lessor (*m*).

## SECT. 5.—*For Particular User.*

Stipulation in Farming Agreement to keep Farm Stocked.

A stipulation by a tenant to keep on a farm a proper and sufficient stock of sheep, horses, and cattle will not be enforced by injunction (*n*), common covenants in husbandry not being the subject of equitable jurisdiction (*o*), unless some single act in violation of them be committed, as if a tenant remove hay which he is bound to consume on the premises (*p*).

Covenant to Work Mines.

An agreement to work a mine as long as it is "fairly workable," does not oblige the tenant to work it at a dead loss (*q*), nor does a covenant to "get the demised clay to the fullest practicable extent consistent with the means of sale of bricks and tiles to be derived therefrom," although a means of sale at an unremunerative rate might be found (*r*), but an agreement to work "in the most proper and effective manner" is broken by a cessation from working, although the dead rent be paid (*s*). "Coal seams workable as coal

(*i*) *Kemp* v. *Bird*, 5 Ch. D. 974; 46 L. J., Ch. 828; 37 L. T. 53; 25 W. R. 838—C. A.

(*k*) *Toleman* v. *Portbury*, L. R., 7 Q. B. 344; 41 L. J., Q. B. 98; 26 L. T. 292; 20 W. R. 441—Ex. Ch.

(*l*) *Reeves* v. *Cattell*, 24 W. R. 485.

(*m*) *Wood* v. *Cooper*, [1894] 3 Ch. 671; 63 L. J., Ch. 845; 71 L. T. 222; 43 W. R. 201; 8 R. 517, per Romer, J.

(*n*) See *Rayner* v. *Stone*, 2 Eden, 128.

(*o*) *Phipps* v. *Jackson*, 56 L. J., Ch. 550; 35 W. R. 378, per Stirling, J.

(*p*) See *Phipps* v. *Jackson*, supra.

(*q*) *Jones* v. *Shears*, 7 C. & P. 346.

(*r*) *Newton* v. *Nock*, 43 L. T. 197, per Denman, J.

(*s*) *Kinsman* v. *Jackson*, 42 L. T. 80, affirmed Ib. 558. The dictum of Malins, V.-C., in *Wheatley* v. *Brymbo Coal Co.*, L. R., 9 Eq. 538, that it is enough if the dead rent be paid, would seem not to be law. See per Jessel, M.R., 42 L. T. 558.

Covenant to Work Mines —*contd.*

seams," means workable at a profit, including the coal and fire clay, &c., to which the tenant is entitled (*t*). Where lessees of mines entered into an absolute unqualified covenant to get 2,000 tons of rock salt in each year during the continuance of the term, or pay for the deficiency: held, that they were liable, whether the salt could be got easily or with difficulty, and that whether it existed at all was immaterial (*u*). So, where lessees of a mine had covenanted with all reasonable diligence to sink the shafts down to the salt: held, that they were bound to do so, although it might be an unreasonable application of time and labour (*x*). So, where the lessees of a mine covenanted to work it during the continuance of the term in a proper and workmanlike manner, it was held, that they must be taken to have covenanted to work the mine *in some way*, in as prudent and proper a manner as they could under the circumstances, and therefore had no right to abandon the works altogether, notwithstanding that the mine was drowned by an influx of brine, which rendered it impossible to work the mine at a profit (*x*). A lessee of iron mines covenanted to work them, unless prevented by accident or want of materials, or unless the ironstone should be insufficient in quantity or quality, or would not by itself, or with a proper mixture or process, make good common pig-iron. It was held, that the mixture intended was not necessarily of ingredients procurable on the demised premises (*y*). In another case, there was a demise of all mines which had been, or during the demise should be, discovered or open under certain lands, and there was a covenant by the lessee that he would work the said mines in a proper and workmanlike manner; and it was held, that no action lay on the covenant if the mines had never been worked either before or since the demise (*z*). On the construction of a proviso that the lease should be void if the tenant ceased working at any time for two years, it was held, that a fraudulent working for a short time would not prevent a forfeiture (*a*).

Public-house Covenants.
To keep Hous Open.

Where a lessee covenanted to use his utmost endeavours to continue the house open as a public-house, and the licence was taken away by the magistrates on account of the disorderly conduct of a sub-tenant, and was not renewed for six years, when the lease expired; it was held, that the covenant was broken, because the lessee had done no act to endeavour to get the licence renewed (*b*). But there is no implied covenant by the lessee of a public-house

(*t*) *Carr* v. *Benson*, L. R., 3 Ch. 524; 18 L. T. 696; 16 W. R. 744.
(*u*) *Jervis* v. *Tomkinson*, 1 H. & N. 195; 26 L. J., Ex. 41.
(*x*) *Jervis* v. *Tomkinson*, 1 H. & N. 195; 26 L. J., Ex. 41.
(*y*) *Foley* v. *Addenbrooke*, 13 M. & W. 174.
(*z*) *Quarrington* v. *Arthur*, 10 M. & W. 335.
(*a*) *Doe* d. *Bryan* v. *Bancks*, 4 B. & A. 401; Gow, 220; 23 R. R. 318.
(*b*) *Linder* v. *Prior*, 8 C. & P. 518.

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that he will do no act whereby the licence shall become forfeited (*c*). Even an express covenant that the lessee would do no act which could or might "affect, lessen, or make void" the licence was held not to be broken by a conviction of the lessee which might have been but was not recorded on his licence under the Licensing Acts (*d*); and a covenant so to conduct business "as to afford no ground or pretext whatever whereby the licence or licences should or might be suspended, discontinued, forfeited, or be in danger of being suspended, discontinued or forfeited" has been similarly construed under similar circumstances (*e*); but a similar covenant is broken by two recorded convictions of the lessee notwithstanding that a new occupier with a renewed licence is in possession, and such new occupier may be ejected for the breach (*f*). Moreover, an agreement not to do anything to "imperil" the licence of a beer-house has been held not to be broken by the mere absence of the licensee away at sea (*g*). A stipulation for similar covenants to those of an old lease will not, if a licence has become forfeited, entitle the intending landlord to a covenant to procure a licence, but only to a covenant for best endeavour to obtain and keep up one (*h*).

Not to affect Licence. *Wooler* v. *Knott.*

Protection of Landlord under Licensing Acts.

It may be here stated that, by sect. 56 of the Licensing Act, 1872 (35 & 36 Vict. c. 94), "where any tenant of any licensed premises is convicted of an offence" against that Act, and such offence is one the repetition of which may render the premises liable to be disqualified from receiving a licence for any period, the clerk of the peace is bound to serve notice of the conviction upon the owner of the premises. By the same section, the owner may appeal to petty sessions against a disqualification of the licensed premises on the grounds only—(1) "that the required notice has not been served;" (2) "that the tenant by whom the offence was committed held under a contract made prior to the commencement of the act, and that the owner could not legally have evicted the tenant in the interval between the commission of the offence, in respect of which the disqualifying order was made, and the receipt by him of the notice of the immediately preceding offence which on repetition renders the premises liable to be disqualified from receiving a licence at any period;" or (3) "that the offence in respect of which the disqualifying order was made occurred so soon after the receipt of such last-mentioned notice that the owner, notwithstanding he had legal power

(*c*) *Maw* v. *Hindmarsh*, 28 L. T. 644.

(*d*) *Wooler* v. *Knott*, 1 Ex. D. 265; 45 L. J., Ex. 313; 34 L. T. 362; 24 W. R. 1004—C. A. And see *Bryant* v. *Hancock & Co.*, L. T. for Ap. 2, 1898, at p. 503, and Addenda, p. lxxvii, ante—C. A.

(*e*) *Fleetwood* v. *Hull*, 37 W. R. 714; and p. 174, ante, per Charles, J.

(*f*) *Harmann* v. *Powell*, 60 L. J., Q. B. 628; 65 L. T. 255.

(*g*) *Moore* v. *Robinson*, 48 L. J., Q. B. 156, per Lush, J.

(*h*) *Shephcard* v. *Walker*, 34 L. T. 230.

to evict the tenant, could not with reasonable diligence have exercised that power in the interval which occurred between the said notice and the second offence." Moreover, by sect. 15 of the Licensing Act, 1874 (37 & 38 Vict. c. 49), a temporary authority may be obtained by or on behalf of the landlord of licensed premises to carry on the business in case of the licence of the tenant being declared forfeited on conviction of felony, or of certain offences against the licensing acts therein mentioned.

Temporary Authority for Landlord to Sell.

In *Croft* v. *Lumley*, a lease of the Opera House contained a covenant on the part of the lessee not to use the house for any but purposes of a theatrical kind, and "to use his best endeavours to improve" the house for that purpose. The house was closed at the end of the season of 1852, and was not opened at all during the following year. It was held by the House of Lords that this was not a breach of the covenant (*i*). And a covenant to use the demised premises "as a post-office and not for any other purpose," was held not to be broken by the issue of Inland Revenue licences under the authority of the Customs and Inland Revenue Act, 1869, 32 & 33 Vict. c. 14, s. 18 (*k*).

Theatrical Covenant. *Croft* v. *Lumley.*

Post-office.

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## Sect. 6.—*Sole Dealing with Landlord of "Tied House."*

Covenants or undertakings entered into by the lessee to deal with the lessor alone in the way of trade, or indeed any other mode of binding a party to purchase articles of particular individuals, are not favoured by the courts. The question upon the validity of such covenants has generally arisen as to leases of what are known as "tied houses" granted by brewers to publicans, to enforce which it must be proved that *good* beer—"good marketable beer" (*l*), and perhaps also such beer as the publican requires (*m*)—was supplied (*n*); and the quality cannot be shown to be good by evidence that the brewer served good beer to his other customers at the same period of time (*n*). It is, however, now clearly settled that such covenants, which are extremely common, are legal and binding in equity on an assignee, whether they run with the land or not, provided he have actual or constructive notice of them (*o*).

Contracts to deal with Lessor only.

Public-house Leases.

(*i*) *Croft* v. *Lumley*, 6 H. L. Cas. 672; 27 L. J., Q. B. 321.

(*k*) *Wadham* v. *Postmaster-General*, 24 L. T. 545. And see *Doe* v. *Churchwardens of Rugeley*, 6 Q. B. 107, where a covenant to use a house as a poor-house only, was held not to be broken by ceasing so to use it after the passing of the Poor Law Amendment Act, which compelled the non-user.

(*l*) *Luker* v. *Dennis*, 7 Ch. D. 227; 47 L. J., Ch. 174; 37 L. T. 827; 26 W. R. 167, per Fry, J.

(*m*) *Edwick* v. *Hawkes*, infra.

(*n*) *Holcombe* v. *Hewson*, 2 Camp. 391; *Cooper* v. *Twibill*, 3 Camp. 286, n.; 13 R. R. 803; *Thornton* v. *Sherratt*, 8 Taunt. 429; 20 R. R. 543.

(*o*) *Wilson* v. *Hart*, L. R., 1 Ch. 463; 35 L. J., Ch. 569; *Catt* v. *Tourle*, L. R., 4 Ch. 654, 659; 38 L. J., Ch. 654; 17 W. R. 939; *Luker* v. *Dennis*, ubi supra.

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*Sole Dealing with Landlord of "Tied House."*

The covenant to deal with the lessor only is often strengthened by an agreement by the lessor to accept a reduced rent so long as such dealing is continued (*p*). But the covenant is an absolute one, and the lessee has not the alternative of dealing with a rival brewer or other person, and paying the unreduced rent (*q*).

Reduction of Rent if Lessor only dealt with.

Buying through Agent.

The covenant is satisfied by buying through an agent of the lessee, although the lessor would have refused to sell to such agent if he had known for whom he was agent. This was held in a case where a publican employed an agent to buy of his brewer-landlord beer of a character which the brewer did not supply to publicans (*r*).

Compensation in respect of restrictive Covenant under Lands Clauses Acts.

Where a licensed public-house is taken under the Lands Clauses Consolidation Act, 1845, the brewers are entitled, by virtue of sect. 18 of that act, to compensation for the value of the premises as increased to them by such covenant (*s*). But for rating purposes, the brewery on the one hand and the licensed public-house on the other, are to be valued and rated irrespective of any such covenant (*t*).

Assignment of Reversion.

*Clegg* v. *Hands.*

Where the lessee of a public-house covenanted, for himself and his assigns, with his lessors (brewers) to take all his beer of them, *or their successors* in their said trade, and the lessors sold their trade, and the public-house, with other premises, to third persons, who removed their business to a short distance; it was held, that the trade of the lessors was determined, and that their assignee could not take advantage of the covenant, on the assignee of the lessee purchasing beer from another brewer (*u*); but in a more recent case of an assignment of a reversion of a public-house and express assignment of the benefit of a restrictive covenant by the lessee not to sell ale not bought from the lessors either alone or jointly with any future partners, it was held by the Court of Appeal that the covenant run with the reversion, and was not restricted either to assigns carrying on the same brewer's business as the lessors, or to assigns who themselves made beer; and an injunction was granted to restrain the lessee from selling beer other than such as should have been purchased from the assignees of the reversion either directly or through the original reversioners (*x*).

Sale of House held under restrictive Covenant.

Where, in the conditions of sale of a public-house, it was described as a free public-house, and the lease contained a clause of this nature, it was held, that the purchaser was not bound to complete his pur-

(*p*) See Form, Davidson's Precedents, vol. 5.

(*q*) *Hanbury* v. *Cundy*, 58 L. T. 155, per Stirling, J.

(*r*) *Edwick* v. *Hawkes*, 18 Ch. D. 199; 50 L. J., Ch. 577; 45 L. T. 168; 29 W. R. 914.

(*s*) *Bourne* v. *Mayor, &c., of Liverpool*, 33 L. J., Q. B. 15; 10 Jur., N. S. 125.

(*t*) *Overseers of Sunderland*, app., *Guardians of Sunderland Union*, resp., 18 C. B., N. S. 531; 34 L. J., C. P. 121.

(*u*) *Doe* d. *Calvert* v. *Reid*, 10 B. & C. 849.

(*x*) *Clegg* v. *Hands*, 44 Ch. D. 503; 59

chase, and might recover back his deposit, notwithstanding the lease was read over by the auctioneer at the time of sale (*y*).

Where there was a lease of limeworks, with a stipulation that the lessor should furnish, and the lessee take, coals from particular collieries; it was held, that the lessee could not, on failure by the lessor to raise the full quantity of coals, resort to other collieries for the whole of his supply, but only for the deficiency (*z*).

Purchase of Coals.

## Sect. 7.—*Re-delivery of Fixtures, Goods, Land, &c.*

Where fixtures, furniture, or other goods and chattels, are leased together with houses, it is usual to attach a schedule of them to the lease, and to insert a covenant by the lessee to re-deliver them in the same condition at the end of the term. The object in doing this is to give the lessor a remedy on the covenant (with clearer evidence) for any damage sustained by their being removed or injured during the term. Where a lessee of a coal mine had covenanted at the end of the term to yield up the works and mines and all ways and roads in good repair, order and condition, so that the works might be continued and carried on by the lessor: held, that such covenant did not include wooden sleepers, or iron tram-plates fastened to such wooden sleepers, used for the purpose of a railway or tramway from and to the mines (*a*).

Covenants to re-deliver Fixtures, &c.

Sometimes the lessor reserves the powers of taking such portions of the land demised as he may want for building or other purposes, upon giving a specified notice to the lessee, and making a proportionable abatement out of the rent (*b*). Such provisoes may be perfectly reasonable and just, and have often been recognized by the courts both of law and equity. Such a power has been extended to the whole of the land demised (*c*); where the proviso was, that the lessor might from time to time have any part of the land leased, it was held, he might require possession of the whole (*d*). In the same case it was held, as the proviso gave the lessor power to take possession, it did not operate by way of covenant merely (*d*). But in another case, where there was no such power, it was held to operate only as a covenant (*e*).

Covenants to give up Part of Land.

L. J., Ch. 477; 62 L. T. 502; 38 W. R. 433—C. A., distinguishing *Doe* v. *Reid*, supra, and *Renals* v. *Cowlishaw*, L. R., 11 Ch. D. 866, and followed in *White* v. *Southend Hotel Co.*, [1897] 1 Ch. 767; 68 L. J., Ch. 387; 76 L. T. 273; 45 W. R. 434—C. A., and in *Birmingham Breweries* v. *Jameson*, per Byrne, J., Feb. 11th, 1898: See L. T. for Feb. 19th, p. 365, and S. J. for Feb. 19th, p. 264.

(*y*) *Jones* v. *Edney*, 3 Camp. 285; 13 R. R. 803.

(*z*) *Wight* v. *Dicksons*, 1 Dow. 141.

(*a*) *Duke of Beaufort* v. *Bates*, 31 L. J., Ch. 481; 10 W. R. 200.

(*b*) See Forms, post, Appendix B.

(*c*) *Doe* d. *Wilson* v. *Abel*, 2 M. & S. 541; 15 R. R. 343.

(*d*) *Doe* d. *Gardner* v. *Kennard*, 12 Q. B. 244.

(*e*) *Doe* d. *Willson* v. *Phillips*, 2 Bing. 13; 2 L. J., C. P. 103; 27 R. R. 539.

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*For Quiet Enjoyment (Possession Essential).*

## SECT. 8.—*Covenants for Quiet Enjoyment.*

### (a) *Possession Essential.*

A tenant always has either impliedly or expressly a right to enjoy the premises during the period of tenancy; but whether the right be implied or express, possession by the tenant is essential to it, and a mere interesse termini (as to which see ante, p. 209) will not support an action for the breach of the right (*f*).

### (b) *Implied.*

Covenants in Law for Quiet Enjoyment.

All covenants between a lessor and his lessee are either express covenants, or covenants in law, that is to say, implied covenants. By a covenant in law for quiet enjoyment the lessee is to enjoy his lease against the *lawful* entry, eviction or interruption of any man, but not against tortious entries, evictions or interruptions; and the reason of the law is solid and clear, because against tortious acts the lessee has proper remedy against the wrongdoers (*g*).

Contract by Parol Demise.

A contract for quiet enjoyment is implied by law from a parol demise (*h*), but not a contract for a good title (*i*).

From "Demise."

From any words of letting.

From the word "demise" a covenant for quiet enjoyment is implied, and a covenant for good title also (*k*); and it has been said that there is no magic in the word demise, and that any words of letting will be sufficient to import a contract in law for quiet enjoyment (*l*); but the dicta are conflicting, and the weight of authority is in favour of the view that the covenant is not implied from the mere relation of landlord and tenant, but only from certain words used in creating the lease (*m*).

Not from "Give" o "Grant."

By the Real Property Act, 1845, 8 & 9 Vict. c. 106, s. 4, the word "give" or "grant" in a deed executed after the 1st October, 1845, "shall not imply any covenant in law in respect of any tenements or hereditaments, except so far as the words 'give' or 'grant' may, by force of any act of parliament, imply a covenant" (*as in railway acts, &c.*).

Nor when an express Covenant.

Any express stipulation in a lease, either for title or quiet enjoyment, however qualified or restricted, will prevent any more general stipulation on the same subject being implied by law, from the word

(*f*) *Wallis* v. *Hands*, [1893] 2 Ch. 75; 62 L. J., Ch. 586; 68 L. T. 428; 41 W. R. 471, per Chitty, J.

(*g*) *Hays* v. *Bickerstaff*, Vaugh. 118; 2 Mod. 34; *Lucy* v. *Leviston*, Freem. 103; 3 Keb. 163; *Tisdale* v. *Sir W. Essex*, Hob. 34; Platt on Covenants, 313.

(*h*) *Bandy* v. *Cartwright*, 8 Ex. 913; *Hall* v. *City of London Brewery Co.*, 31 L. J., Q. B. 257.

(*i*) *Bandy* v. *Cartwright*, supra.

(*k*) *Williams* v. *Burrell*, 1 C. B. 429; Smith, L. & T. 230 (2nd ed.).

(*l*) See per Brett, J., in *Mostyn* v. *West Mostyn, &c. Co.*, 1 C. P. D. 145.

(*m*) *Baynes* v. *Lloyd*, [1895] 2 Q. B. 610; 64 L. J., Q. B. 787; 73 L. T. 250; 14 R. 678—C. A. The "certain words" appear to be "demise," or "grant."

"demise" or any equivalent word—the maxim being *expressum facit cessare tacitum*. Where a person held under an agreement which amounted to an actual demise, subject to the same conditions as were mentioned in the memorandum under which the lessor held the premises, and it did not appear what those conditions were, it was held, that a contract for quiet enjoyment could not be implied (*n*). By writing not under seal signed by plaintiff and defendant, plaintiff agreed to take of defendant a farm at a yearly rent, "the tenancy to commence from the 29th of September next, for a term of eight years, subject to a lease," to be drawn up by defendant: held, that there was no contract by the defendant *to give the plaintiff possession* of the farm on the day named; for that possession was to be given only on the commencement of a tenancy *under a lease for eight years*, and not under that agreement, which was void as a lease under the Real Property Act, 1845, 8 & 9 Vict. c. 106, s. 3, nor under an implied tenancy at will, or from year to year, to be created by entry, or entry and payment of rent under that agreement (*o*).

Implied Contract to give Possession, &c.

Where there is an *actual demise* for one year or more, the lessor impliedly contracts to give the lessee possession at the commencement of the term, and if he fails to do so, by reason of a previous tenant wrongfully holding over, the lessee may recover damages, and is not driven to bring ejectment against the previous tenant (*p*). By agreeing to grant a lease, however, the intended lessor does not impliedly engage for a general warranty, nor undertake to deliver an abstract of his title (*q*); nor that he has a good title to the fee simple, and will deliver a written abstract (*r*); but he does impliedly promise that he has title to grant such a lease (*s*).

The implied Contract ceases when the Lessor's Estate ceases. *Adams* v. *Gibney*.

The implied covenant for quiet enjoyment ceases with the estate of the lessor, and does not necessarily continue during the whole term expressed to be granted. This was laid down decisively after examination of the old authorities in *Adams* v. *Gibney* (*t*), where tenant for life, with remainder over, demised by indenture for fifteen years, without any express covenant for quiet enjoyment, and the lessee having been evicted by the remainderman after the death of the tenant for life, but before the expiration of the term, it was held, that he could not maintain an action of covenant against the executor of the tenant for life (*u*); and the rule was firmly adhered to in

(*n*) *Messent* v. *Reynolds*, 3 C. & P. 194.

(*o*) *Drury* v. *Macnamara*, 5 E. & B. 612; *Brashier* v. *Jackson*, 6 M. & W. 549; 8 Dowl. 784.

(*p*) *Coe* v. *Clay*, 5 Bing. 440; 7 L. J., C. P. 162; 30 R. R. 699; *Jinks* v. *Edwards*, 11 Exch. 775; *Ludwell* v. *Newman*, 6 T. R. 458; 3 R. R. 231.

(*q*) *Gwillim* v. *Stone*, 3 Taunt. 433.

(*r*) *Temple* v. *Brown*, 6 Taunt. 60.

(*s*) *Stranks* v. *St. John*, L. R., 2 C. P. 376; 36 L. J., C. P. 118; *Anthony* v. *Brecon Market Co.*, L. R., 2 Ex. 167.

(*t*) *Adams* v. *Gibney*, 6 Bing. 656; 8 L. J., C. P. 243; 32 R. R. 514.

(*u*) *Adams* v. *Gibney*, 6 Bing. 656, and *sup.*

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*Penfold* v. *Abbott* (*x*), in which the tenant was in under a yearly tenancy with an agreement for an under-lease, the landlord being a lessee for years. In both these cases the tenant might have been considered to know the limited nature of the landlord's interest, but this appears to make no difference; the inflexible rule appears to be that when the landlord's interest ends, his *implied* contract for quiet enjoyment ends with it (*y*).

Breach by Resignation of Ecclesiastical Lessor.

If the incumbent of a living let lands belonging to the benefice for a term of years, his resignation of the living during the term is a breach of the contract (*z*).

Interesse Termini.

An interesse termini (see ante, p. 718) will not support an action for quiet enjoyment (*a*).

### (b) *Express Covenant for Quiet Enjoyment.*

Express Covenant for Quiet Enjoyment is usually less than implied one.

*Merrill* v. *Frame.*

It is material to observe that the express covenant for quiet enjoyment is usually a qualified one only, and is in one respect a less protection to the lessee than the implied one, inasmuch as it does not protect the lessee in case of an eviction by title paramount to that of the lessor, as we have seen that the implied covenant does. In another respect, however, it is a greater protection to the lessee, inasmuch as it endures during the whole term granted, and does not cease with the estate of the lessor (*b*) as we have seen that the implied covenant does (*c*). The usual *qualified* covenant for quiet enjoyment is to the following effect, viz.: "And the said [lessor] doth hereby for himself, his heirs, his executors and administrators, covenant with the said [lessee], his executors, administrators and assigns, that he and they paying the rent hereby reserved, and performing the covenants hereinbefore on his and their part contained, shall and may peaceably possess and enjoy the said demised premises for the term hereby granted, without any interruption or disturbance from or by the said [lessor], his [heirs *or* executors, administrators] or assigns, *or any other person or persons claiming by, from or under him, them or any of them*" (*d*). The covenant, which almost invariably occurs at the end of the lease, varies somewhat in its phraseology (*e*), but it may be laid down as an almost universal rule that, however framed, it may be safely entered into by any

(*x*) *Penfold* v. *Abbott*, 32 L. J., Q. B. 67; 11 W. R. 169.

(*y*) *Baynes* v. *Lloyd*, [1895] 2 Q. B. 610; 64 L. J., Q. B. 787; 73 L. T. 250; 14 R. 678—C. A.; *Schwarz* v. *Locket*, 38 W. R. 142; 61 L. T. 719.

(*z*) *Price* v. *Williams*, 1 M. & W. 6.

(*a*) *Wallis* v. *Hands*, [1893] 2 Ch. 75, and supra (*f*).

(*b*) *Evans* v. *Vaughan*, 4 B. & C. 261; 3 L. J., K. B. 213; 32 R. R. 250.

(*c*) See notes (*x*), (*y*), (*z*).

(*d*) 8 & 9 Vict. c. 124, Sched., post, Appendix A.; see also Forms, post, Appendix B.

(*e*) The greatest number of variations is to be found in Davidson's Precedents.

The chief variation from the form in the text is that of the insertion of the words "lawful" or "lawfully" before "interruption" or "claiming."

lessor who never had any title whatever to the demised premises, or any part thereof; because any subsequent entry, eviction, ejectment, or other interruption or disturbance by the real owner, or by the party entitled to possession, or by any other person who does not claim "by, from or under" the lessor, would be no breach of such qualified covenant (*f*), which covenant excludes the implied covenant for title, as well as the implied covenant for quiet enjoyment (*g*). The wrongful acts of a tenant of the lessor, under a previous lease, who does things not authorized by such lease, do not amount to a breach of the usual qualified covenant for quiet enjoyment (*h*). So in conveyances containing the usual qualified covenants for title, &c. (*i*).

Distress for Land Tax due from Lessor.

Even a distress for previous arrears of land tax due from the lessor is no breach of the usual qualified covenant, because the collector of the tax does not claim by, from or under, but *against* the lessor (*k*). This was held in *Stanley* v. *Hayes* (*k*).

Ejectment of Lessor for non-payment of Head Rent.

*Kelly* v. *Rogers.*

Nor is even the ejectment by the head landlord of the lessor for non-payment by the lessor of the rent due on the head lease or for breach of any covenant in the head lease a breach of the covenant, as was held by the Court of Appeal in *Kelly* v. *Rogers* (*l*), in which the words of the covenant were as nearly as possible with those in *Stanley* v. *Hayes*, which case was approved, but would have been followed on the ground of the time which had elapsed since it was decided, whether the court had approved of it or not (*m*). This is a case which is usually provided for by covenant of the mesne landlord *with the sub-tenant* to pay the ground rent.

Lessee is put upon Inquiry as to Title and restrictive Covenants of Lessor.

*Parker* v. *Whyte.*

A lessee is a purchaser *pro tanto*, to whom the maxim *caveat emptor* applies (*n*) if he does not take advantage of his fair opportunities (*o*). Therefore, he must, at his peril, ascertain that the intended lessor has sufficient title to demise for the proposed term (*p*), and that his conveyance does not restrict him from permitting the premises to be used for any trade or business intended (*q*): or the lessee should (if possible) obtain from the lessor an *unqualified* covenant for quiet enjoyment during the term, without any interruption or disturbance by the lessor, "*or by any other person or persons whomsoever;*" i.e. against all persons having lawful title: or he must take

(*f*) *Line* v. *Stephenson*, 7 Scott, 69, Ex. Ch.; *Merrill* v. *Frame*, 4 Taunt. 329; 13 R. R. 612.

(*g*) *Line* v. *Stephenson*, ubi supra.

(*h*) *Jeffryes* v. *Evans*, 19 C. B., N. S. 246; 34 L. J., Q. B. 261.

(*i*) *Thackeray* v. *Wood*, 5 B. & S. 325; 34 L. J., Q. B. 226.

(*k*) *Stanley* v. *Hayes*, 3 Q. B. 105.

(*l*) *Kelly* v. *Rogers*, [1892] 1 Q. B. 910; 61 L. J., Q. B. 604; 66 L. T. 582; 40 W. R. 516.

(*m*) Per Lord Esher, M.R., ib.

(*n*) *Besley* v. *Besley*, 9 Ch. D. 103; 38 L. T. 844; 27 W. R. 184.

(*o*) Id.; *Hyde* v. *Warden*, 3 Ex. D. 72; 47 L. J., Ex. D. 191—C. A.

(*p*) *Spencer* v. *Marriott*, 1 B. & C. 457; 25 R. R. 453.

(*q*) See *Dennett* v. *Atherton*, L. R., 7 Q. B. 316, and 726, post.

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his chance and run all risk as to the lessor's title. Where the lessee is to build upon or otherwise improve the demised premises, or pays a premium for the lease, he should take care either to investigate the lessor's title (or at all events to see the conveyance to him): or he should obtain an *unqualified* covenant for quiet enjoyment during the term (*r*). The lessor ought not to refuse to enter into such a covenant where no investigation of his title takes place. It is much more reasonable that he, rather than the tenant, should run any risk as to his own title, when he does not allow it to be investigated by or on behalf of the tenant. But it often happens that an intended lessee fears to lose the proposed lease by asking either for an investigation of the lessor's title or for an unqualified covenant for quiet enjoyment; indeed he generally knows that nothing of the sort would be agreed to (*s*). And yet a sub-lessee, who neglects to inquire into the provisions of the original lease does so at his own risk, and may, at the instance of the original lessor, be restrained by injunction from breaking the covenants in such lease, although they are not repeated in the sub-lease (*t*): or he may be ejected for a forfeiture and perhaps have no remedy over against his own lessor (*u*). A tenant from year to year, equally with a tenant having a larger interest, is bound to make proper inquiries into his landlord's title, and he is affected with the consequences of not doing so (*x*).

Payment of Rent, &c., no condition of Performance. *Edge* v. *Boileau.*

In the covenant for quiet enjoyment by the lessee, the usual qualification "*he paying the rent thereby reserved and performing the covenants*" does not make the payment of rent, &c., a condition precedent to the performance of the covenant by the lessor. So it was laid down more than 200 years ago in *Hays* v. *Bickerstaff* (*y*), and recently in *Edge* v. *Boileau* (*z*).

Enjoyment during Expressed Term, not during Estate of Lessor.

The words "during the said term" mean during the whole term expressed to be granted, and not merely during the actual continuance of the estate of the lessor (although it is otherwise where the covenant is implied by law) (*a*); as has been held in two cases of leases by tenants for life, in each of which the lease was for lives,

(*r*) See *Onions* v. *Cohen*, 2 H. & M. 354; 34 L. J., Ch. 338, for an instance in which an unqualified covenant was decreed.

(*s*) And see the Vendor and Purchaser Act, 1874, ante, 102.

(*t*) *Herbert* v. *Maclean*, 12 Ir. Ch. R. 84; *Robson* v. *Flight*, 34 L. J., Ch. 101; 11 Jur., N. S. 147; *Mitchell* v. *Steward*, L. R., 1 Eq. 541.

(*u*) *Spencer* v. *Marriott*, 1 B. & C. 457; 1 L. J., K. B. 134; 25 R. R. 453; *Hayward* v. *Parke*, 16 C. B. 295.

(*x*) *Wilson* v. *Hart*, L. R., 1 Ch. 463; 12 Jur., N. S. 460; 14 L. T. 499.

(*y*) *Hays* v. *Bickerstaff*, 2 Mod. 34; Vaugh. 118. See also *Dawson* v. *Dyer*, 5 B. & Ad. 584; *Allen* v. *Babbington*, Sid. 280. *Anon.*, 4 Leon. 50, contra, would seem to be no longer law. *Bastin* v. *Bidwell*, 18 Ch. D. 238, and the cases seemingly contra there collected by Kay, J., are, it is submitted, distinguishable on the ground that the renewal of a lease is a privilege.

(*z*) *Edge* v. *Boileau*, 16 Q. B. D. 117; 55 L. J., Q. B. 90; 53 L. T. 907; 34 W. R. 103.

(*a*) Ante, 719.

the lessor held under a settlement not authorizing such a lease, and the lessee was evicted by the remainderman after the death of the lessor, but during the continuance of the lives (*b*).

Covenant for Quiet Enjoyment does not extend to Acts of Third Persons having no Title.

The express covenant for quiet enjoyment without any interruption or disturbance by the lessor, his heirs or assigns, even though followed by the words "or by any other person or persons whomsoever," does not extend to the *unlawful acts of third persons having no title* (*c*). The law will never adjudge that a lessor covenants against the *wrongful* acts of strangers, except his covenant is express to that purpose; for the law itself does defend every man against wrong; and therefore, though one warrants land to another expressly, [or covenants for quiet enjoyment *generally*,] yet he does not defend against tortious entries (*d*).

Covenant against interruption by named Persons.

It is, however, different where an individual is named, for there the covenantor is presumed to know the person against whose acts he is content to covenant, and may therefore be reasonably expected to stipulate against any disturbance from him, whether by lawful title or otherwise (*e*). Therefore a covenant for quiet enjoyment, or for indemnity against all actions, suits, claims and demands whatsoever, both in law and equity, of certain *named persons*, extends to their unlawful acts, claims and demands, without any lawful right or title (*f*), as well as to their lawful acts (*g*). It has been held too that a covenant for quiet enjoyment against all persons claiming, or pretending to claim, extended to all interruptions whether lawful or not except those of persons claiming under the lessee himself (*h*).

By Persons pretending to Claim.

What Acts are breaches by Lessor himself.

The covenant of course applies to all interruptions and disturbances by the lessor himself (*i*), although it be framed against "lawful" evictions (*k*), for in such a case the court will not consider the word "lawful" (*l*). Therefore if a lessor covenant that he will not interrupt the lessee in the enjoyment of a close demise, the erection by him of a gate on a necessary way leading to it, so as to intercept it, is a breach of the covenant, although the lessor had a legal right to erect the gate there, but for his covenant (*m*). So if the lessor of a mine excavates a stone quarry over it, in such a manner as thereby to interrupt the lessee in his occupation of the mine, that is a breach of the covenant for quiet enjoyment, whether the lessor has or has not a legal right to excavate the quarry (*n*).

(*b*) *Evans* v. *Vaughan*, 4 B. & C. 261; *Williams* v. *Burrell*, 1 C. B. 102.
(*c*) Year Bk. 22 Hen. 6, 62 b; 32 Hen. 6, 32 b; *Tisdale* v. *Sir W. Essex*, Hob. 34, 35; *Dudley* v. *Folliott*, 3 T. R. 585; 1 R. R. 772; *Young* v. *Raincock*, 7 C. B. 310.
(*d*) See ante, 718.
(*e*) *Nash* v. *Palmer*, 5 M. & S. 374, 379; *Foster* v. *Mapes*, Cro. Eliz. 213.
(*f*) *Fowle* v. *Welsh*, 1 B. & C. 29; 1 L. J., K. B. 17; 25 R. R. 291.
(*g*) *Foster* v. *Mapes*, supra; *Perry* v. *Edwards*, 1 Stra. 400.
(*h*) *Chaplin* v. *Southgate*, 10 Mod. 384.
(*i*) *Corus* v.——, Cro. Eliz. 544.
(*k*) *Lloyd* v. *Tomkies*, 1 T. R. 671.
(*l*) *Crosse* v. *Young*, 2 Show. 421.
(*m*) *Andrews* v. *Paradise*, 8 Mod. 318.
(*n*) *Shaw* v. *Stenton*, 2 H. & N. 858.

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It may sometimes be more difficult to decide whether persons causing an interruption claim "through or under" the lessor. If the lessor covenant with the lessee that he has not done any act to prejudice the lease, but that the lessee shall enjoy it against all persons; in this case, the words "against all persons" refer to the first branch of the covenant, and are limited and restrained to acts done by him (*o*). Where the lessors covenanted that the lessee of a mill should enjoy the mill and stream without interruption by them, or by persons claiming under them, or by their acts or procurement, a diminution of the water occasioned by supplies under contracts entered into by the lessors prior to making the lease, is not a breach of the covenant for quiet enjoyment (*p*). But where the covenants for title are general and absolute against all persons they will not be qualified by reference to other covenants, unless there are words either in the absolute covenants themselves, or in the preceding or subsequent ones, to connect them (*q*). Where A. B. covenanted with his lessee for quiet enjoyment as against any person "claiming by, from or under" him, it was held, that an eviction by a prior appointee of A. B. and C. D. was a breach of the covenant, and that the case was not altered by the grant to the lessee being "as far as in his power lay, or he lawfully might or could" (*r*). So an eviction by the lessor's widow, claiming under a settlement executed by him before the lease, constitutes a breach (*s*). So is an eviction by a tenant under a previous lease granted by the lessor (*t*); and also an injury to the foundations, committed under a previous mining lease granted by an ancestor of the lessor, expressly named in the lessor's covenant for quiet enjoyment (*u*). The usual qualified covenant for quiet enjoyment is likewise broken by an eviction, molestation or disturbance of the lessee by persons claiming under a prior mortgage for a long term granted by the trustees of a settlement *with the concurrence of the defendant*, who joined therein and covenanted for payment of the mortgage-money, and for title, &c. (*x*). It is also broken by interruption of the enjoyment by the lessee of adjacent premises held under a common lessor, as was held in a case where the defendants demised a farm to the plaintiff having previously demised an adjoining farm to another lessee with the right to use the drains through plaintiff's land to carry away as much water as

Acts of Person claiming through or under Lessor.

By Settlement.

By Prior Lease.

By Mortgage.

Breach by Act of Lessee of Adjacent Premises.

(*o*) Shep. Touch. 166.
(*p*) *Blatchford* v. *Mayor, &c., of Plymouth*, 3 Bing. N. C. 691; and see *Thackeray* v. *Wood*, 5 B. & S. 325; 33 L. J., Q. B. 275.
(*q*) *Smith* v. *Compton*, 3 B. & Adol. 189.
(*r*) *Calvert* v. *Sebright*, 15 Beav. 156.
(*s*) *Butler* v. *Swinnerton*, Cro. Jac. 656; Palm. 339; 2 Roll. 286.
(*t*) *Rolph* v. *Crouch*, L. R., 3 Ex. 44; 37 L. J., Ex. 8.
(*u*) *Taylor* v. *Shafto*, 16 L. T. 205.
(*x*) *Carpenter* v. *Parker*, 3 C. B., N. S. 206; 27 L. J., C. P. 78.

they were adequate to carry, and the plaintiff's farm was damaged by the escape of water from drains improperly constructed (*y*).

Molestation by Action.

A breach of the covenant for quiet enjoyment may occur either by a molestation arising from an action of any kind relating to the title or possession, or by any act by which the lessee is disturbed in the possession of the premises. Of the first sort is an ejectment by a person having a lawful title; or any other suit by which the peaceable occupation of the premises is prevented: thus, a covenant in a lease, that the lessee should quietly enjoy the estate discharged from tithes, was held broken by a suit for them, although commenced after the expiration of the term (*z*): but where in covenant for quiet enjoyment the breach assigned was, "that the defendant had exhibited a bill in Chancery against him for ploughing meadow, and obtained an injunction, which had been dissolved with 20*s.* costs;" it was held on demurrer to be no breach of covenant, for the covenant was for quiet enjoyment, and this was a suit for waste (*a*).

Prevention of Particular Use of Land.

On the other hand, any description of annoyance, on the part of the lessor himself, to the occupation of the premises, which prevents the lessee from enjoying his property in so ample a manner as he is entitled to do by the terms of the lease, amounts to a breach of the covenant for quiet enjoyment of a second sort: thus if a man covenant that he will not interrupt the covenantee in the enjoyment of a close, the erection of a gate which intercepts it is a breach of the covenant, although he had a right to erect it (*b*). So if, after a demise of mines containing the usual covenant for quiet enjoyment, the lessor digs a quarry over the mines and makes holes, through which water percolates and escapes into the mines, although he had a legal right to work the quarry, his doing so in such a manner amounts to a breach of the covenant for quiet enjoyment of the mines (*c*).

Not a covenant of indemnity.

But the covenant is not a covenant of indemnity, and only extends to interruptions which might have been foreseen when the lease was granted. Therefore where a "feeder" was struck in the course of working a mine with the result that a large body of underground water, the existence of which was unsuspected and the nature of which was uncertain, flooded the mine which adjoined a mine worked by the landlord, it was held that the lessee of the flooded mine could not maintain an action on the covenant (*d*).

(*y*) *Sanderson* v. *Mayor of Berwick*, 13 Q. B. D. 547; 53 L. J., Q. B. 554; 51 L. T. 495; 33 W. R. 67—C. A., varying judgment of Denman, J.

(*z*) *Laming* v. *Laming*, Cro. Eliz. 316.

(*a*) *Morgan* v. *Hunt*, 2 Ventr. 215.

(*b*) *Andrews* v. *Paradise*, 8 Mod. 318.

(*c*) *Shaw* v. *Stenton*, 2 H. & N. 858.

(*d*) *Harrison, Ainslie & Co.* v. *Lord Muncaster*, [1891] 2 Q. B. 680; 65 L. T. 481; 40 W. R. 102—C. A.

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An action on the covenant for quiet enjoyment may be maintained for the disturbance of a way of necessity (*e*); or of a way by grant from the covenantor (*f*), if the act done be in the assertion of title, and not a mere tortious act for which an action of trespass might be maintained (*g*).

Disturbance of way.

Restriction of Particular Use of Land.

The restriction of the particular use of the land must be the act of the lessor himself, otherwise the action cannot be supported. A decree restraining a particular use of the land by reason of a covenant with the lessor, but not otherwise interfering with the title, is not a breach of the covenant for quiet enjoyment. This was held by the Exchequer Chamber in *Dennett* v. *Atherton* (*h*). There the defendant covenanted with the grantor, upon a conveyance of the premises to him in fee, not to permit any part of the premises to be used for selling beer, and afterwards let part of the premises with a covenant for quiet enjoyment on his part, and a covenant not to carry on particular trades (of which beer-selling was not one) on the part of the lessee. The term was assigned to the plaintiff, who had no notice of the defendant's restrictive covenant, and having used the premises as a beer-shop was restrained by an injunction in Chancery from so doing. The court decided that there was no breach of covenant, express or implied. But it has been since laid down in the Court of Appeal that where the ordinary and lawful enjoyment of the demised land is substantially interfered with by the acts of the lessor or those claiming under him the covenant is broken, though neither the title to nor the possession of the land may be affected (*i*).

*Dennett* v. *Atherton.*

Notice to Sub-tenant to pay Rent to Landlord.

A notice to a sub-tenant to pay the rent due to the landlord instead of to the tenant, appears to be a breach of the covenant if the notice be complied with (*k*), but otherwise not (*l*).

Breach under Compulsion of Statute.

*Newby* v. *Sharpe.*

Failure by a landlord under compulsion of a statute is no breach. Where a landlord covenanted to keep the demised premises available for storing cartridges, and for quiet enjoyment, and the Explosives Act, 1875, passed after the demise, made such storage illegal, it was held that the landlord might lawfully remove the cartridges, and committed no breach of the covenant for quiet enjoyment by so doing (*m*).

(*e*) *Morris* v. *Edgington*, 3 Taunt. 24; 12 R. R. 579.

(*f*) *Pomfret* v. *Ricroft*, 1 Taunt. 322.

(*g*) *Sedden* v. *Senate*, 13 East, 72.

(*h*) L. R., 7 Q. B. 316; 41 L. J., Q. B. 165; 20 W. R. 442; affirming *Spencer* v. *Marriott*, 1 B. & C. 457.

(*i*) *Sanderson* v. *Mayor of Berwick-upon-Tweed*, 13 Q. B. D. at p. 551; and see *Robinson* v. *Kilvert*, 41 Ch. D. at p. 97—C. A.

(*k*) *Edge* v. *Boileau*, 16 Q. B. D. 117, and 722, ante; in this case the plaintiff recovered 100*l.* damages, and the Court refused a new trial for excess of damages.

(*l*) *Edge* v. *Boileau*, supra; *Whitcot and Lindsey* v. *Nine*, B. & G. 81.

(*m*) *Newby* v. *Sharpe*, 8 Ch. D. 39; 47 L. J., Ch. 617; 38 L. T. 583; 26 W. R. 685.

A covenant for quiet enjoyment does not oblige the lessor to rebuild or repair, in case the buildings are destroyed or injured by fire, tempest or otherwise (*n*).

Is not to rebuild.

In *Anderson* v. *Oppenheimer*, it was held that the covenant for quiet enjoyment was not broken by the bursting of a water-pipe conveying water from a cistern belonging to the landlord of a house let in separate floors (*o*), but it seems that if there had been negligence on the part of the landlord in keeping and maintaining the pipe, or any act wilfully done or omitted to be done by the landlord in connection with it *after the demise*, the decision would have been the other way. But for a breach of this kind, there must be a physical interference with the demised premises; a mere nuisance is not enough. Therefore, where the landlord of two rooms let a room above them for music and dancing, whereby the tenant of the two rooms, who occupied them as offices in his business as an accountant, was much annoyed, it was held that there had been no breach of the covenant for quiet enjoyment, although the court awarded 20*l.* as damages for the noise and vibration (*p*).

Bursting of Water-pipe. *Anderson* v. *Oppenheimer.*

Nuisance by Music and Dancing on floor above. *Jenkins* v. *Jackson.*

The covenant for quiet enjoyment runs with the land (*q*), and is therefore binding on the assignees of the reversion; and may be rendered available by the assignees of the term. Where A. let to B., who assigned to C., and C. assigned to D., and B. had covenanted for quiet enjoyment with C. and his assigns, it was held by the Exchequer Chamber, that D. might maintain an action against B., on being ejected by A., for a forfeiture by B. before the assignment to C. (*r*).

Runs with Land. *Campbell* v. *Lewis.*

When the covenant is general, the alleged breach must show an interruption or disturbance by some person having *lawful* title and right of entry (*s*). Where the covenant applies to the acts of any particular person or persons *therein named*, an interruption or disturbance by any such person (whether lawful or not) amounts to a breach (*t*). Where the covenant is qualified and confined to interruptions and disturbances by the lessor, his heirs and assigns, "or by any other person or persons claiming by, from or under him, them or any of them," the breach must show an interruption

Particulars of Breaches.

(*n*) *Brown* v. *Quilter*, Ambler, 620; ante, Chap. XVI.

(*o*) *Anderson* v. *Oppenheimer*, 5 Q. B. D. 602; 49 L. J., Q. B. 708, affirming decision of Field, J.

(*p*) *Jenkins* v. *Jackson*, 40 Ch. D. 71; 58 L. J., Ch. 124; 60 L. T. 95; 37 W. R. 254; per Kekewich, J., distinguishing *Shaw* v. *Stenton*, 2 H. & N. 850, and p. 725, supra, on the ground that there was physical interference in that case.

(*q*) *Campbell* v. *Lewis*, 3 B. & Ald. 392; 21 R. R. 520; affirming *Lewis* v. *Campbell*, 8 Taunt. 715; 21 R. R. 516.

(*r*) Id.

(*s*) *Lucy* v. *Leviston*, Freem. 103; 3 Keb. 163; *Dudley* v. *Folliott*, 3 T. R. 585; 1 R. R. 772; *Young* v. *Raincock*, 7 C. B. 310; *Hall* v. *City of London Brewery Co.*, 2 B. & S. 737; 31 L. J., Q. B. 257; *Jeffryes* v. *Evans*, 19 C. B., N. S. 246.

(*t*) *Foster* v. *Mapes*, Cro. Eliz. 212; *Lucy* v. *Leviston*, Freem. 103; 3 Keb. 163; *Fowle* v. *Welsh*, 1 B. & C. 29; 25 R. R. 291; *Nash* v. *Palmer*, 5 M. & S. 374; 17 R. R. 364.

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or disturbance by the lessor (*u*), his heirs or assigns, or by some other person lawfully claiming by, from or under him, them or some of them (*x*).

"Claiming Under" Lessor.

One who claims under a deed of settlement made by A. is a person claiming under A. within the meaning of the usual qualified covenant for quiet enjoyment (*y*), as also is a person who claims under a lease previously granted by the lessor (*z*), although such lease has expired (*a*).

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## SECT. 9.—*Covenants in Leases of Flats.*

The cases bearing on covenants in leases of flats will be found collected together in Mr. Clode's Book on Tenement Houses and Flats, and also in Mr. George Blackwell's book on the Law of Residential and Business Flats. In the present work they are dealt with separately, but reference may be made here to *Ryan* v. *Mutual Tontine Westminster Chambers Association* (*b*), in which the Court of Appeal held that that had been no breach of a covenant by the defendant lessor to employ a resident porter to act as a servant of the tenants of the several rooms in each of seven distinct blocks; to *Miller* v. *Hancock* (*c*), in which the same court held that the owner of a flat is liable for injuries caused to persons having business with the tenants by the staircase being out of repair; to *Allport* v. *Securities Corporation* (*d*), in which North, J., granted a mandatory injunction to reinstate a staircase, the removal of which caused a tenant's access to his rooms to be by another staircase along a circuitous and less convenient route; and to *Hudson* v. *Cripps* (*e*), in which the landlord of residential flats was restrained by North, J., from converting a large part of them into a club, at the instance of a tenant who held under an agreement in a common form binding the tenant to rules suitable only for residential purposes, although there was no express agreement by the landlord that the building should be used exclusively for residential flats.

Resident Porter.

Staircase.

Conversion of part into Club.

(*u*) *Corus* v. ——, Cro. Eliz. 544; *Andrews* v. *Paradise*, 8 Mod. 318; *Lloyd* v. *Tomkies*, 1 T. R. 671; *Shaw* v. *Stenton*, 2 H. & N. 858.

(*x*) Ante, 720.

(*y*) *Hurd* v. *Fletcher*, 1 Doug. 43; *Evans* v. *Vaughan*, 4 B. & C. 261; *Carpenter* v. *Parker*, 3 C. B., N. S. 206; 27 L. J., C. P. 78.

(*z*) *Rolph* v. *Crouch*, L. R., 3 Ex. 44; 37 L. J., Ex. 8.

(*a*) *Ludwell* v. *Newman*, 6 T. R. 458; 3 R. R. 231; *Coe* v. *Clay*, 5 Birg. 440; 7 L. J., C. P. 162; 30 R. R. 699; *Jinks* v. *Edwards*, 11 Exch. 775.

(*b*) *Ryan* v. *Mutual Tontine Association*, [1893] 1 Ch. 116; 62 L. J., Ch. 252; 67 L. T. 820; 41 W. R. 146; 2 R. 156—C. A., reversing judgment of Smith, J., [1891] 1 Ch. 427.

(*c*) *Miller* v. *Hancock*, [1893] 2 Q. B. 177; 69 L. T. 214; 41 W. R. 578; 4 R. 478—C. A.

(*d*) *Allport* v. *The Securities Corporation*, 64 L. J., Ch. 491; 72 L. T. 353; 14 R. 420, per North, J.

(*e*) *Hudson* v. *Cripps*, [1896] 1 Ch. 265; 65 L. J., Ch. 328; 73 L. T. 741; 44 W. R. 200, per North, J., applying *Spicer* v. *Martin*, 14 App. Cas. 12, and p. 707, ante.

# CHAPTER XVIII.

## OF RIGHTS OF COMMON, WAY, LIGHTS, WATER, AND SPORTING, AND OF THE LONDON BUILDING ACT.


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## Sect. 1.—*Rights of Common* (*a*).

### (a) *Generally.*

Common is a right or liberty to take or use some part or portion of that which another person's lands, woods, waters, &c., naturally produce, without having any property in such lands, woods, waters, &c. (*b*). The most usual rights of common are—1. Common of pasture—that is, a right of liberty which one or more may have to feed their cattle on another man's land. 2. Common of turbary—that is, the liberty to cut turves in another's soil to be burnt in a house (*c*). 3. Common of estovers—that is, a right to take trees, loppings, shrubs or underwood in another's wood, coppices, &c. (*d*). 4. Common of piscary—that is, a right to fish in another's pond, pool or river.

Nature of Rights of Common.

A right of common is not a mere easement, but a *profit à prendre* in the soil of another. So is a right to hunt, shoot, fowl or fish in another's land or water, and to carry away whatever is so taken (*e*): so is a right to dig clay in another's land for the purpose of making bricks (*f*). But a right to deposit and mix dung, &c. upon adjoining land, and to make the same into manure, and carry away the same, is a mere easement and not a profit à prendre (*g*). So a right in the occupier of an ancient messuage to water his cattle at a pond,

Right of Common not mere Easement.

(*a*) And see Hall on Rights of Common and Profits à Prendre, A.D. 1871.

(*b*) Bac. Abr. tit. *Common;* Tudor's L. C. Real Prop. 108 (2nd ed.).

(*c*) Noy, 145; 3 Lev. 165; 7 East, 121.

(*d*) Cro. Jac. 25; Cro. Eliz. 820; 4 Co. R. 87 a; 5 Id. 25 a.

(*e*) *Wickham* v. *Hawker*, 7 M. & W. 63.

(*f*) *Clayton* v. *Corby*, 2 Q. B. 813.

(*g*) *Pye* v. *Mumford*, 11 Q. B. 666, 668.

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and to take the water thereof for domestic purposes, for the more convenient use of his messuage, is a mere easement and not a profit à prendre (*h*). A right of way is a mere easement and not an interest in the land itself (*i*). A right of common or other profit à prendre can exist only by grant under seal, or by prescription from time immemorial (which is always supposed to be founded on an ancient grant); or by user for thirty or sixty years pursuant to the Prescription Act (*k*), but not by custom (*l*). "The reason why a profit à prendre cannot be supported by a custom in an indefinite number of people is, that the subject of the profit à prendre would, in that case, be liable to be entirely destroyed" (*m*). A right to carry away the soil of another *without stint* cannot be claimed even by prescription; nor can the claim be sustained by evidence of a lost grant (*n*).

Right of Common cannot exist by Custom.

Prescriptive Rights at Common Law.

By the common law an enjoyment to confer a title to an easement or profit à prendre must have existed (or be bound by a jury to have existed), from time immemorial [A.D. 1189], and is presumed to have originated by a grant made before that time (*o*); and any easement or profit à prendre, which is reasonable and might have been so granted, may be claimed by way of prescription at common law (*p*).

The Prescription Act.

Sect. 1.

Rights of Common and other Profits à prendre, after Thirty Years' Enjoyment.

By the Prescription Act, 1833, 2 & 3 Will. 4, c. 71, it is enacted (s. 1), that no claim which may be lawfully made at the common law by custom (*q*), prescription or grant to any *right of common or other profit or benefit* to be taken and enjoyed from or upon any land, shall, where such right, profit or benefit shall have been actually taken and enjoyed by any person claiming right thereto without interruption for the full period of *thirty years*, be defeated or destroyed by showing *only* (*r*) that such right, profit or benefit was first taken or enjoyed at any time prior to such period of thirty years; but that such claim may be defeated in any other way by which the same is now liable to be defeated (*s*); and when such right, &c., shall have been enjoyed for the *sixty years*, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some express consent in writing.

After Sixty Years the Right to be absolute, unless, &c.

(*h*) *Manning* v. *Wasdale*, 5 A. & E. 758; *Whaley* v. *Laing*, 2 H. & N. 476; 3 H. & N. 675, 901; 27 L. J., Ex. 422.

(*i*) *Godley* v. *Frith*, Yelv. 159.

(*k*) 2 & 3 Will. 4, c. 71, infra.

(*l*) *Gateward's case*, 6 Co. R. 60: Cro. Jac. 152; *Grimstead* v. *Marlow*, 4 T. R. 717; 2 R. R. 512: *Jones* v. *Robin*, 10 Q. B. 581, 620.

(*m*) *Race* v. *Ward*, 4 E. & B. 705.

(*n*) *Att.-Gen.* v. *Mathias*, 4 K. & J. 579; 27 L. J., Ch. 761; *Bailey* v. *Stephens*, 12 C. B., N. S. 91.

(*o*) *Potter* v. *North*, 1 Ventr. 387; 2 Blac. Com. 265.

(*p*) *Rogers* v. *Taylor*, 1 H. & N. 706; 26 L. J., Ex. 203.

(*q*) *Mounsey* v. *Ismay*, 3 H. & C. 486; 24 L. J., Ex. 52. No claim to a profit à prendre can be made by custom, unless in the case of a copyhold tenant against his lord; *Arlett* v. *Ellis*, 9 B. & C. 671; *Beardsworth* v. *Torkington*, 1 Q. B. 782.

(*r*) See *Rochdale Canal Co.* v. *Radcliffe*, 18 Q. B. 287.

(*s*) There are six modes by which prescriptive rights may be extinguished, viz., 1. By unity of possession. 2. By release. 3. By severance. 4. By the dissolution of the corporation to which they belong. 5. By enfranchisement. 6. By inclosure.

By sect. 4, each of the periods of years hereinbefore mentioned is to be the period *next before some suit or action* (*t*) wherein the claim or matter to which such period may relate is brought into question; and no act or other matter is an *interruption*, within the meaning of the statute, unless it be submitted to *for one year* after the party interrupted has had notice thereof, and of the person making the same. It is possible for an interruption not to be submitted to or acquiesced in for one year, although no action for it be brought within that period (*u*).

Sect. 4. Above Periods to be *next before some Action.*

By sect. 6, no presumption is to be allowed or made in favour of any claim, upon proof of the exercise of the right claimed for any less period of time than for that mentioned in the act.

Sect. 6. No Presumption allowed on Proof of User for shorter Period.

Sect. 7 provides, that the time during which any person, otherwise capable of resisting any claim, shall have been an infant, idiot, non compos mentis, feme covert, or tenant for life (*x*), or during which any action shall have been pending and diligently prosecuted until abated by the death of any party thereto, shall be excluded in the computation of the periods hereinbefore mentioned.

Sect. 7. Proviso for Disabilities.

A title under this act is always inchoate until the action is commenced in which its validity is called in question, however long it may have been enjoyed (*y*). On the other hand, a right which is inchoate at the time of the interruption or disturbance may become complete and support an action for such interruption commenced immediately after the expiration of the prescribed period and before the interruption has been submitted to for a year (*z*). So a defendant's right may become complete between the time when, &c., and the commencement of the action (*a*). A title gained under this act by user for the prescribed period may exist concurrently with a common law title, and does not merge or extinguish it (*b*). A right claimed by user under this act can only be co-extensive with the user; and an issue on a plea justifying under such a right is an issue *not upon the right, but the user*, and differs therefore from an issue on a right claimed by prescription from time immemorial (*c*).

Title inchoate until Action commenced.

The words "enjoyed by any person *claiming right*" (sect. 2), and "enjoyment thereof *as of right*" (sect. 5), mean an enjoyment had,

"Enjoyment as of Right" means an open Enjoyment.

(*t*) See *Ward* v. *Robins*, 15 M. & W. 241, 243; *Cooper* v. *Hubbuck*, 12 C. B., N. S. 456; 31 L. J., C. P. 323; *Bennison* v. *Cartwright*, 5 B. & S. 1; 33 L. J., Q. B. 137.

(*u*) *Bennison* v. *Cartwright*, supra.

(*x*) *Pye* v. *Mumford*, 11 Q. B. 667. Not a tenant for years: *Palk, Bart.* v. *Shinner*, 18 Q. B. 568; 22 L. J., Q. B. 27.

(*y*) *Wright* v. *Williams*, 1 M. & W. 77; *Richards* v. *Fry*, 7 A. & E. 698; 3 N. & P. 67.

(*z*) *Flight* v. *Thomas*, 11 A. & E. 688; 3 P. & D. 442; 7 Dowl. 741; *S. C.* (in error), 8 Cl. & Fin. 231; 1 West. 671.

(*a*) *Ward* v. *Robins*, 15 M. & W. 237.

(*b*) *Onley* v. *Gardiner*, 4 M. & W. 496; *Lowe* v. *Carpenter*, 6 Exch. 825.

(*c*) *Davies* v. *Williams*, 16 Q. B. 546; *Battishill* v. *Reed*, 18 C. B. 696. 703; *Rochdale Canal Co.* v. *Radcliffe*, 18 Q. B. 303, 304.

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The Prescription Act—*continued.*

not secretly or by stealth, or by tacit sufferance, or by permission asked from time to time on each occasion or on many; but an enjoyment had openly, notoriously, without particular leave at the time, by a person claiming to use without danger of being treated as a trespasser, as a matter of right, whether the right so claimed shall be strictly legal as by prescription and adverse user, or by deed, or shall have been merely lawful so far as to excuse trespass (*d*). The user must not be precarious (*e*), but as of right against all persons, so as to be evidence of a perfect right (*f*). The enjoyment must be continuous and as of right for the prescribed period next before the commencement of the suit, of the easement *as an easement* (*g*), without interruption acquiesced in for a year (*h*): and such right is defeated by unity of possession during all or part of the period of enjoyment, though such unity of possession has its inception after the completion of the prescribed period (*i*). Therefore where the plaintiff had enjoyed a way as of right and without interruption from 1800 to 1855, when the action was brought, it was held, that his claim under the statute was defeated by unity of possession from 1843 to 1853 (*k*). The right or easement must be appurtenant to some dominant tenement, and not in gross; otherwise the act does not apply (*l*).

Remedies for a Disturbance of Common.

The remedies for disturbance of common may be considered as respects the lord, and as regards the commoner. The former having the right to the soil may, when wrongfully dispossessed thereof, maintain an action of ejectment (*m*); and if he be disturbed by a mere stranger, who puts in cattle, having no colour of right, or by a commoner who surcharges the common, he may maintain an action of trespass or case (*n*). In some cases, also, where the right of common is clearly stinted as to number, he may distrain the surplus number damage feasant (*o*). It has been held, that a commoner may maintain an action on the case for an injury done to the common, by taking away from thence the manure which was dropped on it by the cattle, though his proportion of the damage be found only to the amount of a farthing: at least the smallness of the damage found is no ground for a nonsuit (*p*). One commoner, who has surcharged,

(*d*) *Tickle* v. *Brown*, 4 A. & E. 369; *Gaved* v. *Martyn*, 19 C. B., N. S. 732; 34 L. J., C. P. 353.

(*e*) *Gaved* v. *Martyn*, supra.

(*f*) *Winship* v. *Hudspeth*, 10 Exch. 5; 23 L. J., Ex. 268.

(*g*) *Mounsey* v. *Ismay*, 3 H. & C. 486; 34 L. J., Ex. 52. A man cannot have an "easement" over his own land, but only upon or over the land of another person. See *Onley* v. *Gardiner*, 4 M. & W. 496.

(*h*) See *Bennison* v. *Cartwright*, 5 B. & S. 1; 33 L. J., Q. B. 137.

(*i*) *Onley* v. *Gardiner*, 4 M. & W. 496; *Battishill* v. *Reed*, 11 C. B. 696; 25 L. J., C. P. 290.

(*k*) *Battishill* v. *Reed*, supra.

(*l*) *Shuttleworth* v. *Le Fleming*, 19 C. B., N. S. 687; 34 L. J., C. P. 309.

(*m*) Cole Ejec. 611.

(*n*) *Arlett* v. *Ellis*, 9 B. & C. 671.

(*o*) 1 Roll. Abr. 665; *Dixon* v. *James*, 2 Lutw. 1241; 4 Burr. 2431.

(*p*) *Pindar* v. *Wadsworth*, 2 East, 154; 6 R. R. 412.

may maintain an action against another for surcharging the common (*q*). One commoner cannot generally distrain the cattle of another; for the right of commonage, which every commoner has, runs through the whole land (*r*). Nor can one commoner distrain the cattle of another commoner pur cause de vicinage, inasmuch as the cattle come upon the common under some colour of right (*s*). But in case of an absolutely stinted common, in point of number, one commoner may distrain the supernumerary cattle of another (*t*); but not if an admeasurement be necessary, as where the stint has relation to the quantity of the commoner's land (*u*). A freeman or burgess, entitled as such to common of pasture, may distrain the cattle of a person wrongfully claiming to be so entitled (*x*); or he may sue for the disturbance (*y*).

Abatement of Nuisances on Common.

Where a house obstructs the exercise of a right of common the commoner may, after notice and request to the party to remove the house, pull it down, though such party is actually inhabiting and present in the house (*z*); but he may not do so without such previous notice and request (*a*). Where the injury complained of arises from an act of the lord, the commoner may often proceed himself to abate the nuisance (*b*); thus, if the lord so plant trees as to destroy the common, such an act would be considered as a nuisance, and the commoner might abate it; but he cannot justify cutting down trees planted by the lord on the waste, if it be not a total destruction of the common, though there be not a sufficiency of common left; his remedy being by action on the case (*c*). The distinction seems to be this: if the lord of the manor make a hedge round the common, or do any other act that *entirely excludes* the commoner from exercising his right, the latter may do whatever is necessary to let himself into the common: but if the commoner can get at the common, and enjoy it to a certain extent, and his right be *merely abridged* by the act of the lord, in that case his remedy is by an action on the case, and he cannot assert his right by any act of his own (*d*). The owner of a common may, under the stat. of 13 Edw. 1, stat. 1 (Westm. 2), c. 46, erect thereon a house necessary for a beast-keeper or for a woodward (*e*). It seldom, if ever, happens that a commoner can

(*q*) *Hobson* v. *Todd*, 4 T. R. 71; 2 R. R. 335.

(*r*) Bac. Abr. tit. *Common* (C. 2); *Hall* v. *Harding*, 4 Burr. 2426.

(*s*) *Cape* v. *Scott*, L. R., 9 Q. B. 269; 43 L. J., Q. B. 65; 30 L. T. 87; 22 W. R. 326.

(*t*) Year Book, 46 Edw. 3, 12 b; 2 Lutw. 1241; *Mary's case*, 9 Co. R. 112; Freem. 273.

(*u*) *Hall* v. *Harding*, 1 W. Blac. 673; 4 Burr. 2426.

(*x*) *Stubbs* v. *Escourt*, 2 H. & C. 47.

(*y*) *Bradsworth* v. *Torkington*, 1 Q. B. 782.

(*z*) *Davies* v. *Williams*, 16 Q. B. 546.

(*a*) *Perry* v. *Fitzhowe*, 8 Q. B. 757; *Jones* v. *Jones*, 1 H. & C. 1; 31 L. J., Ex. 506.

(*b*) Bac. Abr. tit. *Common* (C.).

(*c*) *Kirby* v. *Sadgrove* (in error), 1 Bos. & P. 13; 3 Anst. 892; 6 T. R. 483.

(*d*) Bac. Abr. tit. *Common* (C.); *Cooper* v. *Marshall*, 2 Wils. 51; 1 Burr. 259; *Kirby* v. *Sadgrove* (in error), 1 Bos. & P. 13.

(*e*) *Patrick* v. *Stubbs*, 9 M. & W. 830.

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distrain the cattle of the lord as damage feasant, unless by special custom (*f*). But it seems that if cattle be *agisted* by the lord and improperly put on the common, the commoners may distrain them as the cattle of a stranger (*g*).

Ascertainment of Rights of Common.

An action will lie against the lord by one copyholder on behalf of himself and the other copyholders, being numerous, to have their rights of common ascertained; but one copyholder, not suing on behalf of all, cannot maintain such action (*h*).

### (b) *Common of Pasture.*

Description and Kinds of Common of Pasture.

Common of pasture is a right or liberty to depasture cattle, &c. on another's land. It is generally restricted to commonable cattle, i.e. such as plough and manure the land—as horses, oxen, cows, and sheep—and seldom extends to swine, goats, geese and the like (*i*). It is usually stinted as to the number of cattle to be depastured, either by an express limitation of number, or by those only being allowed to depasture which are "levant and couchant" upon the land in respect of which the right of common is claimed; i.e. such cattle as the winter eatage of the land, together with the produce of it in summer, and the food obtained from the common, is capable of maintaining (*k*). A right of common of pasture for cattle levant and couchant cannot be claimed by prescription as appurtenant to a house without any curtilage or land (*l*). A right of common of pasture without stint, as annexed to an ancient messuage without land, cannot exist by law (*m*); but common of pasture may exist in respect of land to which there is no house attached (*n*). Common of pasture is sometimes limited as to the times or periods of the year during which it may be exercised. But all such restrictions depend upon the terms of the grant (express or implied), or the extent of the user. Common of pasture is divided into—1. Common appendant. 2. Common appurtenant. 3. Common in gross. 4. Common pur cause de vicinage.

Common appendant.

Common of pasture *appendant* is a common law right, and must have existed from time immemorial (*o*). It belongs of common right only to arable land, for commonable cattle: i.e. horses and oxen to plough the land, kine and sheep to compester it (*p*): which cattle

(*f*) *Hodesdon* v. *Gresil*, Yelv. 104; *Kenrick* v. *Purgiter*, Cro. Jac. 208; Yelv. 129; *Hoskins* v. *Robins*, 2 Saund. 324.

(*g*) Year Book, 30 Edw. 3, 27; Bullen, 229.

(*h*) *Phillipps* v. *Hudson*, L. R., 2 Ch. 243; 36 L. J., Ch. 301; 15 W. R. 370.

(*i*) Tudor L. C. Real Prop. 109 (2nd ed.).

(*k*) *Whitelock* v. *Hutchinson*, 2 Moo. & R. 205; *Carr* v. *Lambert*, 3 H. & C. 499; 34 L. J., Ex. 66.

(*l*) *Scholes* v. *Hargreaves*, 5 T. R. 46.

(*m*) *Benson* v. *Chester*, 8 T. R. 396; 4 R. R. 708.

(*n*) *Ricketts* v. *Salwey*, 2 B. & A. 360.

(*o*) Tudor L. C. Real Prop. 109 (2nd ed.).

(*p*) Co. Lit. 122 a; Bac. Abr. tit. *Common* (A. 1).

must be "levant and couchant." Therefore it can only be claimed for as many cattle as are necessary to plough and manure the tenant's arable land (*q*). Or, perhaps, more accurately speaking, for such cattle as the land, or the produce thereof, will keep during the winter (*r*). Tenants of a manor have no general common law right of common appendant on the waste (*s*).

Common appurtenant.

Common of pasture *appurtenant* is a right or liberty annexed to land, of depasturing cattle, &c., on another's land. It is not (like common appendant) confined to arable land or to commonable cattle (*t*), but it may be annexed to meadow, pasture or other land, and may extend to swine, goats, geese, &c., according to the terms of the grant or the extent of the user. It may be claimed by modern grant (*u*), or by user under the statute (*x*), or by prescription at common law (*y*). In a plea prescribing for common of pasture appurtenant to land it was, even before the Judicature Act, essential to aver that the cattle were the party's own cattle levant and couchant on his land; and if the claim were for an unlimited number, without these qualifying words, it could not be supported (*z*). But a person might claim common appurtenant for a certain number, and in such case need not aver that they were levant or couchant (*a*).

Common in gross.

Common of pasture in *gross* is a right or liberty to depasture cattle, &c., in another's land, independently of being the owner or occupier of any other land; and may be granted by deed to a man and his heirs, or for life (*b*). It is not an easement, because not annexed to any dominant tenement; and there can be no easement, properly so called, unless there be both a servient and a dominant tenement (*c*). Neither a common appendant nor a common appurtenant for cattle levant and couchant can be turned into a common in gross, because they cannot be severed from the land to which they appertain without extinguishment; but a common appurtenant for a certain number of beasts may, for such a grant has no reference to connection of tenure (*d*).

Common by Vicinage.

Common pur cause de vicinage, or common by reason of neighbourhood, is a liberty the tenants of one lord in a town have to

(*q*) *Bennett* v. *Reeve*, Willes, 227; *Tyrringham's case*, 4 Co. R. 36 a.

(*r*) *Benson* v. *Chester*, 8 T. R. 396; *Cheesman* v. *Hardham*, 1 B. & A. 711.

(*s*) *Earl of Dunraven* v. *Llewellyn*, 15 Q. B. 791.

(*t*) Co. Lit. 122 a; 4 Co. R. 37; Plow. 161; Tudor L. C. Real Prop. 111 (2nd ed.).

(*u*) *Sacheverill* v. *Porter*, Cro. Car. 482; *Cowlam* v. *Slack*, 15 East, 108; Fitz. N. B. 180, N.; Bac. Abr. tit. *Common* (A. 2).

(*x*) 2 & 3 Will. 4, c. 71, s. 1.

(*y*) Co. Lit. 122.

(*z*) *Benson* v. *Chester*, 8 T. R. 396, 401; 4 R. R. 708.

(*a*) Tudor L. C. Real Prop. 111 (2nd ed.).

(*b*) Co. Lit. 122 a; Fitz. N. B. 37; 4 Co. R. 30; Tudor L. C. Real Prop. 111, 112 (2nd ed.).

(*c*) *Rangeley* v. *Midland R. Co.*, L. R., 3 Ch. Ap. 306, 310, Lord Cairns, L.J.

(*d*) *Bunn* v. *Channen*, 5 Taunt. 244.

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enjoy a common of pasture with the tenants of another lord in another town (*e*). It can only be claimed by grant, or by prescription from time immemorial, or by user for sixty or thirty years under 2 & 3 Will. 4, c. 71, but not by custom (*f*). This is not properly a right of common, but rather an excuse for a trespass, and at most but a permissive right, which was originally allowed for the prevention of suits in neighbourhoods where a boundary could not easily be established (*g*). It exists where the tenants of two lords have used, time out of mind, to have common promiscuously in both lordships, lying together and open to one another (*h*); it is therefore necessary that these adjoining lands should both be commonable (*i*). It seems that common pur cause de vicinage may also exist between the proprietors of neighbouring lands, though there are no commons on either side (*k*); and the lord of a manor may have, in respect of the waste or common land in his own manor, a right to turn his own cattle upon the common of an adjoining manor (*l*). Every common pur cause de vicinage is a common appendant (*m*). Where one of two adjoining commons, with common of vicinage, was enclosed and fenced off by the owner of the soil, leaving open only a passage sufficient for the highway which led over the one to the other; yet as the separation was not complete so as to prevent the cattle straying from one to the other by means of the highway, it was held, that the common by vicinage still continued (*n*).

Common of Pasture in Common Fields.

There is frequently a mutual right of intercommoning between the owners of the land in open common fields: the extent of this right and the mode of exercising it varies according to the custom which has prevailed among the occupiers of such land. Where, however, there is no custom which has become binding upon the parties, the common law rule appears to be, that those persons only who are owners of land within an open common field are entitled to enjoy the right of intercommoning; and such right can be exercised at those times only when the corn is off the land, that is, after all the corn and grain have been reaped and gathered, and before any more has been sown (*o*).

(*e*) Co. Lit. 122 a; *Jones* v. *Robin*, 10 Q. B. 620, 632.

(*f*) *Jones* v. *Robin*, 10 Q. B. 587, 620; *Clarke* v. *Tinker*, Id. 604; *Prichard* v. *Powell*, Id. 589, 603.

(*g*) Co. Lit. 122; R. 2 a; Willes, 32; Bac. Abr. tit. *Common* (A. 4).

(*h*) 8 Co. R. 78.

(*i*) *Heath* v. *Elliott*, 4 Bing. N. C. 838.

(*k*) *Jones* v. *Robin*, 10 Q. B. 581, 620.

(*l*) *Earl of Sefton* v. *Court*, 5 B. & C. 917.

(*m*) 1 Danv. Abr. 799.

(*n*) *Gullett* v. *Lopes, Bart.*, 13 East, 348. As to distress, see *Cape* v. *Scott*, L. R. 9 Q. B. 269, and 733 (*s*), ante.

(*o*) *Cheesman* v. *Hardham*, 1 B. & A. 706; *Musgrave* v. *Cave*, Willes, 319.

### (c) *Common of Turbary.*

Nature of Common of Turbary.

Common of turbary is a right or liberty to dig turf upon the ground of another, or in the lord's waste: this common is appendant or appurtenant to a house, but not to lands, for turves are to be burnt in the house (*p*). It may also be in gross, or may be granted expressly with other land (*q*). It does not give any right to the land, trees or mines; nor can it exclude the owner of the soil (*r*). A custom that all customary tenants of a manor having gardens, parcels of their customary tenements respectively, have immemorially, by themselves, their tenants and occupiers, dug, taken and carried away from a waste within the manor, to be used upon their said customary tenements, for the purpose of making and repairing grass plots in the gardens, parcels of the same respectively, for the improvement thereof, such turf covered with grass, fit for the pasture of cattle, as hath been fit and proper to be so used at all times of the year, as often and in such quantity as occasion hath required, is bad in law, as being indefinite and uncertain, and destructive of the common (*s*); and so is a similar custom for taking and applying such turf for the purpose of making and repairing the banks and mounds in, of and for the hedges and fences of such customary tenements (*t*). An occupier of a messuage and lands, who has common in the lord's waste, may set up a custom to cut rushes, as annexed to his rights of common.

Rushes.

### (d) *Common of Estovers.*

Nature and Description of Estovers.

Common of estovers is a right or liberty of taking necessary wood for the use and furniture of a house or farm, from off another's land (*u*). This right is generally considered as being divided into three distinct species, distinguished from each other by a different application of the Saxon word "bote," which is synonymous with the French "estovers:" thus there is a house-bote, plough-bote and hay-bote. House-bote is a sufficient allowance of wood to build or repair the house, or to burn in it, which latter is sometimes called fire-bote. Plough-bote and cart-bote are wood to be employed in making and repairing all instruments of husbandry, as ploughs, carts, harrows, rakes, forks, &c. Hay-bote or hedge-bote is wood for repairing hedges or fences, as pales, stiles, and gates to secure enclosures (*x*). These botes or estovers must be reasonable, and

"House-bote, plough-bote," &c.

(*p*) Tudor L. C. Real Prop. 116 (2nd ed.).

(*q*) *O'Hare* v. *Fahy*, 10 Ir. Com. L. Rep. 318, C. P.

(*r*) 4 Co. R. 37.

(*s*) *Wilson* v. *Willes*, 7 East, 121; 3 Smith, 167; 8 R. R. 604. As to the right of tenant in common to dig turves, see *Wilkinson* v. *Haygarth*, 12 Q. B. 837.

(*t*) *Beam* v. *Bloom*, 3 Wils. 456; 2 W. Blac. 926.

(*u*) Co. Lit. 122 a; 2 Blac. Com. 35; Tudor L. C. Real Prop. 114 (2nd ed.).

(*x*) Wood's Inst. 344.

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any tenant, except a strict tenant at will, may take them off the land demised to him without leave of the lessor, unless he be restrained by special covenant to the contrary (*y*). House-bote, hay-bote and fire-bote belong to a termor of common right, and he may take wood for the same; but if he take more than is needful he may be punished for waste (*z*), as if he cut down wood to burn, when he has sufficient dead wood. Although the tenant may cut down and take sufficient wood to repair walls, palings, fences or hedges as he found them, yet he cannot do so to make new ones (*a*). If a man have common of estovers by grant, he cannot build new houses to have common of estovers for those houses (*b*). Common of estovers cannot be appendant to land, but it must necessarily be to a house to be spent there (*c*).

### (e) *Common of Piscary.*

Nature of Common of Piscary.

Common of piscary is a right or liberty of fishing in another man's water (*d*). It can only exist in streams which are not navigable, for the sea and all navigable rivers are open to all the king's subjects (*e*). It is a profit à prendre and not a mere easement nor an interest in land (*f*). It may be either appendant, appurtenant or in gross (*g*). It may exist by grant, or by prescription from time immemorial, or by user for thirty or sixty years under the Prescription Act (*h*), but not by custom (*i*). So a custom for all the inhabitants in a parish to use a footpath for angling with rods and lines for fish in the daytime, for recreation only, and not profit, is bad, as setting up a custom to take a profit à prendre in alieno solo (*k*). Common of piscary, to the exclusion of the owner of the soil, is contrary to law; though a person by prescription may have a separate right of fishing in such water, and the owner of the soil will be excluded (*l*): for a man may grant the water without passing the soil. If one grant a separate fishery, neither the soil nor water pass, but only a right of fishery (*m*).

(*y*) Fitz. N. B. 59, M.; Co. Lit. 41.
(*z*) Termes de la Ley, 387, 396.
(*a*) Co. Lit. 53; Wood's Inst. 525; 9 Co. R. 113.
(*b*) Fitz. N. B. 180, H.; *Arundel* v. *Steere*, Cro. Jac. 25.
(*c*) Co. Lit. 121 b; Fitz. N. B. 180, C. b; Tudor L. C. Real Prop. 115 (2nd ed.).
(*d*) Tudor L. C. Real Prop. 114 (2nd ed.).
(*e*) *Warren* v. *Matthews*, 6 Mod. 73; *Begott* v. *Orr*, 2 Bos. & P. 472.
(*f*) *Herbert* v. *Daughluyn*, Cro. Car. 492; *Wickham* v. *Hawker*, 7 M. & W. 63.
(*g*) Tudor L. C. Real Prop. 114 (2nd ed.).
(*h*) 2 & 3 Will. 4, c. 71, s. 1; *Wickham* v. *Hawker*, 7 M. & W. 63.
(*i*) *Lloyd* v. *Jones*, 8 C. B. 81, 89; 5 D. & L. 784.
(*k*) *Bland* v. *Lipscombe*, 4 E. & B. 713, n. (*c*).
(*l*) Co. Lit. 122 a.
(*m*) Bac. Abr. tit. *Piscary*.

### (f) *Approvement of Common.*

Lord may inclose Common against Tenants.

The lord of the manor or the owner of the soil and freehold, or his grantee or any person seised in fee of part of the waste (*n*), may inclose and approve part of a common against tenants having common of pasture, notwithstanding they have also some other right on the common, as a right to dig for sand, &c., if he leave sufficient common of pasture (*o*); and this may be done by an owner pur autre vie of the common (*p*).

Sufficiency of Common must be left for Commoners. *Arlett* v. *Ellis.*

There must be a sufficiency of common left for the commoners (*q*), and the onus of proving that a sufficiency was left lies with the lord (*r*). Besides the lord, any person who is seised in fee of part of a waste within a manor may approve, leaving a sufficiency of common. The lord, however, has not an *unlimited* right to inclose parts of a common without the consent of the homage; for an unlimited custom for the lord to inclose parts of a common and grant them in severalty, without the consent of the homage, is bad, being inconsistent with the rights of the commoners (*s*); although a custom for the lord, with the consent of the homage, to grant parts of a common for building is good (*t*), even in exclusion of the commoners (*u*); but a custom for the lord to grant leases of the waste of a manor, without restriction, from time immemorial cannot be presumed, and is bad in point of law (*x*). A custom for one commoner to inclose against another is good (*y*); and such a custom does not abridge the common law right of the lord to inclose (*z*). Where a part and not the whole of a common has been inclosed, a commoner, in asserting his right of common, may throw down the whole of the hedge erected on the common; and a plaintiff in trespass cannot recover against him on a new assignment, because he had thrown down more than sufficient to admit his cattle (*a*). If there be a custom within a manor for a lord to grant parcels of the waste by copy of court roll, the premises granted in that mode are well described as copyhold premises, although the date of the grant be modern (*b*).

Against what Rights of Common there may be Approver.

In one case it appears to have been supposed that there can be no approver in derogation of a right of common of turbary (*c*): but that

(*n*) *Glover* v. *Lane*, 3 T. R. 445; 1 R. R 737.
(*o*) 20 Hen. 3 (Statute of Merton), c. 4; 13 Edw. 1, stat. 1 (Westm. 2). c. 46; 3 & 4 Edw. 6, c. 3; 2 Inst. 87; *Strickland* v. *Fawcett*, Willes, 57; *Shakespeare* v. *Peppin*, 6 T. R. 741; 3 R. R. 330.
(*p*) *Patrick* v. *Stubbs*, 9 M. & W. 830.
(*q*) *Arlett* v. *Ellis*, 7 B. & C. 346; 9 id 671; *Lascelles* v. *Lord Onslow*, 36 L. T. 459.
(*r*) *Arlett* v. *Ellis*, supra; *Lake* v. *Plaxton*, 10 Exch. 196.
(*s*) *Arlett* v. *Ellis*, supra.
(*t*) *Folkard* v. *Hemmett*, 5 T. R. 417, n.
(*u*) *Boulcot* v. *Winmill*, 2 Camp. 261; 11 R. R. 710.
(*x*) *Badger* v. *Ford*, 3 B. & A. 153; 22 R. R. 331.
(*y*) *Barber* v. *Dixon*, 1 Wils. 44.
(*z*) *Duberly* v. *Page*, 2 T. R. 392, n.
(*a*) *Arlett* v. *Ellis*, 7 B. & C. 346; 9 id. 764.
(*b*) *Ld. Northwick* v. *Stanway*, 3 Bos. & P. 346.
(*c*) *Grant* v. *Gunner*, 1 Taunt. 435; 10 R. R. 562.

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case has been misunderstood; it was lost by mispleading, and the above point was not decided. It has since been held that the lord may inclose parcels of a waste against a right of common of turbary, if he leave a sufficiency of common for turbary, &c. (*d*). A custom for the owner of a waste to set out to the owners of certain ancient messuages portions of the waste, to be by them held in severalty for getting turves therein, and when the portions set out are cleared of turves, for the owners of the waste to inclose and approve such portions, to hold at their pleasure in severalty for ever, freed of all common of turbary, and pasture, is good (*e*). The lord, however, has no right, under the Statute of Merton, to inclose and approve the waste of a manor, where the tenants of a manor have a right to dig gravel on the waste and to take estovers (*f*).

Encroachment on the Waste.

If an encroachment upon the waste be suffered to remain for twelve years, it gives a title to the land to the party who has made the encroachment, who may dispose of it by will or otherwise (*g*); twelve years' adverse possession of a waste inclosed is a bar to the entry of a commoner; the lord's right of entry for a forfeiture is barred after twelve years by the Real Property Limitation Act, 1874 (*h*).

If a licence be given by a commoner by parol to build a cottage on a common, which is accordingly executed, he cannot maintain an action for the encroachment, although no sufficient common remains (*i*).

For whose Benefit the Encroachment is made.

When a lessee encroaches on the waste during his term, and is suffered to remain in uninterrupted possession, it is now settled that it shall be considered primâ facie that the encroachment was made for the benefit of the tenant during his term, and afterwards of his lessor, (except as against third persons (*k*),) unless it appears clearly by some act done *at the time*, that the tenant intended the encroachment for his own benefit, and not to hold it as he held the farm to which it was adjacent (*l*). He is, therefore, bound to deliver up the land taken from the waste of his lessor at the end of his term, with the rest of the premises demised (*m*).

(*d*) *Arlett* v. *Ellis*, 7 B. & C. 336; 9 id. 671.

(*e*) *Clarkson* v. *Woodhouse*, 5 T. R. 412, n.; 3 Doug. 189; *Place* v. *Jackson*, 4 D. & R. 318.

(*f*) *Duberly* v. *Page*, 2 T. R. 391.

(*g*) *Asher* v. *Whitelock*, 35 L. J., Q. B. 17; 11 Jur., N. S. 925.

(*h*) See *Doe* d. *Tarrant* v. *Hellier*, 3 T. R. 162; 1 R. R. 680; *Whitton* v. *Peacock*, 3 Myl. & K. 325.

(*i*) *Harvey* v. *Reynolds*, 1 C. & P. 141; *Perry* v. *Fitzhowe*, 8 Q. B. 757.

(*k*) *Doe* d. *Raddeley* v. *Massey*, 17 Q. B. 373; *Doe* d. *Croft* v. *Tidbury*, 14 C. B. 304.

(*l*) Post, Chap. XX.

(*m*) *Bryan* d. *Child* v. *Winwood*, 1 Taunt. 208; *Doe* d. *Watt* v. *Morris*, 2 Bing. N. C. 189; post, Chap. XX.

### (g) *Inclosure of Common.*

Local Inclosure Acts.

The inclosure of commons, otherwise than by "approvement" can only be effected by the authority of parliament; or by a special agreement under seal between the lord and all the copyholders, under which the allotments will become of freehold tenure (*u*). But it is generally impracticable to procure the consent of *all* copyholders, especially where there are trustees, or persons under the disability of infancy or coverture, or having any limited estates. Local inclosure acts are very numerous, and formerly were very long and special; but in 1801 a general act was passed (41 Geo. 3, c. 109), intituled "An Act for consolidating in one Act certain Provisions usually inserted in Acts of Inclosure, and for facilitating the Mode of Proving the several Facts usually required on the passing of such Acts." This was followed by very many others on the same subject (*o*).

## Sect. 2.—*Right of Way.*

### (a) *Private Ways.*

Tenant cannot acquire an Easement against his Landlord. *Outram* v. *Maude.*

"Nothing is more clearly established," it has been said by Bacon, V.-C., "than that a person to whom land is demised cannot by its use and enjoyment acquire an easement in it, distinct from the use and enjoyment of such land, against his landlord; and it is further clearly established law that the tenant cannot acquire any such right while a unity of possession in the subject demised and in the easement claimed subsists in the same person" (*p*).

Nature of Rights of way.

A private right of way is a mere easement over the soil of another, and not an interest in the land itself (*q*). The presumption that the soil of a road *usque ad medium filum viæ* belongs to the owners of the adjoining lands applies equally to a private as to a public road (*r*). A private way may be either a footway, a horseway, or a cartway (*s*). It is susceptible of almost infinite variety, according to the extent of the grant, express or implied, and of the user where no deed is produced (*t*). Thus, it may exist for agricultural purposes only (*u*); or for the carriage of coals only (*x*); or for the carriage of all articles except coals (*y*). A right of way for carts and carriages does not

Limited Right of Way.

(*n*) *Paine* v. *Ryder*, 24 Beav. 151.

(*o*) See the whole series of Acts, Chitty's Statutes, tit. *Inclosure*.

(*p*) *Outram* v. *Maude*, 17 Ch. D. 391; 50 L. J., Ch. 783; 29 W. R. 818.

(*q*) *Godley* v. *Frith*, Yelv. 159; *Hewlins* v. *Shippam*, 5 B. & C. 221.

(*r*) *Holmes* v. *Bellingham*, 7 C. B., N. S. 329; 29 L. J., M. C. 132; *Smith* v. *Howden*, 14 C. B., N. S. 398.

(*s*) Co. Lit. 56 a; Gale, 317 (4th ed.).

(*t*) Gale, 316 (4th ed.).

(*u*) *Reignold* v. *Edwards*, Willes, 282; *Jackson* v. *Stacey*, Holt, N. P. C. 455; *England* v. *Wall*, 10 M. & W. 699.

(*x*) *Ireson* v. *Moore*, 3 Ld. Raym. 291; 1 Salk. 15.

(*y*) *Marquis of Stafford* v. *Coyney*, 7 B. & C. 257; *Jackson* v. *Stacey*, Holt, N. P. C. 455; 17 R. R. 663.

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necessarily include a right of way for horned cattle; but the extent of the right is a question for the jury upon the evidence of user, &c. (*z*). So proof of user of a way for farming purposes does not necessarily prove a right of way for the purpose of conveying coal, the produce of a mine lying under the defendant's land (*a*). So, proof of a right of way for the purpose of carting timber will not support a plea of right of way for all carts, carriages, horses, and on foot; or even amount to proof of any one of those rights taken separately, so as to admit of the verdict being entered distributively (*b*). So a reservation in a lease of a right of way on foot and for horses, oxen, cattle and sheep, does not include a right to lead manure (*c*).

Reasonable User of Right of Way.

Where premises are demised or conveyed "with a right of way thereto," it may be a question for the jury what is a reasonable use of such right (*d*). A., having a right of way to a close, demised the close to B. by a parol demise, not mentioning the right of way. B. being possessed of an adjoining close upon which he was erecting certain houses, used the way for carting building materials to A.'s close, for the purpose of using them upon his own adjoining land;—held, that it was properly left to the jury to say whether B.'s use of the road was a bonâ fide exercise of the right of way to A.'s close, or a mere colourable mode of getting to his own land (*e*). Where a right of way was expressed to be "through the gateway" of the plaintiff (which gateway led to other premises of the plaintiff), and, at the time of the lease, carts could come in to load and unload and turn round and go out again, but through alterations of the premises could not now do so without slightly trenching upon the plaintiff's premises: held, that in the reasonable use of the right of way the defendants had a right to do this, and that what was a reasonable user was for the jury (*d*).

Claim of Right of Way by User, or Prescription.

The right of way may be claimed by user for [20 *or* 40] years, pursuant to the Prescription Act, 1833, 2 & 3 Will. 4, c. 71, s. 2, or by prescription from time immemorial (*f*), or by express or implied grant (lost or not lost (*g*)), and sometimes by custom (*h*). If a particular class of persons use a pathway, and the owner does not interrupt the user for some private reason not communicated to the persons using the path, a public right of way is gained by the

(*z*) *Ballard* v. *Dyson*, 1 Taunt. 279; 9 R. R. 770; Gale, 319 (4th ed.).
(*a*) *Cowling* v. *Higginson*, 4 M. & W. 245; Gale, 331 (4th ed.).
(*b*) *Higham* v. *Rabett*, 5 Bing. N. C. 622; 7 Dowl. 653; Gale, 333 (4th ed.).
(*c*) *Brunton* v. *Hall*, 1 Q. B. 792.
(*d*) *Hawkins* v. *Carbines*, 27 L. J., Ex. 44.
(*e*) *Skull* v. *Glenister*, 16 C. B., N. S. 81; 32 L. J., C. P. 185; *Williams* v. *James*, L. R., 2 C. P. 577; 36 L. J., C. P. 256; and see *Dare* v. *Heathcote*, 25 L. J., Ex. 245; 26 Id. 164.
(*f*) Id. 811; *Darling* v. *Clue*, 4 F. & F. 329.
(*g*) Id. 812.
(*h*) *Grimstead* v. *Marlowe*, 4 T. R. 718; 2 R. R. 512.

user after a lapse of twenty years (*i*). Where the owners and occupiers of a particular close or farm have immemorially been used to cross a particular piece of land, a right of way is created by the immemorial usage which supposes an ancient grant: and in pleading such a right of way, it is not necessary to describe all the closes intervening between the two termini (*k*).

Prescription Act.

Claims to Right of Way, &c., not to be defeated after 20 Years' Enjoyment by showing only the Commencement.

By the Prescription Act, 1832 (2 & 3 Will. 4, c. 71), sect. 2, "No claim which may be lawfully made at common law, by custom, prescription or grant, to any way or other easement, or to any watercourse, or the use of any water, to be enjoyed or derived upon, over or from any land or water of our said lord the king, his heirs or successors, or being parcel of the Duchy of Lancaster or of the Duchy of Cornwall, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of *twenty years*, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years; but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter as hereinbefore last mentioned shall have been so enjoyed as aforesaid for the full period of *forty years*, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing."

After 40 Years Right absolute unless had by Writing.

"Enjoyment" under Act means continuous Enjoyment as of Right.

The enjoyment of a way or other easement under this act means *a continuous enjoyment as of right*, for twenty (*or* forty) years next before the commencement of the suit, or of some other suit or action wherein the right was brought into question (*l*); *as an easement*, without interruption acquiesced in for a year; and such right is defeated by unity of possession during all or part of the period of enjoyment, though such unity of possession has its inception after the completion of the twenty (*or* forty) years (*m*). Therefore where the plaintiff had enjoyed a way as of right, and without interruption from 1800 to 1855, when the action was brought: held, that his claim under the statute was defeated by unity of possession from 1843 to 1853 (*n*). Evidenced that during the alleged enjoyment the land over which, and the land in right of which, it has been exercised, were held by the

(*i*) *Reg.* v. *Broke*, 1 F. & F. 514.

(*k*) *Simpson* v. *Lewthwaite*, 3 B. & Adol. 226.

(*l*) *Cooper* v. *Hubbuck*, 12 C. B., N. S. 456; 31 L. J., C. P. 323; *Beytagh* v. *Cassidy*, 16 W. R. 403, Ir. Exch.

(*m*) *Battishill* v. *Reed*, 18 C. B. 696; 25 L. J., C. P. 290; *Onley* v. *Gardiner*, 4 M. & W. 496.

(*n*) *Battishill* v. *Reed*, supra.

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same person, disproves the enjoyment "as of right" and "as an easement" (*o*).

Private Ways by Grant.

A right of way *appurtenant* to land passes to the tenant by a parol demise of the land, though nothing is said about it at the time of the demise (*p*). A private right of way may be grounded on a special permission;—as when the owner of lands grants to another a liberty of passing over his grounds, to go to church, to market, or the like, in which case the gift or grant is particular, and confined to the grantee alone; it dies with the person, and if the grantee quit the country, he cannot assign over his right to any other, nor can he justify taking another person in his company. Under a grant of way from A. to B., "in, through and along" a particular way, the grantee is not justified in making a traverse road across the same (*q*). A reservation of a right of way "to a stable and loft over and *the space or opening under* the loft, and now used for a wood-house," does not authorize the party to use the way to a cottage built on the spot where the loft and space under was, there having been such an alteration in the substance of the place (*r*). If a right of way be granted to a cottage, and the cottage is changed into a tanyard, the right of way ceases; but if there is a general grant of all ways to a cottage, the right is not lost by reason of the cottage being altered (*s*).

Limited Right of Way.

A right of way for agricultural purposes is a limited and qualified right of way, and does not necessarily confer a right to use such a way for general and commercial purposes (*t*). So a reservation of a right of way, on foot and for horses, oxen, cattle and sheep, does not confer a right to use it to lead manure (*u*). A lease of lands, excepting the mines, with power to work them, "with free ingress, &c., to and from the same, or to or from any other mines, quarries, lands, and grounds, on foot, &c., and also all necessary ways, privileges, and powers whatsoever for the purposes aforesaid, and particularly of laying, making, and granting waggon-ways in and over the premises demised," does not give the lessor power to grant wayleaves for all purposes, but only a limited power for getting the expected minerals (*x*). Under a grant of a free and convenient way for the purpose of conveying coals, among other articles, the grantee has a right to lay a framed waggon way (*y*). If a man, upon a lease for years, reserve a way to himself through the house of the lessee to a back-

(*o*) *Clayton* v. *Corby*, 2 Q. B. 813.
(*p*) *Skull* v. *Glenister*, 16 C. B., N. S. 81; 32 L. J., C. P. 185.
(*q*) *Senhouse* v. *Christian*, 1 T. R. 560.
(*r*) *Allan* v. *Gomme*, 11 A. & E. 759; explained in *Henning* v. *Burnet*, 8 Exch. 192, 194; Gale, 317, n. (*c*) (4th ed.).
(*s*) Per Parke, B., in *Henning* v. *Burnet*, 8 Exch. 192.
(*t*) *Jackson* v. *Stacey*, Holt, 455; *Reignold* v. *Edwards*, Willes, 282.
(*u*) *Brunton* v. *Hall*, 1 Q. B. 792.
(*x*) *Durham and Sunderland Rail. Co.* v. *Walker*, 2 Q. B. 940.
(*y*) *Senhouse* v. *Christian*, 1 T. R. 560; 1 R. R. 300.

house, he cannot use it but at seasonable times and on request (*z*). There being two tenants of adjoining houses held under the same landlord, the tenant of one of the houses acquired a right of way to his vaults through the adjoining vaults. The landlord sold both properties at one sale, with a condition that they were to be subject to, and with the benefit, as the case might be, of all subsisting rights or easements of way or passage, so far as any lot might be affected thereby: held, that the vendor being subject to no liability as to right of way, the purchaser of one tenement could not enforce a right of way as against the other (*a*).

Private Ways of Necessity.

A right of way may also arise by act and operation of law: for if a man grant a piece of ground in the middle of his field, he at the same time tacitly and impliedly gives a way to come at it (*b*); and the grantee may cross the grantor's land for that purpose without being a trespasser. And it is the same though the close aliened be not totally inclosed by the grantor's land, but partly by a stranger's, for the grantee may not go over the stranger's land (*c*). The lessee of an inner close has by necessity a right of way, suitable to the business for which the lease was made, over an outer close which belongs to the same landlord; but the lessee of one close cannot as such by user acquire an easement over another close which belongs to the same landlord (*d*). When the law gives anything it gives impliedly whatsoever is necessary for enjoying the same (*e*); therefore when one (even as trustee) conveys land to another, to which there is no access but over the grantor's land, a right of way passes of necessity, as incidental to the grant (*f*); so also, if the owner of two closes, having no way to one of them but over the other, part with the latter without reserving the way, it seems that it will be reserved for him by operation of law (*g*). A lessor demised a messuage, consisting of two parts, separated by intervening reserved land, subjected only to a specific right of way for the lessee to a third building, for a specific purpose, which reservation, strictly interpreted, would preclude him from all access to the one part, which was accessible only by crossing the reserve land in one of two directions, the one by entering it from the residue of the demised premises, the other, and far the more convenient, by entering it from the public street: it was held that the lessee was entitled to a

(*z*) *Tomlin* v. *Fuller*, 1 Ventr. 48.

(*a*) *Daniel* v. *Anderson*, 31 L. J., Ch. 610; *White* v. *Bass*, 7 H. & N. 722; 31 L. J., Ex. 283; *Scott* v. *Sykes*, 2 F. & F. 191; *Dodd* v. *Burchell*, 1 H. & C. 113; *Suffield* v. *Brown*, 33 L. J., Ch. 249.

(*b*) *Oldfield's case*, Noy, 123; 2 Roll. Abr. 60, pl. 17.

(*c*) 2 Roll. Abr. 60.

(*d*) *Gayford* v. *Moffatt*, L. R., 4 Ch. App. 133.

(*e*) Hobart, 234.

(*f*) *Howton* v. *Frearson*, 8 T. R. 50; 4 R. R. 581.

(*g*) *Pomfret* v. *Ricroft*, 1 Wms. Saund. 321, n. (6); cited L. R., 4 Ch. App. 135; *Clarke* v. *Cogge*, Cro. Jac. 170; Owen, 122; *Staple* v. *Heydon*, 6 Mod. 1; *Chichester* v. *Lethbridge*, Willes, 72, note; *Howton* v. *Frearson*, 8 T. R. 50; 4 R. R. 581.

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way across the reserved land from the public street in that part (*h*). By a lease of a house, with all appurtenances, a right of way *necessary* for the convenient occupation of such house and previously enjoyed by the tenant will pass (*i*). If a way granted by a lease cannot be used by reason of its passing over the land of a third person, and there is no other way to the lessee's house, he is entitled to a way of necessity to the nearest highway by the shortest line across the grantor's land (*k*).

Way of Necessity, limited by Necessity which created it.

A way of necessity is limited by the necessity which created it, and when such necessity ceases, the right of way also ceases (*l*), but it exists after unity of possession of the close to which and the close over which it runs, and after a subsequent severance (*m*).

Ways under Leases made pursuant to Act of Parliament.

A private estate act, enabling tenants for life to grant building leases, empowered the lessors to lay out and appropriate any part of the land authorized to be leased as and for a way, street, square, passage, sewer, or other conveniences, for the general improvement of the estate, and the accommodation of the tenants and occupiers; held, that exclusive private rights of way over land so appropriated for a way might be granted to particular lessees, and that tenants under other leases granted in pursuance of the powers of the act, but containing no grant by deed of a right to use such ways, were not entitled by the provisions of the statute to use them (*n*).

## SECT. 3.—*Lights.*

Nature of Rights to Light and Air.

The right to the reception of such light and air as fall *perpendicularly* on a man's land is a natural right of property incident to the land, and not a mere easement over the land of another: but a right to the reception of light and air, without obstruction, in a *lateral* direction over the land of another is an easement (*o*).

2 & 3 Will. 4, c. 71, s. 3: The Prescription Act.

By the Prescription Act, 1832, 2 & 3 Will. 4, c. 71, s. 3, "when the access and use of light to and for any dwelling-house, workshop or other building shall have been actually enjoyed therewith (*p*)

(*h*) *Morris* v. *Edgington*, 3 Taunt. 24; 12 R. R. 579; *Wilson* v. *Bagshaw*, 5 Man. & R. 448; *Osborne* v. *Wise*, 7 C. & P. 761.

(*i*) *Hinchcliffe* v. *Earl Kinnoul*, 5 Bing. N. C. 1; *Pheysey* v. *Vicary*, 16 M. & W. 484; *Kavanagh* v. *Coal Mining Co. of Ireland*, 14 Ir. Com. L. R. 82, Q. B. But it is otherwise where the way is not mentioned and not absolutely necessary; *Dodd* v. *Burchall*, 1 H. & Colt. 113; 31 L. J., Ex. 364; and see *Dyer* v. *Carter*, 1 H. & N. 916; *Worthington* v. *Gimson*, 2 E. & E. 618; 29 L. J., Q. B. 116; *Pearson* v. *Spencer*, 1 B. & S. 571; 3 B. & S. 761; *Polden* v. *Bastard*, 4 B. & S. 258; 11 W. R. 778; 14 Id. 199.

(*k*) *Osborne* v. *Wise*, 7 C. & P. 761.

(*l*) *Holmes* v. *Goring*, and *Same* v. *Elliott*, 2 Bing. 76.

(*m*) *Buckby* v. *Coles*, 5 Taunt. 311; 15 R. R. 508.

(*n*) *White* v. *Leeson*, 5 H. & N. 53; 29 L. J., Ex. 105.

(*o*) Gale, 300 (4th ed.); Tudor L. C. Real Prop. 168 (2nd ed.).

(*p*) The words "as of right" are here purposely omitted; *Flight* v. *Thomas*, 11 A. & E. 695.

for the full period of *twenty years*, without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom (*q*) to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose (*r*) by deed or writing."

Decisions.

This section puts the right on a simple foundation, and with the simplest exception (*s*). The enjoyment for the requisite period may have been partly before the passing of the act, the enactment being retrospective (*t*). The enjoyment need not be adverse (*u*). The right may be gained by user for twenty years, although by permission orally given (*x*); but not by user under a consent or agreement by deed or writing (*y*). The mere payment of rent for the use of light is not an "interruption" within the meaning of sect. 4 (*z*). A user for twenty years will create a right, though interrupted by intervals of suspension, occasioned by a unity of possession, such intervals being excluded from the computation (*a*). But where the dominant and servient tenements were for sixty years in the occupation of the same person as tenant thereof respectively; it was held, that no right to light was acquired, the enjoyment of the light during that period not being *as an easement* (*b*).

Building Lease.

Where, by lease for 999 years of a plot of building land, with a house erected by the lessee under a building agreement, the lessor demised the house and land "and all rights and appurtenances, except rights restricting the free use of any adjoining land, or the conversion or appropriation at any time of any land for building or other purposes, obstructive or otherwise," it was held by the Court of Appeal that the reservation was not an agreement within the proviso of sect. 3, and, therefore, did not prevent the lessee from acquiring a right to light under the act (*c*).

Two Houses held under the same Landlord.

*Frewen* v. *Phillips.*

Where two houses are held by different tenants under the same landlord for long terms granted and expiring at the same time, by twenty years' user during such terms one tenant acquires as against the other an indefeasible right to the light (*d*). But whether such

(*q*) This destroys the custom of the city of London to build on ancient foundations to any height, notwithstanding the obstruction of ancient lights; *Crofts* v. *Haldane*, 8 B. & S. 194; L. R., 2 Q. B. 194; 36 L. J., Q. B. 85.

(*r*) *Bridges* v. *Blanchard*, 1 A. & E. 536; *Blanchard* v. *Bridges*, 4 A. & E. 176.

(*s*) Per Coleridge, J., in *Merchant Taylors' Co.* v. *Truscott*, 11 Exch. 863.

(*t*) *Simper* v. *Foley*, 2 Johns. & H. 555.

(*u*) *Tickle* v. *Brown*, 4 A. & E. 369.

(*x*) *Mayor, &c., of London* v. *Pewterers' Co.*, 2 Moo. & R. 409.

(*y*) Sect. 3, supra.

(*z*) *Plasterers' Co.* v. *Parish Clerks' Co.*, 8 Exch. 630; *Rogers* v. *Taylor*, 2 H. & N. 828, 833.

(*a*) *Thomas* v. *Thomas*, 2 C., M. & R. 34; *Simper* v. *Foley*, 2 Johns. & H. 555.

(*b*) *Harbridge* v. *Warwick*, 3 Exch. 552.

(*c*) *Mitchell* v. *Cantrill*, 37 Ch. D. 563; 58 L. T. 29; 36 W. R. 229—C. A.

(*d*) *Frewen* v. *Phillips*, 11 C. B., N. S. 449; *Mitchell* v. *Cantrill*, 36 W. R. 229—C. A., and note (*c*), supra.

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right would continue as against the landlord or his assigns after the expiration of the terms may be doubted (*e*).

Period of User.

A user for nineteen years and a fraction gives an inchoate right, which cannot be defeated by any subsequent interruption within one year next before the action (*f*); but in such case the full period of twenty years should be allowed to elapse before the commencement of any action for disturbance of the right; and the action must be brought before the interruption has continued for one year. Where windows were shown to have existed twenty years, it was held that proof that they did not exist twenty-two years before the obstruction was insufficient to defeat the action (*g*). When a house is partly built and the windows put in, the twenty years begin to run, notwithstanding the house is not completed or made fit for habitation until several years afterwards (*h*). Although the twenty years' user must be next before some suit or action wherein the claim to the right to light is brought in question, it need not be next before the pending suit or action (*i*).

Amount of Light.

In order to establish the right to the access of an extraordinary amount of light necessary for a particular purpose or business to an ancient window, open, uninterrupted and known enjoyment of such light in the manner in which it is at present enjoyed and claimed must be shown for a period of twenty years (*k*). The owner of ancient lights is entitled, not only to sufficient light for the purposes of his then business, but to all the light which he had enjoyed previously to the interruption complained of (*l*). There is no distinction between the right to light and air in regard to town houses and country houses (*m*).

How lost—by Alterations.

Alterations in windows by merely enlarging them, without changing their character or position, do not destroy the right to light and air through that part of the aperture which is old (*n*). Even opening new windows which cannot be obstructed without at the same time obstructing an ancient window will not justify or excuse any obstruction of such ancient window (*o*).

(*e*) *Daniel* v. *Anderson*, 31 L. J., Ch. 610; *White* v. *Bass*, 7 H. & N. 722; 31 L. J., Ex. 283. Semble, that it would; see *Simper* v. *Foley*, 2 Johns. & H. 555.

(*f*) *Flight* v. *Thomas*, 11 A. & E. 688.

(*g*) *Penwarden* v. *Ching*, Moo. & M. 400.

(*h*) *Courtauld* v. *Legh*, L. R., 4 Ex. 126.

(*i*) *Cooper* v. *Hubbuck*, 12 C. B., N. S. 456; 31 L. J., C. P. 323; *Beytagh* v. *Cassidy*, 16 W. R. 403, Ir. Exch.

(*k*) *Lanfranchi* v. *Mackenzie*, L. R., 4 Eq. 421; 36 L. J., Ch. 518.

(*l*) *Yates* v. *Jack*, L. R., 1 Ch. Ap. 295; 14 L. T. 151; 14 W. R. 618.

(*m*) *Martin* v. *Headon*, L. R., 2 Eq. 425; 35 L. J., Ch. 682.

(*n*) *Tapling* v. *Jones*, 11 H. L. Cas. 290; 34 L. J., C. P. 342; *Garrett* v. *Sharp*, 3 A. & E. 325; *Blanchard* v. *Bridges*, 4 A. & E. 191, 192.

(*o*) *Tapling* v. *Jones*, supra; overruling *Renshaw* v. *Bean*, 18 Q. B. 112, and *Hutchinson* v. *Copestake*, 8 C. B., N. S. 102; 9 id. 863; and see *Binckes* v. *Pash*, 11 C. B., N. S. 324, which may also be considered as overruled on this point.

It was held in *Barnes* v. *Loach* (*p*)—a case of the first impression—that the implication of a grant of lights upon the alienation to different persons of tenements previously in the ownership of the same person is not prevented by the fact that the dominant tenement at the time of the alienation is in lease, and consequently not in the possession of the alienor.

Dominant Tenement under Lease at Time of Severance of Ownership. *Barnes* v. *Loach.*

In *Master* v. *Hansard* (*q*), the owner of an estate granted a lease of a plot of ground to A. (with a building upon it known as the Crystal Palace Hotel), who covenanted not to do anything on the demised premises which should be an annoyance to the neighbourhood or to the lessor or his tenants. Some years afterwards the same owner granted a lease of an adjoining plot to B., who entered into a similar restrictive covenant, but had no notice that such covenant was contained in A.'s lease also. Within twenty years A. commenced, by building operations, to darken the windows of B.'s house. It was held by the Court of Appeal, that B. could not prevent this being done, the restrictive covenants being for the benefit of the landlord, and not of the tenants.

Disposition by Owner of Two Tenements. *Master* v. *Hansard.*

General words in a grant must be restricted to what the grantor had power to grant at the date of it. Therefore, where the defendant, having a term for four years in premises over which light came to the premises demised to plaintiff, "together with all lights," &c., for twenty-one years, bought the first-mentioned premises at the end of the four years, it was held that the defendant might destroy the light (*r*).

Restriction of General Words.

A right to light under the Prescription Act, 1833, 2 & 3 Will. 4, c. 71, s. 3, may be lost by blocking up the windows for one year, and discontinuing to use them during that period (*s*); but a common law right to light is not so readily determined. It may be lost by twenty years' non-user (*t*). It may also sometimes be lost by an abandonment of the right for less than twenty years, provided the jury find that the party thereby manifested an intention of permanently abandoning his right to the light, or that the lights had been kept so closed as to lead the owner of the adjoining land to alter his position, in the reasonable belief that the lights had been permanently abandoned (*u*). It seems doubtful whether the

By Non-User, or Abandonment.

(*p*) *Barnes* v. *Loach*, 4 Q. B. D. 494; 48 L. J., Q. B. 756; 41 L. T. 278; 28 W. R. 32.

(*q*) *Master* v. *Hansard*, 4 Ch. D. 718; 48 L. J., Ch. 505; 36 L. T. 535; 25 W. R. 570, C. A. From a perusal of the judgments it does not seem that B. would have succeeded if he had had notice of A.'s covenant at the time of entering into his own.

(*r*) *Booth* v. *Alcock*, L. R., 8 Ch. 1663; 42 L. J., Ch. 557; 29 L. T. 231; 21 W. R. 743.

(*s*) Ante, Sect. 1 (a); but see *Tapling* v. *Jones*, 11 H. L. Cas. 290; 34 L. J., C. P. 342, in which the right given by statute after twenty years' user is considered as secure and permanent as a right at common law.

(*t*) *Lawrence* v. *Obee*, 3 Camp. 514; 14 R. R. 830; *Moore* v. *Rawson*, 3 B. & C. 332.

(*u*) *Stokoe* v. *Singers*, 8 E. & B. 31; 26 L. J., Q. B. 257.

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manifestation of an intention to abandon the lights communicated to the owner of the adjoining land would destroy the right, until such owner altered his position, and incurred expense or loss in reliance thereon (*r*). But an abandonment is effectual when communicated *and acted on* (*x*).

Action by either Landlord or Tenant.

Either the tenant in possession or the reversioner may sue for an obstruction to lights (*y*).

Evidence.

To prove a right under the statute there must be evidence of a continuous uninterrupted user in each year for twenty years next before action (*z*), or at all events a user commencing more than twenty years before action, and continued without interruption to within one year next before action (*a*). The issue is upon the user and not upon the right (*b*); but where a grant is pleaded the issue is upon the grant as alleged, and not upon the user or non-user during the last twenty years, which is merely matter of evidence (*c*). There must also be evidence of some sensible and material obstruction of the light and of the damage thereby occasioned to the plaintiff (*d*).

Injunction against Continuance of Injury.

In an action for obstructing lights, the plaintiff may claim an injunction against a continuance of the injury (*e*).

## SECT. 4.—*Watercourses.*

Definition of a Watercourse.

A watercourse means water flowing between banks more or less defined. To constitute a watercourse in which rights may exist, or may be acquired by user or otherwise, the flow of water must possess that unity of character by which the flow on one person's land can be identified with that on his neighbour's land. Water which squanders itself over an indefinite surface is not a watercourse, nor a proper subject-matter for the acquisition of a right by user (*f*). But the moment the water of a spring runs into a definite channel, it constitutes a watercourse (*g*). All accessions to such stream, from whatever source, form part of it (*h*). Where the question at the trial is whether there is a watercourse or not, the judge ought, before he leaves that question to the jury, to instruct them as to what constitutes a "watercourse" in law (*i*).

(*v*) See note (*u*) on p. 749.
(*x*) *Reg.* v. *Chorley*, 12 Q. B. 515, cited 8 E. & B. 37.
(*y*) *Jeffer* v. *Gifford*, 4 Bur. 2141; and see Chap. XIX., post.
(*z*) *Lowe* v. *Carpenter*, 6 Exch. 825.
(*a*) *Flight* v. *Thomas*, 8 Cl. & F. 231.
(*b*) *Davies* v. *Williams*, 16 Q. B. 546; *Battishill* v. *Reed*, 18 C. B. 698, 703.
(*c*) *Ward* v. *Ward*, 7 Exch. 838; 21 L. J., Ex. 334.
(*d*) *Manning* v. *Gresham Hotel Co.*, Ir. R., 1 Ch. 115.
(*e*) See further as to injunctions, post, Chap. XIX.
(*f*) *Briscoe* v. *Drought*, 11 Ir. Com. L. R. 250; *Rawstron* v. *Taylor*, 11 Exch. 369; *Broadbent* v. *Ramsbottom*, id. 602, 615; 25 L. J., Ex. 115.
(*g*) *Dudden* v. *Guardians of Clutton Union*, 1 H. & N. 627.
(*h*) *Wood* v. *Waud*, 3 Exch. 748.
(*i*) *Briscoe* v. *Drought*, 11 Ir. Com. L. R. 250; and see *Elliott* v. *South Devon R. Co.*, 2 Exch. 725; *Cashell* v. *Wright*, 6 E. & B. 891.

Nature of Rights in natural Streams.

Flowing water is publici juris, not in the sense that it is a bonum vacans, to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only, that *all may reasonably use it who have a right of access to it:* that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the term of his possession only (*k*). The right to the use of flowing water is clear. Primâ facie the proprietor of each bank is the proprietor of half the land covered by the stream, *ad medium filum aquæ*, but there is no property in the water. Each proprietor of the land has a right to the advantage of the stream *flowing in its natural course* over his land, and to use the same as he pleases for any purpose of his own, not inconsistent with a similar right in the proprietors of land above or below; so that neither can any proprietor above diminish the quantity or injure the quality of the water which would otherwise naturally descend, nor can any proprietor throw back the water without the licence or the grant of the proprietor above (*l*); or a right to do so acquired by prescription from time immemorial, or by user for [40 *or* 20] years, pursuant to the Prescription Act, 1833, 2 & 3 Will. 4, c. 71, s. 2 (ante, p. 743) (*m*). Every riparian proprietor has a right to the reasonable use of water flowing past his land, namely, for his domestic purposes, and for his cattle. He has also the right to the use of the water for any other purpose, provided he does not thereby interfere with the rights of the proprietors either above or below him (*n*). Subject to this condition a riparian proprietor may dam up the stream for the purpose of a mill, or divert the water for the purposes of irrigation; but he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors and inflicts upon them a sensible injury (*o*). He has a right by means of water-wheels and machinery, erected by him for that purpose, to pump up water from the stream to a reservoir, and to convey it thence by pipes to his dwelling-house upon another estate at a distance from the stream, and there to apply such water to his domestic and other necessary purposes of utility; provided he takes only a reasonable quantity with reference to the size of the stream and the rights of his

(*k*) *Embrey* v. *Owen*, 6 Exch. 369; *Mason* v. *Hill*, 3 B. & Adol. 304; 5 id. 1.

(*l*) *Mason* v. *Hill*, 5 B. & A. 1, 24; *Wright* v. *Howard*, 1 Sim. & Stu. 190, 203; 24 R. R. 169; *Acton* v. *Blundell* (in error), 12 M. & W. 348, 349.

(*m*) *Sampson* v. *Hoddinott*, 1 C. B., N. S. 596; 3 id. 590; 3 id. 596; *Moore* v. *Webb*, 1 C. B., N. S. 673; *Murgatroyd* v. *Robinson*, 7 E. & B. 391; *Gaved* v. *Martyn*, 19 C. B., N. S. 732; 34 L. J., C. P. 353.

(*n*) *Miner* v. *Gilmour*, 12 Moore, P. C. 131; 7 W. R. 328, cited L. R., 2 Ex. 9; *Sampson* v. *Hoddinott*, 1 C. B., N. S. 590; 3 id. 596; 26 L. J., C. P. 148; *Ld. Norbury* v. *Kitchin*, 3 F. & F. 292; 9 Jur., N. S. 132.

(*o*) *Miner* v. *Gilmour* and *Ld. Norbury* v. *Kitchin*, supra.

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neighbour; but he has no right to take more water by means of the wheels and machinery than he would have a right to take otherwise (*p*). The proprietor of a watercourse has a right to avail himself of its momentum as a power which may be turned to beneficial purposes; and he may make a reasonable use of the water itself for domestic purposes, for watering cattle, or even for irrigation, provided it is not unreasonably detained or essentially diminished (*q*). A riparian proprietor has a right to divert water to a reasonable extent for the purposes of irrigation; but the extent of such user must depend upon the circumstances of each case. It must not be such as materially to prejudice any proprietor below (*r*). If a riparian proprietor unreasonably *detain* the water of a stream for purposes of irrigation, whereby another proprietor lower down the stream is deprived of the use of the water daily for several hours, until it is too late for him to use it for irrigating his land, or for any other lawful and necessary purpose, he may maintain an action (*s*). A proprietor of land contiguous to a stream may, *as soon as he is injured* by the diversion of the water from its natural course, maintain an action against the party so diverting it: and it is no answer to the action that the defendant first appropriated the water to his own use, unless he has had twenty years' undisturbed enjoyment of it in its altered course (*t*). So where the water is improperly heightened and penned and forced back upon the plaintiff's land situate higher up the stream (*u*). So where the stream is heated or polluted with the refuse of a mill or works higher up the stream (*x*). The right to have a stream flow *in its natural state*, without diminution or alteration, is *a natural right incident to the property* in the land through which it passes, and not a mere easement (*y*). The owner of such property has a right to have the stream come to him in its natural state in flow, quantity and quality, and to go from him without obstruction, upon the same principle that he is entitled to the support of his neighbour's soil for his own land in its natural state. Such a right in no way depends upon prescription, or the presumed grant of his neighbour, nor from presumed acquiescence of the proprietors above and below (*z*). By grant, or by prescription

(*p*) *Ld. Norbury* v. *Kitchin*, supra.

(*q*) *Blanchard* v. *Baker*, 8 Greenleaf, 258, cited 4 C. B., N. S. 604; 6 Exch. 365.

(*r*) *Embrey* v. *Owen*, 6 Exch. 353, 372; *Ld. Norbury* v. *Kitchin*, 3 F. & F. 292.

(*s*) *Sampson* v. *Hoddinott*, 1 C. B., N. S. 593, 612; 3 id. 596; 26 L. J., C. P. 148.

(*t*) *Mason* v. *Hill*, 5 B. & A. 1; 2 N. & M. 743; 3 B. & Adol. 304; 5 id. 1.

(*u*) *Saunders* v. *Newman*, 1 B. & A. 258; Gale, 220 (4th ed.).

(*x*) *Wood* v. *Waud*, 3 Exch. 748; *Carlyon* v. *Lovering*, 1 H. & N. 784; *Whaley* v. *Laing*, 2 H. & N. 476; 3 id. 675; 5 id. 480; 26 L. J., Ex. 327; 27 id. 422; *Magor* v. *Chadwick*, 11 A. & E. 571; *Mason* v. *Hill*, 3 B. & Adol. 304; 5 id. 1.

(*y*) *Dickinson* v. *Grand Junction Canal Co.*, 7 Exch. 282, 299; *Chasemore* v. *Richards*, 2 H. & N. 163; 7 H. L. Cas. 349; 29 L. J., Ex. 81; *Rawstron* v. *Taylor*, 11 Exch. 381, 382.

(*z*) *Chasemore* v. *Richards*, supra.

from time immemorial, or by user for forty or twenty years, pursuant to 2 & 3 Will. 4, c. 71, s. 2 (*a*), a riparian proprietor may acquire a right to use the water in a manner not justified by his natural right; but such acquired right is an easement, and has no operation against the natural rights of a landowner higher up the stream, unless the user by which it was acquired affects the use that he himself has made of the stream, or his power to use it, so as to raise the presumption of a grant, and so render the tenement above a servient tenement (*b*). Nothing short of twenty years' undisturbed possession of water diverted from the natural channel, or raised by a weir, can give a party an adverse right against those whose lands lie lower down the stream, and to whom it is injurious; a possession of above nineteen years is not sufficient (*c*).

The Alveus or Bed of a River.

A purchaser of land on the banks of a river takes, by his conveyance, the right of ownership of a moiety of the bed of the river ad medium filum aquæ (*d*). The soil of the alveus is not the common property of the respective owners on the opposite sides of a river; the shore of each belongs to him as severalty, and extends usque ad medium filum aquæ; but neither is entitled to use it in such a manner as to interfere with the natural flow of the stream (*e*). A fence or bulwark on the bank is allowable, but the alveus is sacred (*f*). The mouth of a river comprehends the whole space between the lowest ebb and the highest flood mark (*g*).

Evidence.

The evidence must be similar, *mutatis mutandis*, to that in actions where a right of common is pleaded (*h*). The plaintiff may prove his alleged right either by grant, express or implied, or by prescription from time immemorial; or by user for forty or twenty years, pursuant to 2 & 3 Will. 4, c. 71, s. 2 (*i*); or as a natural incident to the ownership of his mill or land. No act of appropriation of the water of a natural stream to a beneficial purpose by means of a mill or otherwise is necessary to entitle the plaintiff to complain of a wrongful diversion of the water from its natural channel (*k*). Where the plaintiff claims a right to a flow of water "by reason of his possession of a mill," but proves a right by reason of his possession of the land on which the mill had been recently erected, he is entitled to the verdict (*l*). But the usual allegation that the

(*a*) Ante, Sect. 1.

(*b*) *Sampson* v. *Hoddinott*, 1 C. B., N. S. 590; 3 id. 596; 26 L. J., C. P. 148; *Wright* v. *Williams*, 1 M. & M. 77; *Greatrex* v. *Hayward*, 8 Exch. 291; *Carlyon* v. *Lovering*, 1 H. & N. 797.

(*c*) *Prescott* v. *Phillips*, cited 6 East, 213.

(*d*) *Crossley* v. *Lightowler*, L. R., 3 Eq. 279; 2 Ch. App. 478; 36 L. J., Ch. 584.

(*e*) *Bickett* v. *Morris*, L. R., 1 H. L. Cas. 47; 12 Jur., N. S. 802.

(*f*) Id.

(*g*) *Horne* v. *Mackenzie*, 6 Cl. & Fin. 628.

(*h*) See Ros. Ev. (13th ed.), p. 776.

(*i*) *Hale* v. *Oldroyd*, 14 M. & W. 789, 793; *Northam* v. *Hurley*, 1 E. & B. 665; *Whitehead* v. *Parks*, 2 H. & N. 870; *Whaley* v. *Laing*, id. 476; 3 id. 675; 27 L. J., Ex. 422; *Nuttall* v. *Bracewell*, 4 H. & C. 714; L. R., 2 Ex. 1.

(*k*) Gale, 299.

(*l*) *Ricketts* v *Salway*, 2 B. & Adol. 360; *Wood* v. *Waud*, 3 Exch. 748, 773;

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plaintiff was possessed of mines, lands, &c., is not proved by evidence showing that he was lessee, not of the surface or banks, but only of mines, with liberty to use the streams for colliery purposes only (*m*). In case for the diversion of water the plaintiff alleged in his declaration a reversionary interest in three closes of land—to wit, *three ponds* filled with water, one pond being upon each of the said closes—and a right to the flow of the water into the said closes for supplying the said ponds in the said closes with water for the watering of cattle. The defendant traversed the right to the flow of the water as alleged. It appeared in evidence at the trial that the plaintiff had enjoyed an immemorial right to the flow of this water into an ancient pond in one of his closes, but that, above thirty years before, he made a new pond in each of the three closes, and turned the water so as to supply them, *and thenceforth disused the old pond*, which was gradually filled with rubbish and overgrown with grass. The plaintiff's right in respect of the three ponds having been defeated by proof of an outstanding life estate, under 2 & 3 Will. 4, c. 71, s. 7: held, that he was entitled under this declaration to recover in respect of his right to the flow of water to the *old* pond (*n*). Where it appeared in evidence that the channel had been dug about thirty years before action, it was held that a prescriptive right at common law was negatived (*o*). But in such case the plaintiff may prove a right by user for twenty years; and if once a user as of right be proved to have commenced, it can be defeated only by subsequent interruptions not submitted to for one year. On the other hand, the defendant may prove that the user was always contentious, and never as of right (*p*), or that it sprung out of a belief that it was authorized by an expired lease, or out of a "comity between landlord and tenant" (*q*).

User not of Right.

Action maintainable, although mode of Enjoyment changed. *Saunders* v. *Newman.*

The occupier of a mill may maintain an action for any back water and injury to his mill, although he has not enjoyed it precisely in the same state for twenty years: and therefore it is no defence to such an action that the occupier has within a few years erected in his mill a wheel of different dimensions, but requiring less water than the old one (*r*). "The owner is not bound to use the water *in the same precise manner*, or to apply it to the same mill: if he were, that would stop all improvements in machinery" (*s*). Proof

in which *Frankum* v. *Earl of Falmouth*, 2 A. & E. 452; 6 C. & P. 529, is explained and distinguished.

(*m*) *Insole* v. *James*, 1 H. & N. 243.

(*n*) *Hale* v. *Oldroyd*, 14 M. & W. 789; and see *Brown* v. *Best*, 2 Wils. 174; *Payne* v. *Shedden*, 1 Moo. & R. 382; *Drewett* v. *Sheard*, 7 C. & P. 465; *Ward* v. *Ward*, 7 Exch. 838; 21 L. J., Ex. 334; *Lovell* v. *Smith*, 8 C. B., N. S. 120.

(*o*) *Eaton* v. *Swansea W. W. Co.*, 17 Q. B. 267, 269.

(*p*) *Eaton* v. *Swansea W. W. Co.*, supra.

(*q*) *Chamber Colliery Co.* v. *Hopwood*, L. R., 32 Ch. D. 549—C. A.

(*r*) *Saunders* v. *Newman*, 1 B. & A. 258.

(*s*) Id. 261.

of a slight alteration by the plaintiff in the course of a stream above his land is not sufficient to destroy his right (*t*). But proof that the defendant, or the person through whom he claims, within twenty years enlarged certain weirs, &c., *so as to abstract more water* from the river than he had previously been accustomed to do, whereby the plaintiff's mill was injured, is sufficient; for although the defendant and his predecessors have on several occasions (long before the last twenty years) enlarged their weirs and deepened their channels, &c., so as to appropriate to themselves as much water from the river *as they from time to time wanted*, yet that will not justify a further abstraction of water from the river (*u*).

Artificial Cuts or Drains. *Sampson* v. *Hoddinott.*

The right of a riparian proprietor, it was clearly established by *Sampson* v. *Hoddinott*, is limited to natural streams, and does not attach in the case of artificial cuts or drains (*x*). It is also settled that the flow of water from a drain made by a landowner in his own land for the purposes of agricultural improvements for twenty years does not give a right to the neighbour, so as to preclude the landowner from altering the level of his drain for the improvement of his land (*y*), and that no right can be acquired under 2 & 3 Will. 4, c. 71, s. 2 (*z*), to the use of an artificial watercourse made for a particular and temporary purpose (*a*). An artificial watercourse or drain, however, may have been originally made for permanent purposes, and under such circumstances and have been since used for such a period as to give all the rights that the riparian proprietors would have had if it had been a natural stream (*b*).

In *Beeston* v. *Weate*, the plaintiff and the defendant occupied contiguous portions of lands. For more than forty years, and as far back as living memory went, the occupiers of the plaintiff's land had been in the habit of passing over the defendant's land to a brook which lay on the other side of that land, and of damming up the brook when necessary, so as to force the water into an old artificial watercourse which ran across the defendant's land to the plaintiff's land. They did this for the purpose of supplying their cattle with water, whenever they wanted the water, except when the owners of the defendant's land used the water, as they did at certain seasons of the year, for irrigation. It was held, that upon this evidence the jury was warranted in inferring a user, as of right, by the occupiers

(*t*) *Hall* v. *Swift*, 4 Bing. N. C. 381.

(*u*) *Bealey* v. *Shaw*, 6 East, 208; 8 R. R. 466, explained 5 B. & Adol. 19; Gale, 216 (4th ed.); *Mason* v. *Hill* (in error), 5 B. & Adol. 1, 19; *Brown* v. *Best*, 1 Wils. 174; *Moore* v. *Webb*, 1 C. B., N. S. 673.

(*x*) *Sampson* v. *Hoddinott*, 1 C. B., N. S. 590; 3 id. 596; 26 L. J., C. P. 148 (overruling *Magor* v. *Chadwick*, 11 A. & E. 571); and see *Wardle* v. *Brocklehurst*, 1 E. & E. 1058; 29 L. J., Q. B. 145; Gale, 81 (4th ed.).

(*y*) *Greatrex* v. *Hayward*, 8 Exch. 291; *Wood* v. *Waud*, 3 Exch. 778.

(*z*) Ante, Sect. 1.

(*a*) *Arkwright* v. *Gell*, 5 M. & W. 203; 11 Exch. 610; Gale, 279—287 (4th ed.).

(*b*) *Suteliffe* v. *Booth*, 32 L. J., Q. B. 136.

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of the plaintiff's land, of the easement on the defendant's land; and that, for the interruption of such easement, the plaintiff might maintain an action against the defendant (*c*).

Implied Grant or Reservation of Drains, &c.

Where the owner of two or more adjoining houses sells and conveys one of them to a purchaser, such house is entitled to the benefit, and is subject to the burthen, of all existing drains communicating with the other house, without any express reservation or grant for that purpose: an *implied* grant or reservation (as the case may require) will be presumed in the absence of express words to the contrary (*d*). It makes no difference in this respect that the purchaser did not know of the drains under his house, if he might have ascertained their existence upon a careful inspection by a person ordinarily conversant with the subject, and it will be deemed his own fault if he did not do so at the time of his purchase (*d*). Two properties, which adjoined, were originally possessed by the same owner, in one of which was a cesspool and a drain to carry the water from the adjoining property, which was a tan-yard. The owner afterwards sold the property to different persons, and the conveyances contained no reference to the drain and cesspool:—held, that there was an implied grant of the easement of the cesspool in the conveyance of the tan-yard (*e*). Where the plaintiff excepts and reserves to himself the right to make and use a sewer in land conveyed by him to the defendant, whereby the *exclusive* use of such sewer is reserved to the plaintiff, he may maintain an action against the defendant for opening and using the sewer (*f*). So where the defendant grants to the plaintiff the use of water, subject to a proviso for the use thereof by the defendant, the plaintiff may maintain an action on the deed for the abuse of such reservation by the defendant (*g*).

Licence to make or use Drains, &c.

A parol licence to make a drain or watercourse *in the land of the licensor* will not, even after it has been fully executed at the expense of the licensee, confer any right or title on him to have the use and benefit of the drain or watercourse free from obstruction; nor enable him to maintain any action against the licensor for obstructing such drain or watercourse without notice (*h*). But a licence attached to

(*c*) *Beeston* v. *Weate*, 5 E. & B. 986; 25 L. J., Q. B. 115.

(*d*) *Pyer* v. *Carter*, 1 H. & N. 916, 921; 26 L. J., Ex. 258. But see contra, *Suffield* v. *Brown* (on appeal), 33 L. J., Ch. 249, 259; *Polden* v. *Bastard*, 7 B. & S. 130, 131.

(*e*) *Ewart* v. *Cochrane*, 4 Macq. H. L. Cas. 117; 7 Jur., N. S. 925; but see *Suffield* v. *Brown*, supra.

(*f*) *Lee* v. *Stevenson*, E., B. & E. 512; 27 L. J., Q. B. 263.

(*g*) *Rawstron* v. *Taylor*, 11 Exch. 369.

(*h*) *Hewlins* v. *Shippam*, 5 B. & C. 221; 7 D. & R. 783; *Cocker* v. *Cowper*, 1 C. M. & R. 418; *Greenslade* v. *Halliday*, 6 Bing. 379; *Mason* v. *Hill*, 5 B. & Adol. 1; *Wood* v. *Leadbitter*, 13 M. & W. 838; *Adams* v. *Andrews*, 15 Q. B. 284; *Taplin* v. *Florence*, 10 C. B. 744; *Roffey* v. *Henderson*, 17 Q. B. 574; *Roberts* v. *Rose*, 3 H. & C. 162; 33 L. J., Ex. 1; affirmed in error, 4 H. & C. 103; L. R., 1 Ex. 82; 35 L. J., Ex. 62.

a valid grant of real or personal property is irrevocable, it being a licence coupled with an interest (*i*). No man can derogate from his own grant, nor can any person claiming through or under him. But a licence connected with an invalid grant is a mere licence (whether under seal or not), and may be revoked at any time (*k*), either expressly or by implication (*l*). A parol licence to erect a skylight, or a weir, or other easement *on the land of the licensee* cannot be revoked, after it has been executed at the licensee's expense, so as to render it necessary for the licensee to incur further expense in removing it (*m*).

Extinguishment or Suspension of Drains, &c.

Nothing of *absolute necessity* to a messuage or other building is extinguished by unity of ownership or possession; as a gutter in alieno solo to carry off water, &c., or a watercourse, or a way of necessity. They are merely *suspended as easements* during the joint ownership or possession, and will revive whenever the building or the land is conveyed to another (*n*). But it is otherwise with respect to ways not of necessity or other easements not of a continuous nature (*o*).

Underground Water.

The principles which regulate the rights of owners of land in respect to water flowing *in known and defined channels*, whether upon or below the surface of the ground, do not apply to underground water which merely percolates through the strata in no known channels (*p*). The owner of land through which water flows in a subterranean course has no right or interest in it which will enable him to maintain an action against a landowner who, in carrying on mining operations on his own land in the usual manner, drains away the water from the land of the first-mentioned owner, and leaves his well dry (*q*). The owner of a mill on the banks of a stream cannot maintain an action against a landowner who sinks a deep well on his own land and by pumps and steam-engines diverts the underground water which would otherwise have percolated through the soil and flowed into the river, by which, for more than sixty years, the mill was worked (*r*). "If a man has the misfortune to lose his spring

(*i*) *Wood* v. *Manley*, 11 A. & E. 34; *Feltham* v. *Cartwright*, 5 Bing. N. C. 569.

(*k*) *Fentiman* v. *Smith*, 4 East, 107; 7 R. R. 533; *Wood* v. *Leadbitter*, 13 M. & W. 838, 845; *Taplin* v. *Florence*, 10 C. B. 744, 764.

(*l*) *Roffey* v. *Henderson*, 17 Q. B. 574.

(*m*) *Winter* v. *Brockwell*, 8 East, 308; 9 R. R. 454; *Liggins* v. *Inge*, 7 Bing. 682; *Harvey* v. *Reynolds*, 12 Price, 724.

(*n*) *Pheysey* v. *Vicary*, 16 M. & W. 485, 489.

(*o*) *Pyer* v. *Carter*, 1 H. & C. 916; *Dodd* v. *Burchell*, 1 H. & C. 113; 31 L. J., Ex. 364; *Worthington* v. *Gimson*, 2 E. & E. 618; 29 L. J., Q. B. 116; *Pearson* v. *Spencer*, 1 B. & S. 571, 583; 3 B. & S. 761; *Polden* v. *Bastard*, 4 B. & S. 258; 32 L. J., Q. B. 372; affirmed in error, L. R., 1 Q. B. 156; 7 B. & S. 130; 35 L. J., Q. B. 92.

(*p*) *Chasemore* v. *Richards* (in error), 2 H. & N. 168; 7 H. L. Cas. 349; 29 L. J., Ex. 81; *Ibbotson* v. *Peat*, 3 H. & C. 644, 650.

(*q*) *Acton* v. *Blundell*, 12 M. & W. 324, 348; *New River Co.* v. *Johnson*, 29 L. J., M. C. 93.

(*r*) *Chasemore* v. *Richards* (in error), 2 H. & N. 168; 7 H. L. Cas. 349; 29 L. J., Ex. 81; *Ibbotson* v. *Peat*, 3 H. & C. 644, 650.

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by his neighbour digging a well, he must dig his own well deeper" (*s*). A mine-owner may work his coal in the manner most advantageous to himself, and remove a bar of coal therein to obtain the coal in such bar, although in consequence of his so doing the water floods an adjoining mine (*t*). But he has no right to pollute the water flowing through swallets in his own mine which communicate with a stream running into an adjoining mine (*u*). And after a demise of certain closes and all streams of water therein, reserving to the lessor all mines and minerals, with power to win and work the same, the lessor, or his assigns, cannot work the mines so as to cut off the springs in the closes demised (*x*).

Surface Water.

A landowner has a right to appropriate surface water which flows over his land *in no definite channel*, although the water is thereby prevented from reaching a watercourse which is previously supplied (*y*). He has an unqualified right to drain his land for agricultural purposes in order to get rid of mere surface water, the supply of the water being casual and its flow following no regular or definite course; and a neighbouring proprietor cannot complain that he is thereby deprived of such water, which otherwise would have come to his land (*z*). But where the water from a spring *flowed in a gully or natural channel* to a stream on which was a mill, the spring having been cut off *at its source* and the water received into a tank as it rose from the earth by the licence of the owner of the soil on which the spring rose, it was held, that an action lay by the mill-owner against the person so abstracting the water (*a*).

Flow of Water from Eaves.

The flow of water for twenty years from the eaves of a house cannot give a right to a neighbour to insist that the house should not be pulled down or altered so as to diminish the quantity of water flowing from the roof (*b*). On the other hand it seems that a man may by user acquire the easement or right to project his wall or eaves over the boundary line of his property, or to discharge the rain running from the roof of his house upon the adjoining land (*c*).

(*s*) Per Bramwell, B., in *Ibbotson* v. *Peat*, 3 H. & C. 650.

(*t*) *Smith* v. *Kenrick*, 7 C. B. 515; *Fletcher* v. *Rylands*, 4 H. & G. 263; L. R., 1 Ex. 265; L. R., 3 H. L. Cas. 330; 37 L. J., Ex. 161.

(*u*) *Hodgkinson* v. *Ennor*, 4 B. & S. 229; 32 L. J., Q. B. 231.

(*x*) *Whitehead* v. *Parks*, 2 H. & N. 870.

(*y*) *Broadbent* v. *Ramsbottom*, 11 Exch. 602; 25 L. J., Ex. 115; Gale, 251 (4th ed.).

(*z*) *Rawstron* v. *Taylor*, 11 Exch. 369; 26 L. J., Ex. 33.

(*a*) *Dudden* v. *Guardians of Clutton Union*, 1 H. & N. 627; 26 L. J., Ex. 146.

(*b*) *Wood* v. *Waud*, 3 Exch. 778.

(*c*) *Thomas* v. *Thomas*, 2 C., M. & R. 34.

## Sect. 5.—*Game, &c.*



### (a) *Game generally.*

What is "Game."

By the Game Act, 1831 (1 & 2 Will. 4, c. 32) (*d*), s. 2, "the word 'game' shall for all the purposes of this act be deemed to include hares, pheasants, partridges, grouse, heath or moor game, black game and bustards." Sect. 12 only mentions "game," and therefore does not extend to rabbits (*e*). Sect. 30 gives a summary remedy against trespassers in search or pursuit of "game *or* woodcocks, snipes, quails, landrails or conies." The Game Licences Act, 1860, 23 & 24 Vict. c. 90, requires a game licence to be taken out for the purpose of taking or killing "any game whatever, *or* any woodcock, snipe, quail or landrail, or any conies, or any deer." By the Poaching Prevention Act, 1862, 25 & 26 Vict. c. 114, entitled "An Act for the Prevention of Poaching" (sect. 1), "the word 'game' in this act shall for all the purposes of this act be deemed to include any one or more hares, pheasants, partridges, eggs of pheasants and partridges, woodcocks, snipes, rabbits, grouse, black or moor game, and eggs of grouse, black or moor game." The meaning of the word "game" must be collected from the above enactments. "It is a perfectly undefined word, and one which has been used at various times in different senses, sometimes narrower, sometimes more comprehensive" (*f*). Game, whilst in confinement, may be the subject of larceny, and liable to a distress for rent (*g*).

Rabbits.

Common Law Right of Tenant to Game.

At common law the right to take and kill game (in which, as in all animals feræ naturæ, there is no property) belongs to the tenant, and not to the landlord, by virtue of the tenant's property in the land (*h*). It is and has long been very common however for the landlord to reserve the right to the game in the contract of tenancy, and the Game Act, 1831 (1 & 2 Will. 4, c. 32), which did away with the numerous restrictions and qualifications (*i*) whereby a tenant was almost invariably prevented, even in a case where the game did not happen to be reserved to the landlord, from enjoying his right to it, has specially protected such reservations.

Reservation of Game.

Where a reservation of game is spoken of, this (although from its common use in the Game Act and in leases it is more convenient

(*d*) See this and other acts, Chitty's Statutes, tit. "Game."

(*e*) *Spicer*, app., *Barnard*, resp., 1 E. & E. 874; 28 L. J., M. C. 176.

(*f*) Per Erle, C.J., in *Jeffryes* v. *Evans*, 19 C. B., N. S. 246, 264.

(*g*) Ante, 468; 18 R. R. 604.

(*h*) See *Moore* v. *Earl of Plymouth*, 7 Taunt. 614.

(*i*) Under the statutes repealed by the Act of 1831 the right was restricted to persons having freeholds to the amount of 100*l.* a year, or ninety-nine years' leases of 150*l.*, &c.

The 7th section of the Act of 1831 gave the game to the landlord in cases where the occupation was under a lease (not being for more than twenty-one years) made previously to the passing of the act.

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to employ it) is not quite a correct term; when the lease reserves the game, and the tenant executes the lease, he by so doing regrants the game to the landlord (*k*), granting to the landlord a profit à prendre.

Parol Reservation.

A profit à prendre, like other incorporeal hereditaments, can be granted by deed alone (*l*); but to a certain extent a landlord may "reserve" game by writing without seal, or even by words alone (*m*). The Game Act (1 & 2 Will. 4, c. 32), in sect. 8, expressly speaks of a right of entry for sporting purposes "by lease, or any *written or parol demise or contract*," and these words have been held to show by implication that a parol reservation is sufficient (*n*).

Terms of Reservation in Writing.

Most agricultural leases will be found to contain a reservation of the game to the lessor. It has been held upon the construction of such reservations, that a reservation to the landlord of the exclusive right of "hunting, shooting, fishing, and sporting," debars the tenant from shooting *rabbits* (*o*), but that a grant of lease to hunt does not include a lease to shoot (*p*). An agreement by the tenant not to destroy game is not a reservation of game to the landlord at all (*q*), but a covenant to preserve runs with the land, and may be sued on by an assignee of the reversion (*r*).

Agreement to Preserve.

Grant of Sporting Rights to Third Person.

*Farrer* v. *Nelson.*

Sporting rights are frequently granted by a landowner, either retaining the occupation of the land himself, or having let it with a reservation of the rights. Such a grant has been held not to prevent the grantor from cutting down timber in the ordinary course of management of his estate, although the cutting down will prejudice the shooting (*s*), or from offering the estate in lots for building land (*t*), but not to allow the grantee to tread down the crops in an unreasonable manner (*u*), or to turn rabbits on the land (*u*), or game of any kind (*x*).

Quiet Enjoyment.

Where a farm had been demised to A. with a reservation of the exclusive right of shooting, fishing, and sporting, which right was afterwards with other land and a house let to B. with the

(*k*) *Wickham* v. *Hawker*, 7 M. & W. 103.

(*l*) See *Bird* v. *Higginson*, 2 A. & E. 696, and ante, 88.

(*m*) See *Reg.* v. *Thurlstone*, 28 L. J., M. C. 106; *Jones* v. *Williams*, 46 L. J., M. C. 270; 36 L. T. 559.

(*n*) *Jones* v. *Williams*, 46 L. J., M. C. 270; 36 L. T. 559, per Grove, J.: "It may be taken as settled law that there may be a parol reservation of game on a parol demise." Per Lindley, J., ib. See also *Reg.* v. *Thurlstone*, 28 L. J., M. C. 106.

(*o*) *Jeffryes* v. *Evans*, 34 L. J., C. P. 261, 264; 12 C. B., N. S. 246.

(*p*) *Moore* v. *Earl of Plymouth*, 7 Taunt. at p. 667; 18 R. R. 604. See also *Pickering* v. *Noyes*, 4 B. & C. 639; 4 L. J., K. B. 10; 28 R. R. 430; *Pannell* v. *Mill*, 3 C. B. 625.

(*q*) *Coleman* v. *Bathurst*, L. R., 6 Q. B. 366; 40 L. J., M. C. 131; 24 L. T. 426.

(*r*) *Hooper* v. *Clark*, L. R., 2 Q. B. 200; 36 L. J., Q. B. 79.

(*s*) *Gearns* v. *Baker*, L. R., 10 Ch. 355; 44 L. J., Ch. 334; 33 L. T. 86; 23 W. R. 543.

(*t*) *Pattison* v. *Gilford*, L. R., 18 Eq. 259; 43 L. J., Ch. 524. (There was notice of the sporting rights having been let.)

(*u*) *Hilton* v. *Green*, 2 F. & F. 821.

(*x*) *Birkbeck* v. *Paget*, 31 Beav. 403.

usual covenant for quiet enjoyment (see ante, p. 718), it was held that this covenant was not broken by A. shooting rabbits and destroying furze, inasmuch as these acts were wrongful (*y*).

Damages for Excess of Game.

In *Farrer* v. *Nelson* (*z*), where land was let with a reservation of sporting rights to the landlord, it was held that the tenant might recover damages from the party to whom the landlord had assigned such sporting rights for injury to the tenant's crops by pheasants coming to the crops from a wood (reserved to the landlord) to which they had been brought by such party in excessive numbers.

*Farrer* v. *Nelson.*

User of Sporting Rights.

But if A. should demise twenty closes to B., with a right of shooting over all of them, and B. should covenant not to permit rabbits to become so numerous as to cause damage to A.'s tenants, it will be an answer to an action for breach of such a covenant that over some of the closes A. had not reserved the right of shooting because by such non-reservation A. rendered it impossible for B. to enter upon all the demised closes for the purpose of performing the covenant (*a*).

An exception of liberty for the tenants on the farms to kill rabbits with ferrets only extends to plantations let as farms subsequently to the demise of the right of shooting (*b*). A grant to a person to come with servants or otherwise authorizes the grantee to hawk, &c., by his servants in his absence (*c*). A grant of the right of sporting to the lessee of the right in common with the lessor, his heirs and assigns, and any friend of him or them, confers a privilege not confined to a single friend at a time (*d*).

Construction of Power.

A power to demise lands or any part of them is not well exercised by a demise of part, with liberty of shooting over the whole (*e*). But a lease under a power may except and reserve all game, &c., on the demised premises to the lessor, his heirs and assigns, if apt and sufficient words be used (*f*).

Rating.

The Rating Act, 1874, 37 & 38 Vict. c. 54, extends the operation of the poor rate acts to the right of sporting when severed from the occupation of the land, as has been already shown (ante, p. 609).

1 & 2 Will. 4, c. 32, s. 8.

The 8th and 11th sections of the Game Act, 1831 (1 & 2 Will. 4, c. 32), protect express reservations of game as follows :—

Express Reservations of Game not interfered with.

**8.** Nothing in this act contained shall authorize any person seised or possessed of or holding any land to kill or take the game, or to permit any other person to kill or take the game upon such land, in any case where

(*y*) *Jeffryes* v. *Evans*, supra (*o*). See now Ground Game Act, infra, p. 765. In *Gearns* v. *Baker* and *Pattison* v. *Gilford*, supra, there was no express covenant for quiet enjoyment.

(*z*) *Farrer* v. *Nelson*, 15 Q. B. D. 258 ; 54 L. J., Q. B. 385 ; 52 L. T. 766 ; 33 W. R. 100; Pollock, B., pointed out that "any person is entitled to bring on his land any quantity of game which can reasonably and properly be kept on it."

(*a*) *Cornewall* v. *Dawson*, 24 L. T. 664.

(*b*) *Newton* v. *Wilmot*, 8 M. & W. 711.

(*c*) *Ewart* v. *Graham*, 7 H. L. Cas. 331.

(*d*) *Gardiner* v. *Colyer*, 12 W. R. 979.

(*e*) *Dayrell* v. *Hoare*, 12 A. & E. 356.

(*f*) *Pannell* v. *Mill, Bart.*, 3 C. B. 625 ; *Jeffryes* v. *Evans*, supra.

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1 & 2 Will. 4, c. 32—*contd.*

by any deed, grant, lease or any written or parol demise or contract, a right of entry upon such land for the purpose of killing or taking the game *hath been or hereafter shall be reserved or retained* by or given or allowed to any grantor, lessor, landlord or other person whatsoever. . . . .

Landlord entitled to Game may authorize other Persons.

**11.** Where the lessor or landlord shall have reserved to himself the right of killing the game upon any land, it shall be lawful for him to authorize any other person or persons who shall have obtained an annual game certificate (*g*), to enter upon such land, for the purpose of pursuing and killing game thereon.

By sect. 12, a maximum penalty of 2*l.*, and of 1*l.* for every head of game taken, is imposed on the occupier of land taking or authorizing any other person to take the game in case of special reservation thereof to the landlord or any other person (*h*).

Where Agreement to Preserve is not Reservation.

An agreement by the tenant not to destroy game, but to do all he can to preserve it, and to forbid other persons sporting at the request of the landlord, is not a "reservation" within the meaning of this section, so as to support a conviction of the tenant (*i*).

Summary Proceedings against Trespassers.

By sect. 30, after reciting that "after the commencement of this act game will become an article which may be legally bought and sold, and it is therefore just and reasonable to provide some more summary means than now by law exist for protecting the same from trespassers," after imposing a penalty for trespassing in pursuit of game, woodcocks, snipes, quails, landrails or conies in the daytime, it is enacted that the leave and licence of the occupier of the land so trespassed upon shall not be a sufficient defence in any case where the landlord, lessor or other person shall have the right of killing the game upon such land by virtue of any reservation or otherwise; and by sect. 31 the occupier or any person authorized by him may require the person so found trespassing to quit the land, and also to tell his name and place of abode, and, in case of refusal, may apprehend such person.

Licence of Occupier no Defence where Game Reserved to Landlord.

Saving for Hunting, &c.

By sect. 35, the provisions against trespassers and persons found on any land do not extend to any person hunting or coursing with hounds or greyhounds, and being in fresh pursuit of any deer, hare or fox already started upon any other land, nor to any person bonâ fide claiming and exercising any right or reputed right of free warren or free chase, nor to any gamekeeper lawfully appointed within the limits of any free warren or free chase, nor to any lord or steward of any manor, nor to any gamekeeper lawfully appointed by such lord or steward within the limits of such manor.

(*g*) Now a licence pursuant to 23 & 24 Vict. c. 90.

(*h*) See *Morden*, app., *Porter*, resp., 7 C. B., N. S. 641; *Kenyon*, app., *Hart*, resp., 6 B. & S. 249; 34 L. J., M. C. 87; *Reg.* v. *Cridland and others*, 7 E. & B. 853; 27 L. J., M. C. 28.

(*i*) *Coleman* v. *Bathurst*, L. R., 6 Q. B. 366; 40 L. J., M. C. 131; 24 L. T. 426; 19 W. R. 848 (Lush, J., diss.).

Defendant to Prove Licence, &c., relied on.

By sect. 42, it is not necessary, in any proceeding against any person under the act, to negative by evidence any certificate, licence, consent, authority or other matter of exception or defence; but the party seeking to avail himself of any such certificate, licence, consent, authority or other matter of exception or defence, is bound to prove the same (*k*).

What is a Trespass.

Any person trespassing in a highway, in search or pursuit of game, may be convicted under sect. 30 (*l*). But merely sending a dog into an adjoining cover in search or pursuit of game is not a sufficient "trespass by entering or being" in or upon such cover, the act requiring a personal trespass (*l*). A person who, in his own land, shoots a pheasant in the land of another, and goes on such other land to pick the bird up, commits a trespass of entering land in pursuit of game within the meaning of sect. 30, the shooting and picking up the bird being one transaction (*m*). But entering land for the purpose of picking up dead game is not a trespass in pursuit of game within the meaning of that section, which only applies to *live* game (*n*).

Proof of *Mens rea* not necessary. *Morden* v. *Porter*.

Proof of a *mens rea* is not necessary to support a conviction under sect. 30. It is sufficient if there be evidence of a mere trespass in pursuit of game for which a civil action might be maintained (*o*). A bonâ fide claim of title to the land as owner thereof, or as acting with the authority of such owner, is sufficient to oust the jurisdiction of the justices under this section (*p*): but not a claim of a prescriptive right in gross to kill game on the land, there being no colour for such claim: nor a claim of title in a third person under whom the defendant does not justify (*q*); nor a claim on behalf of the public generally (*r*). The bonâ fides of the claim is for the justices to determine (*s*). A tenant cannot be convicted under this section for killing *rabbits* on land in his own occupation; nor can any person acting as his servant and *on his behalf* with his authority and not by way of sport (*t*). No leave or licence of the tenant or occupier to kill "game" will be of any avail where the game has been expressly reserved to the landlord or lessor or to any other person. In cases where any such leave or licence is available, it must *precede* the act of

(*k*) See *Reg.* v. *Wood*, 25 L. J., M. C. 96; 1 Dears. & B. C. C. 1.

(*l*) *Reg.* v. *Pratt*, 4 E. & B. 860; 24 L. J., M. C. 113; 1 Dears. C. C. 502; *Stacey*, app., *Whitehurst*, resp., 18 C. B., N. S. 344; 34 L. J., M. C. 94.

(*m*) *Osbond*, app., *Meadows*, resp., 12 C. B., N. S. 10; 31 L. J., M. C. 238.

(*n*) *Kenyon*, app., *Hart*, resp., 6 B. & S. 249; 34 L. J., M. C. 87.

(*o*) *Morden*, app., *Porter*, resp., 7 C. B., N. S. 641; 29 L. J., M. C. 213; followed in *Watkins* v. *Major*, L. R., 10 C. P. 662; 44 L. J., M. C. 164; 24 W. R. 164.

(*p*) *Reg.* v. *Cridland*, 7 E. & B. 853; 27 L. J., M. C. 28; *Legg*, app., *Pardoe*, resp., 9 C. B., N. S. 289; 30 L. J., M. C. 108.

(*q*) *Cornwell*, app., *Sanders*, resp., 3 B. & S. 206; 32 L. J., M. C. 6.

(*r*) *Leatt* v. *Vine*, 30 L. J., M. C. 207.

(*s*) *Legg* v. *Pardoe*, 9 C. P., N. S. 289; 30 L. J., C. P. 108.

(*t*) *Spicer*, app., *Barnard*, resp., 1 E. & E. 874; 28 L. J., M. C. 176; *Padwick*, app., *King*, resp., 7 C. B., N. S. 88.

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trespass (*u*); and must be proved by the party who relies on it (*x*). One who finds game on his own land cannot justify pursuing it on the land of another (*y*). A person whose game is enticed away from his land by a neighbour is liable to an action for exploding combustibles on his own land so as to be a nuisance to his neighbour, in order to frighten the game away from his land and to prevent him from killing them and from enticing other game (*z*).

Arrest by Tenant of Trespassers and Poachers.

Whether the game belongs to the tenant or not, he is in general authorized by the Game Laws to arrest trespassers in search of game or poachers. Thus, in the case of poachers by day, the tenant may require them to quit the land and demand their name and abode: and if they refuse, or give a false or illusory name or place of abode, he may arrest them and take them before a justice (*a*). So by the Night Poaching Act he may arrest the poachers if found on the land, or pursue them beyond the lands (*b*).

Action by Tenants against Trespassers.

The tenant has in general the same remedy against trespassers on his lands as the landlord or owner would have; and though when the game belongs to the landlord, the tenant has no remedy against his landlord or any persons shooting with his permission, yet he may proceed against ordinary trespassers, either by action or under the Game Acts when applicable.

Fox-hunting, &c.

There is no principle of law which justifies the trespassing over the lands of others for the purpose of fox-hunting as carried on in modern times (*c*).

*Paul* v. *Summerhayes.*

This was laid down in *Paul* v. *Summerhayes*, in which case an assault by a farmer's son upon two persons following the Taunton Vale foxhounds, who persisted in entering upon a field of his father, was held to be justified; and it was pointed out that the early case (*d*) in which it was thought to have been decided otherwise, must be restricted to the destruction of a noxious animal for the good of the public.

Hunting.

In case of hunting or coursing with hounds or greyhounds, and being in fresh pursuit of any deer, hare or fox already started upon any other land, though (see ante, p. 762) there is no summary remedy under the Game Act, an action may be brought by the tenant (*e*).

Game Licence to Tenants.

Where a tenant is entitled to the game on his lands he requires, in general, a game licence, like other persons, to enable him to take, kill or pursue game. The exceptions to the necessity of this licence as regards the killing of hares and rabbits by tenants will be dealt with

(*u*) *Morden*, app., *Porter*, resp., 7 C. B., N. S. 641; 29 L. J., M. C. 213.
(*x*) Sect. 42, ante, 763.
(*y*) *Deane* v. *Clayton*, 7 Taunt. 489; 18 R. R. 553.
(*z*) *Ibbotson* v. *Peat*, 3 H. & C. 644; 34 L. J., Ex. 118.
(*a*) 1 & 2 Will. 4, c. 32, s. 31, supra.
(*b*) 9 Geo. 4, c. 69, s. 2.
(*c*) *Paul* v. *Summerhayes*, 4 Q. B. D. 9; 48 L. J., M. C. 33; 39 L. T. 574; 27 W. R. 215.
(*d*) *Gundry* v. *Feltham*, 1 T. R. 334; 1 R. R. 215; and see *Essex* v. *Capel*, Chit. Game L. 114; Paterson Game L. 62.
(*e*) *Deane* v. *Clayton*, 7 Taunt. 489; 18 R. R. 553.

presently (*f*). As regards other game, the tenant must be licensed like other persons (*g*). As regards deer, the tenant, if otherwise entitled, needs no game licence to kill them on his own lands (*g*). Nor does he need a game licence to catch woodcocks and snipes with nets or springs: but if he pursue or kill them otherwise, he requires a licence (*g*): and he requires a licence to take, kill or pursue quails or landrails (*g*).

Gun Licence.

It may be mentioned here that, by the Gun Licence Act, 1870 (33 & 34 Vict. c. 57), a ten-shilling gun licence must be taken out yearly for carrying a gun, and that the penalty for carrying a gun without licence is ten pounds. By the 7th section of that act, however, "the said penalty shall not be incurred by" (inter alios) "any person having in force a licence or certificate to kill game granted to him under the laws of excise in that behalf," or "by the occupier of any lands using or carrying a gun for the purpose only of scaring birds or of killing vermin on such lands, or by any person using or carrying a gun for the purpose only of scaring birds or of killing vermin on any lands by order of the occupier thereof, who shall have in force a licence or certificate to kill game, or a licence under this act."

Condition for Re-entry on Conviction.

A condition for re-entry in case the tenant or his assigns shall be convicted of any offence against the game laws will not enable an assignee of the reversion to maintain ejectment against the tenant for shooting without a licence, inasmuch as such condition does not run with the reversion. So it was held in *Stevens* v. *Copp* (*h*); in which case, however, the judgment of Kelly, C.B., proceeded on the ground that shooting without licence was not an offence against the "game laws," but against revenue laws only.

*Stevens* v. *Copp.*

(b) "*Ground Game.*"

Hares and rabbits, being the subject of a special act of parliament in favour of the tenant, called the Ground Game Act, 1880, by sect. 8 of which the term "ground game" means hares and rabbits, may conveniently be considered together. Hares are "game" within the Game Act, 1831 (1 & 2 Will. 4, c. 32), sect. 2, but rabbits are not.

Agreement to keep down Rabbits.

If the tenant agree to become such on condition that the landlord will keep down rabbits, such an agreement is collateral and need not be in writing, although the occupation be under a lease required to be in writing by the Statute of Frauds, and although the lease reserves the right of shooting to the landlord (*i*).

(*f*) Post, Sect. 6 (b), "Ground Game;" 11 & 12 Vict. c. 29, ss. 1, 2; Paterson Game L. 146, 147.

(*g*) 23 & 24 Vict. c. 90, s. 2.

(*h*) *Stevens* v. *Copp*, L. R., 4 Ex. 20; 38 L. J., Ex. 31.

(*i*) *Morgan* v. *Griffiths*, L. R., 6 Ex. 70; 40 L. J., Ex. 46; 23 L. T. 86; 19 W. R. 957.

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When there was an agreement that the tenant would pay compensation for damage done by hares and rabbits, to an amount to be determined by arbitration, it was held that a reference to arbitration was a condition precedent to suing upon the agreement (*k*).

Compensation for Damage by Rabbits.

We have already seen that under a reservation of sporting the tenant is not entitled to kill rabbits (*l*), but that on a grant by the landlord to a third person of sporting rights, the grantee is not entitled to turn rabbits on the land (*m*). A tenant may kill rabbits on his own land without being liable to prosecution under the Game Act (1 & 2 Will. 4, c. 32, s. 30) (*n*).

*West* v. *Houghton*.

In *West* v. *Houghton* (*o*) a lease was made between the plaintiff and defendant by which the plaintiff granted exclusive rights of sporting over his estate to the defendant, who covenanted that he would keep down rabbits so that no appreciable damage might be done to the crops. Appreciable damage was done to the crops of a tenant, but the plaintiff was not liable to compensate, nor did he compensate the tenant. It was held, in an action by the plaintiff for breach of covenant, that having suffered no damage himself, and not being a trustee for the tenant, he was entitled to nominal damages only.

The "Hare Act," 1848.

By the Hare Act (11 & 12 Vict. c. 22) (*p*), a tenant if entitled to the game, but not otherwise, may kill hares on his inclosed lands without a game licence, or may depute another person to kill them for him by an authority to be registered with the clerk to the justices of the petty sessional division.

Certificate.

The Game Certificate Act (23 & 24 Vict. c. 90) dispenses with a certificate in the case of a person killing rabbits on his own land.

The Ground Game Act, 1880.

We now come to the Ground Game Act, 1880 (43 & 44 Vict. c. 47), which gives to all tenants holding under *leases made after the passing of that act* (7th September, 1880) a right to ground game, i.e., by s. 8, to hares and rabbits, concurrent with that of their landlords, and a similar "concurrent right" to tenants under tenancies from year to year created before the passing of the act, notwithstanding any reservation of the game to the landlord in the contract of tenancy.

The Concurrent Right.

By section 1, it is provided that "every occupier" shall have as incident to and inseparable from his occupation the right to kill and take ground game concurrently with any other person who may be entitled to kill and take ground game on the same land. The words

(*k*) *Dawson* v. *Fitzgerald*, L. R., 9 Ex. 7; 43 L. J., Ex. 19.
(*l*) *Jeffryes* v. *Evans*, ante, 760 (*o*).
(*m*) *Hilton* v. *Green*, ante, 760 (*u*).
(*n*) *Spicer* v. *Barnard*, 28 L. J., M. C. 176.
(*o*) *West* v. *Houghton*, 4 C. P. D. 197; 40 L. T. 364; 27 W. R. 678.
(*p*) This act seems now to be practically superseded by s. 4 of the Ground Game Act, 1880, 768, post.

"every occupier" here will clearly include the case of joint tenants in their own right, and probably also joint tenants in the right of another as trustees or executors; for in their representative capacity they are just as much interested in keeping down the game as their beneficiaries.

Limitations of the Concurrent Right.

But the same section limits the exercise of the right to the occupier himself or "persons duly authorized in writing," which persons must be either members of his household or persons in his ordinary service on the land "and any other person" employed for reward, and further provides that any one person may be authorized to kill the game with firearms.

Upon the limitations it is to be observed that the authority in writing need not necessarily be signed (*q*) (though it is desirable that it should be), and that air-guns—for which, however, a licence is required by the Gun Licence Act, 1870—are not excluded. In case of a joint tenancy, the joint tenants must concur in giving the authority.

By sub-s. 1 (c) the authority must be produced to any person having the "concurrent right" or any person authorized by him in writing.

Sporting Rights may be let by Tenant to another person.

The tenant, in a case where the sporting rights belong to him by reason of his not having parted with them, may let them to another person, notwithstanding the 3rd section of the act (*r*), though possibly he may retain concurrent rights in himself (*s*).

Sub-section 2 cuts down the words "every occupier" in section 1 by excluding persons of rights of common or an occupation for grazing or pasturage for not more than nine months; and section 3 cuts down the time within which the concurrent right may be exercised in the case of moorlands or uninclosed lands to the time from 11th December to 31st March.

Concurrent Right retained, though Tenant lets the Sporting.

Section 2 provides for cases where game is not reserved and the tenant lets the right of sporting, and enacts that, although he shall so let it, "he shall nevertheless retain and have the same right to kill and take ground game as is declared by section 1 of the act."

The third section provides for the absolute indefeasibility of the "concurrent right" in the following unmistakable terms:—

Agreements in Contravention of Right of Occupier void.

Every agreement, condition, or arrangement which purports to divest or alienate the right of the occupier, as declared, given, and reserved to him by this act, or which gives to such occupier any advantage in

Sect. 3.

(*q*) In *Pooley* v. *Driver*, 5 Ch. D. 458, no doubt it was held that a contract in writing under Bovill's Act required signature; but the case appears not to be sufficiently in point to govern the present as an authority.

(*r*) *Morgan* v. *Jackson*, [1895] 1 Q. B. 885; 64 L. J., Q. B. 462; 72 L. T. 593; 43 W. R. 479; 59 J. P. 327; 15 R. 411.

(*s*) Ib., per Wright, J.

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consideration of his forbearing to exercise such right, or imposes upon him any disadvantage in consequence of his exercising such right shall be void.

"Void" here would seem to mean void only *quâ* the divesting, &c., of the right of the occupier (*t*). The section applies only to agreements between landlord and tenant, and does not prevent the tenant from letting his concurrent right to a third person (*u*).

Exemption from Game Licence.

The act contains no repeal or even mention of the Hare Act, but section 4 dispenses with the necessity for a game licence in the case of the occupier and the persons duly authorized by him.

Prohibition of Firearms by Night, Traps and Poison.

The 6th section prohibits, under a penalty of not more than 2*l.*, the use of firearms for killing ground game between the end of the first hour after sunset and the beginning of the last hour before sunrise, and also the employment of spring traps, except in rabbit holes, or poison (*x*), "by any person having a right of killing ground game under this act or otherwise," for the purpose of killing ground game.

This section applies to a tenant, though holding without any reservation of game to the landlord (*y*), but has been held, notwithstanding the use of the words "or otherwise," not to apply to an owner occupying his own land (*z*).

The act is printed at length in Appendix (A.), sect. 7, post.

## SECT. 6.—*The London Building Act*, 1894.

The old Metropolitan Building Act repealed, except as to sects. 83, 86.

The old Metropolitan Building Act (14 Geo. 3, c. 78) has been repealed with the exceptions of sections 83 and 86 (ante, pp. 690, 691), which apply to the whole of England, and the Metropolitan Building Act, 1855, 18 & 19 Vict. c. 122, and its amending enactment, has been repealed and superseded by the London Building Act, 1894, 57 & 58 Vict. c. ccxiii.

The Act of 1894, which imposes many obligations upon "owners," and by s. 173 provides elaborately for the recovery of expenses recoverable from owners under the act "from the owner immediately entitled in possession to the premises, *or* the occupier," by sect. 5, sub-sects. (29) and (30) defines "owner" and "occupier" as follows:—

(29) The expression "owner" shall apply to every person in possession or receipt either of the whole or of any part of the rents or profits of

(*t*) See *Gaskell* v. *King*, 11 East, 165; 10 R. R. 462.

(*u*) *Morgan* v. *Jackson*, note (*r*), supra.

(*x*) As to poison, see also the Poisoned Grain Prohibition Act, 1863, 26 & 27 Vict. c. 113, and the Poisoned Flesh Prohibition Act, 1864, 27 & 28 Vict. c. 115, Chit. Stat., tit. "*Poison*."

(*y*) *Saunders* v. *Pitfield*, 58 L. T. 108, per Mathew and Smith, JJ.

(*z*) *Smith* v. *Hunt*, 54 L. T. 422, per Mathew and Smith, JJ.

any land or tenement, or in the occupation of any land or tenement, otherwise than as a tenant from year to year, or for any less term, or at will.

(30) The expression "occupier" does not include a lodger, and "occupier" and "occupation" do not refer to occupation by a lodger.

The definition of "owner" is the same as that in s. 3 of the repealed Act of 1855: the definition of "occupier" was new in 1894.

# CHAPTER XIX.

## RIGHTS AND LIABILITIES AS BETWEEN LANDLORD OR TENANT AND THIRD PERSONS.


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Under the practice before the Judicature Act there was occasionally some difficulty in regard to questions between landlords or tenants and third parties, in consequence of the distinction between the actions of "trespass" and "case" (*a*); but this is now no longer a difficulty, as the technical forms of actions have been abolished, and the pleadings are now statements of facts. The important questions of substance,—as to what are the cases in which a landlord is liable to or entitled to sue third parties, and what are those in which the right or liability attaches to the tenant,—will now be considered.

### Sect. 1.—*Rights and Liabilities between Landlord and Third Persons.*

Right of Action for Damage to Reversionary Interest.

Where an injury is committed to the house or land of a person who had merely a reversionary interest therein, he is entitled to recover damages for the injury which his interest sustains (*b*); and he may also have an action for continuing a nuisance, even after a former recovery for committing it (*c*). For example, where the plaintiff demised a cottage, without excepting mines, it was held, that he might maintain an action on the case for the injury done to the cottage by a stranger, who had excavated coal, though it was not clear whether the injury was from an excavation under the cottage or under adjoining land in the occupation of the plaintiff (*d*). But the landlord's right is confined to the injury to the reversionary interest, inasmuch as he has no present possession of the property. He cannot therefore maintain any action for the injury done by persons

(*a*) See *Barnett* v. *Earl of Guildford*, 11 Ex. 19; *Harrison* v. *Blackburn*, 17 C. B., N. S. 678.

(*b*) *Shadwell* v. *Hutchinson*, 2 B. & Ad. 97; *Thompson* v. *Gibson*, 7 M. & W. 456; see also the principle recognized in *Battishill* v. *Reed*, 18 C. B. 696, 713.

(*c*) This he must have formerly done by an action on the case and not trespass.

(*d*) *Raine* v. *Alderson*, 4 Bing. N. C. 702.

by merely riding on the property, though he might if they made holes in the soil so that the subsoil was injured, if the use of the surface only was demised (*e*).

If the reversion is severed, one tenant in common cannot join the others in an action without their consent in writing (*f*); but any tenant in common may sue without joining the others if he pleases (*g*).

Action by Tenant in Common.

The plaintiff in his statement of claim should show that he had a reversionary interest at the time of the injury being committed (*h*), but there is now a very large power of amendment vested in the judges. And even under the old system of procedure, where the plaintiff declared as for an injury to land in his possession, which turned out on the trial to have been in the possession of his tenant, the real controversy between the parties being whether the land was the plaintiff's property, and whether there was a right of way across it, it was held, that the judge had power to amend the declaration so as to adapt it to an injury to the plaintiff's reversionary interest (*i*).

Statement of Claim.

The nature of the reversion to which the plaintiff is entitled is only so far material as to regulate the amount of damages to be recovered by him. A reversioner for a life estate, for instance, can only recover such damages for an injury to the estate during the term of the lease as are equivalent to the injury done to the life estate (*j*).

What Title sufficient.

Under the old practice, it was held to be fatal that the declaration alleged that the plaintiff had a reversion when the facts proved did not show any true relation of landlord and tenant (*k*). As the actual facts are now to be set out in pleadings this is no longer a danger, but at the same time it should always appear on the pleadings that the plaintiff has an interest entitling him to sue and what that interest is. It may be remarked, however, that payment of rent to a person has been held sufficient primâ facie evidence of a reversion being in him (*l*).

A reversioner cannot sue for anything as an injury to his reversion, unless it permanently injures his estate, or operates in denial of his right (*m*), even though he may have suffered a pecuniary injury thereby (*n*): therefore a temporary fixing of barges and planks in a part of a river near certain premises, thereby obstructing the

What is a sufficient Act of Injury.

(*e*) *Cox* v. *Glue*, 5 C. B. 533.
(*f*) R. S. C., Ord. XVI., Rule 11.
(*g*) *Roberts* v. *Holland*, [1893] 1 Q. B. 665; 62 L. J., Q. B. 621; 41 W. R. 494; 5 R. 370. The action in this case was against a tenant (being assignee of a lessee), but the principle applies to an action against a stranger.
(*h*) See *Hosking* v. *Phillips*, 3 Exch. 168; *Vowles* v. *Miller*, 3 Taunt. 137.
(*i*) *May* v. *Footner*, 5 E. & B. 505; 25 L. J., Q. B., 32.
(*j*) *Evelyn* v. *Raddish*, Holt, 543.
(*k*) See *Martin* v. *Goble*, 1 Camp. 320; *Corbauld* v. *Leigh*, L. R., 4 Ex. 126; *Partridge* v. *Bere*, 1 D. & R. 272; *Hitchman* v. *Walton*, 4 M. & W. 409.
(*l*) *Daintry* v. *Brocklehurst*, 3 Exch. 207.
(*m*) *Hopwood* v. *Schofield*, 2 Moo. & R. 34; *Baxter* v. *Taylor*, 4 B. & Adol. 72; *Metropolitan Association* v. *Petch*, 5 C. B., N. S. 504; *Cooper* v. *Crabtree*, 20 Ch. D. 589; 45 L. T. 587.
(*n*) *Mumford* v. *Oxford, Worcester, &c. Rail. Co.*, 1 H. & N. 34.

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navigation of that part and hindering persons from passing to the premises and unloading boats thereon, is not an injury to the reversion (*o*). But a permanent obstruction of a way in denial of the right is an injury to the reversioner (*p*). The reversioner may sue for any injury done to his house by the defendant's neglect to scour a watercourse in a adjoining close, whereby the watercourse was obstructed, and the water thrown back from the course into the house, doing damage to it thereby (*q*); or for an injury done to it by mining under it (*r*), or by raising the pavement so much in front of it as to block up the entrance and the lower windows of it (*s*): or the erection of a wall, whereby his lights are obstructed (*t*): or for the erection on the defendant's house of eaves and a pipe overhanging and conducting water on land in the occupation of a tenant (*u*). An action is maintainable by a reversioner against the surveyor of a highway for cutting away part of a bank adjoining a public road, though the premises are thereby in fact improved, as the removal of any part of the land is an injury to the reversion (*x*). Where a lease reserves a limited power to the lessors to make a way across the land for certain purposes; in an action by the lessee as a reversioner for making a way across the land for other purposes it is not a ground of complaint that the intention of the defendants was to use the way for other purposes than they had a right to use it; but the question is, whether at the time it was made it had become necessary or expedient for the defendants to make a way for the purposes for which they were entitled, and whether the road made was a proper road for that purpose, in which case the action will only lie, if at all, at the instance of the tenant in possession (*y*). The statement of claim should allege the injury to have been done to the damage of the reversion, or at least state an injury of such a permanent nature as to be necessarily injurious to the reversion (*z*).

For what Injuries Landlord may sue Third Person.

Cause of Action accrues when Damage sustained.

The cause of action does not accrue, nor the Statute of Limitations begin to run, until actual damage is sustained (*a*).

(*o*) *Dobson* v. *Blackmore*, 9 Q. B. 991.

(*p*) *Kidgill* v. *Moor*, 9 C. B. 364; 1 L., M. & P. 131; *Hopwood* v. *Schofield*, supra; see, too, *Bell* v. *Midland Rail. Co.*, 30 L. J., C. P. 273, and *Palk* v. *Skinner*, 18 Q. B. 568, in which the point in question was apparently assumed.

(*q*) *Bell* v. *Twentyman*, 1 Q. B. 766; *Taylor* v. *Stendall*, 7 Q. B. 634; 3 D. & L. 161.

(*r*) See *Raine* v. *Alderson*, 4 Bing. N. C. 702; *Backhouse* v. *Bonomi*, 9 H. L. Cas. 503; 34 L. J., Q. B. 181.

(*s*) *Leader* v. *Moxon*, 3 Wils. 461.

(*t*) *Jesser* v. *Gifford*, 4 Burr. 2141; *Shadwell* v. *Hutchinson*, 2 B. & Adol. 97; Moo. & M. 350; 4 C. & P. 333; *Turner* v. *Sheffield and Rotherham Rail. Co.*, 10 M. & W. 425; *Metropolitan Association, &c.* v. *Petch*, 5 C. B., N. S. 504.

(*u*) *Tucker* v. *Newman*, 11 A. & E. 40; *Fay* v. *Prentice*, 1 C. B. 828; *Battishill* v. *Reed*, 18 C. B. 696; 25 L. J., C. P. 290.

(*x*) *Alston* v. *Scales*, 9 Bing. 3.

(*y*) *Durham and Sunderland Rail. Co.* v. *Walker*, 2 Q. B. 940.

(*z*) *Jackson* v. *Pesked*, 1 M. & S. 234; 14 R. R. 417; *Dobson* v. *Blackmore*, 9 Q. B. 991; *Kidgill* v. *Moor*, 9 C. B. 364; 1 L., M. & P. 131.

(*a*) *Backhouse* v. *Bonomi*, 9 H. L. Cas. 503; 34 L. J., Q. B. 181; and see *Darley, &c. Co.* v. *Mitchell*, 11 App. Cas. 127.

A statement of claim in an action for an injury to the reversionary interest of the plaintiff by obstructing ancient lights, is sufficient on demurrer if it show an obstruction which may operate injuriously to the reversion, either by its being of a permanent character, or by its operating in denial of the right, and it will be assumed to have been so, after verdict (*b*). A nuisance from smoke or noise, although it may be an actionable injury to the tenant in possession, is not one to the reversioner (*c*), as it is only a temporary nuisance and one which may cease at any moment (*d*). But where a nuisance is in its nature of a permanent character, and will continue after the expiration of the term unless removed, and specially if it affect any easement, or the right and title to the demised premises, the reversioner may sue, the pleadings expressly alleging injury to his reversionary interest. The measure of damage in any such action will be so much as the jury may think sufficient to compel the defendant to abate the nuisance; not the amount of the diminution of the saleable value of the reversion (*e*).

Right of Action for Permanent Nuisance.

Measure of damage.

An injunction was granted at the suit of a lessee and lessor respectively of a public-house to restrain an electric lighting company from carrying on their works so as by noise and vibration to interfere with the enjoyment of the lessee and to cause injury to the structure of the premises (*f*).

Injunction Against Electric Lighting Co.

As regards the liability of landlords to third persons, it may be taken as a general rule that the tenant and not the landlord is liable to third persons for any accident or injury occasioned to them by the premises being in a dangerous condition, and the only exceptions to this rule appear to arise when the landlord has either (1) contracted with the tenant to repair, or (2) when he has let the premises in a ruinous condition (*g*), or (3) when he has expressly licensed the tenant to do acts amounting to a nuisance (*h*). It is quite clear and well settled that apart from contract there is no duty upon the owner of an unfurnished house as between him and his tenant to see that the house is let to the tenant in a safe condition at the commencement of the term; and if the tenant, or the customer or guest or employé of the tenant suffer injury from the unsafe state of the house, no action for negligence will lie against the owner (*i*).

Liability of Landlord to Third Persons.

*Nelson* v. *Liverpool Brewery Co.*

(*b*) *Metropolitan Association, &c.* v. *Petch*, 5 C. B., N. S. 504.

(*c*) *Simpson* v. *Savage*, 1 C. B., N. S. 347; *Mumford* v. *Oxford, Worcester and Wolverhampton Rail. Co.*, 1 H. & N. 34.

(*d*) See per Jessel, M.R., *Jones* v. *Chappell*, L. R., 20 Eq. 539.

(*e*) *Battishill* v. *Reed*, 18 C. B. 696; 25 L. J., C. P. 290.

(*f*) *Shelfer* v. *City of London Electric Lighting Co.*, [1895] 1 Ch. 287; 64 L. J., Ch. 216; 72 L. T. 34; 43 W. R. 238; 12 R. 112—C. A.

(*g*) *Nelson* v. *Liverpool Brewery Co.*, 2 C. P. D. 311; 46 L. J., C. P. 675; 25 W. R. 877.

(*h*) *White* v. *Jameson*, L. R., 18 Eq. 303; *Chauntler* v. *Robinson*, 4 Exch. 163.

(*i*) *Lane* v. *Cox*, [1897] 1 Q. B. 415; 66 L. J., Q. B. 193; 76 L. T. 135; 45 W. R. 261—C. A. In this case the tenancy was weekly, the staircase was unsound, and

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Letting Premises with Nuisance. *Todd* v. *Flight.*

When, however, the property of the landlord is let by him in a state which is a nuisance, and he is himself responsible for its being in such a state, he is liable. Therefore where the defendant, who was the owner of a building and a stack of chimneys near to a building of the plaintiff, demised them when the chimneys were known to him to be ruinous and in danger of falling upon the building of the plaintiff, and kept and maintained them in such ruinous state until they fell upon the plaintiff's building, which they did during the occupation of the tenant under such demise, from no default of such tenant, but by the laws of nature :—it was held, that an action for the injury the plaintiff had sustained from the fall of the chimneys would lie against the defendant, though he was not the occupier at the time of the fall (*k*). If the landlord remains liable for repairs to the demised premises, that is evidence of his continuing the nuisance (*l*), the fact, on the other hand, of the tenant being bound to repair being almost conclusive evidence that the landlord is not liable (*m*). An action lies against the landlord of a house, who employs workmen and superintends repairs, though the lessee pays for them, for a nuisance occasioned by the negligence of the workmen (*n*). A person who lets premises with a nuisance upon them, and subsequently receives rent, is liable for the continuance of the nuisance (*o*) ; and so if he re-lets them after the user of the buildings has created a nuisance, or if he has undertaken the cleansing and has not performed it (*p*).

Liability of Landlord in respect of Premises occupied by Tenant from Year to Year.

Where a nuisance of a permanent character is created on land in the occupation of a tenant from year to year, the reversioner is liable for damage caused by it, if it is shown that since the creation of the nuisance and before the damage he renewed the tenancy. It has indeed been held that when a landlord might have given notice to quit and did not, such continuing of the tenancy is equivalent to a re-letting (*q*). This, however, is distinctly dissented from in the undelivered judgment of the Exchequer Chamber in *Gandy* v. *Jubber* (*r*), which would appear to be good law, although not technically a decision of the Court of Error, and is applicable to the case of a weekly tenancy (*s*) as well as to that of other tenancies, and the

Weekly Tenant.

the person injured was a workman who came on the premises at the request of the tenant to move some furniture.

*Copp* v. *Aldridge*, 11 T. L. R. 411, per Lord Russell, C.J., is to the same effect.

(*k*) *Todd* v. *Flight*, 9 C. B., N. S. 377 ; 30 L. J., C. P. 21 ; *Gandy* v. *Jubber*, 5 B. & S. 78 ; 33 L. J., Q. B. 151.

(*l*) *Pretty* v. *Bickmore*, L. R., 8 C. P. 401 ; 28 L. T. 704 ; 21 W. R. 733 ; *Gwinnell* v. *Eamer*, L. R., 10 C. P. 658 ; 32 L. T. 835 ; see, too, *Payne* v *Rogers*, 2 H. Bl. 349.

(*m*) *Gwinnell* v. *Eamer*, supra.

(*n*) *Leslie* v. *Pounds*, 4 Taunt. 649 ; 13 R. R. 718.

(*o*) *Rosewell* v. *Prior*, 2 Salk. 460 ; *Todd* v. *Flight* and *Gandy* v. *Jubber*, supra.

(*p*) *Rich* v. *Basterfield*, 4 C. B. 805.

(*q*) *Gandy* v. *Jubber*, 5 B. & S. 78 ; 33 L. J., Q. B. 151 ; *Bartlett* v. *Baker*, 3 H. & C. 153 ; 34 L. J., Ex. 11 ; *Rex* v. *Pedley*, 1 A. & E. 822.

(*r*) *Gandy* v. *Jubber*, 9 B. & S. 15, n.

(*s*) *Bowen* v. *Anderson*, [1894] 1 Q. B. 164 ; 42 W. R. 236 ; 10 R. 47, where see

question is whether the accident was caused by a structural defect existing at the time of the original letting—in which case the landlord would be liable—or by the negligence of the tenant, in which case the tenant would be liable.

Conviction of Landlord for user of Premises as Brothel.

Where a weekly tenant used a house as a brothel, and the landlord received an additional rent by reason of its occupation for such purpose, the latter, it was held, could not be convicted for keeping such a house merely because, having notice of the use the house was put to, he abstained from giving his tenant notice to quit (*t*); but this state of the law is altered by the Criminal Law Amendment Act, 1885, by s. 13 of which the landlord is expressly made liable in such a case.

Continuance of Nuisance.

A landlord may be liable for the continuance of a nuisance in erecting a building, though he has no right to enter upon the land and remove it (*u*); but he is not liable in respect of a new nuisance created by his tenant during the term if he bought the reversion during the tenancy (*x*).

Liability of Party in Possession.

Although the owner of property may, when he himself occupies, be responsible for injuries arising from acts done upon that property by persons who are there by his permission, though not strictly his agents or servants, such liability attaches only upon parties in actual possession (*y*). Where, therefore, an action was brought by an adjoining owner against A., the owner of premises, for a nuisance from the smoke of a chimney, on the ground that A., having erected the chimney, and let the premises with the chimney so erected, had impliedly authorized the lighting of a fire therein, it was held, that the action would not lie; and it was further held, that as the premises were in the occupation of B., a tenant at the time the fires were lighted, A. was entitled to a verdict on a plea of "not possessed," the allegation as to possession having reference to the time when the nuisance complained of was committed, and not to the time at which the chimneys were erected (*z*).

Effect of Assignment of Reversion.

The fact of an assignment of the reversion will not necessarily relieve a landlord of his liability for the continuance of a nuisance originally caused by him, for before the assignment he was answerable for all the consequential damages: and it is not in his power

explanation by Wills, J., of *Sandford* v. *Clarke*, 21 Q. B. D. 398; 59 L. T. 227; 37 W. R. 28, per Wills and Grantham, JJ., so far as proceeding on the assumption that no notice is necessary to determine a weekly tenancy.

(*t*) *Reg.* v. *Barrett*, 32 L. J., M. C. 36; *Reg.* v. *Stannard*, 33 L. J., M. C. 61; 1 Leigh & Cave, C. C. 349, cited in 5 B. & S. 83, per Compton, J.

(*u*) *Thompson* v. *Gibson*, 7 M. & W. 456.

(*x*) *Rex* v. *Pedley*, 1 A. & E. 822; see, too, *Saxby* v. *Manchester, Sheffield and Lincolnshire Rail. Co.*, L. R., 4 C. P. 198; 38 L. J., C. P. 153.

(*y*) *Rich* v. *Basterfield*, 4 C. B. 783; *Reedie* v. *London and North Western Rail. Co.*, 4 Exch. 244; *Chauntler* v. *Robinson*, Id. 163; *Bishop* v. *Trustees of Bedford Charity*, 1 E. & E. 697; 28 L. J., Q. B. 215; 29 Id. 53.

(*z*) *Rich* v. *Basterfield*, 4 C. B. 783.

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to discharge himself by granting it over, though the action may be brought against the assignee (*a*).

Liability for Nuisance contemplated by Lease.

Although where a nuisance is caused by the act of a tenant, the landlord is not usually liable, yet if the act is one expressly contemplated in and authorized by the lease the landlord may be liable for any injury caused thereby (*b*), although the tenant if sued might have no defence to the action (*c*).

## SECT. 2.—*Rights and Liabilities between Tenants and Third Persons.*

Right of Tenant to sue for Injury to demised Premises.

In almost all cases it is the person in occupation of land and premises who is primâ facie entitled to maintain an action for an injury done to the property, even where the wrongful act has also injured the person entitled to the reversion so as to allow him also to sue. And it may be sufficient that the tenant has a right only let to him and no property in the soil; for example, where the plaintiff was entitled, under a lease from the crown, to the sole right of digging lead in a certain district, to the soil of which she had no right, and let to another all her right so to dig during her term; it was held, that an action might be maintained against a person who wrongfully took the lead (*d*). Indeed, an action may be brought by a tenant against a wrongdoer, although the tenant has no legal title other than actual possession; therefore, a person in possession of glebe land under a lease, void by reason of the rector's non-residence, may yet maintain an action against a trespasser (*e*). A lessee for years, after his lease is expired, may also maintain an action for a trespass on the land before his lease was ended (*f*). But where a tenant's interest is determined, as, for instance, by the death of a tenant for life, under whom he holds, and he is then absent from the premises, and does no act indicating an intention to remain in possession, he is to be presumed to be out of possession, and therefore cannot sue (*g*).

Lessee cannot sue for Trespass before Entry.

A lessee before entry has only an interesse termini (*h*), and cannot maintain an action for a trespass (*i*). Therefore, where a lease was made by way of mortgage, to hold from henceforth, subject to a proviso that on non-payment of the money on a certain day, the mortgagee might enter, he cannot maintain trespass for an entry made by a stranger before that day (*k*).

(*a*) Bull. N. P. 71.

(*b*) *Harris* v. *James*, 45 L. J., Q. B. 544; 35 L. T. 240 (lime quarry worked by blasting).

(*c*) *White* v. *Jameson*, L. R., 18 Eq. 303; 22 W. R. 761.

(*d*) *Harker* v. *Birkbeck*, 3 Burr. 1563; *Taylor* v. *Eastwood*, 1 East, 212.

(*e*) *Graham* v. *Peat*, 1 East, 244; 6 R. R. 268.

(*f*) Bro. Tresp. 456; 2 Roll. Abr. 551, l. 46; *Evelyn* v. *Raddish*, Holt, N. P. C. 543.

(*g*) *Brown* v. *Notley*, 3 Exch. 219.

(*h*) *Lowe* v. *Ross*, 5 Exch. 553.

(*i*) Co. Lit. 296 b; Com. Dig. *Trespass*, B. 1, 2; *Harrison* v. *Blackburn*, 17 C. B., N. S. 678, 691.

(*k*) *Wheeler* v. *Montefiore*, 2 Q. B. 133;

Trees.

A lessee for life or years of land has no property in the trees growing on the land (*l*). Therefore, if a stranger cut down any trees, the lessee may sue for damages for the trespass, and perhaps for the loss of shade from the trees, but he cannot recover damages for their value, because the property of them is in the reversioner (*m*).

Liability of Tenant for defective Fences;

It is the duty of the tenant and not of the landlord, in the absence of special circumstances, to see that fences are in repair, so that cattle cannot stray on the land of others (*n*).

A person who rents the minerals under the land of another with a licence to make a shaft into it, is, in the absence of any stipulation to the contrary, under a legal obligation to the owner of the surface soil to fence the shaft so as to prevent it from being a source of danger to persons or cattle who may be rightfully upon it (*o*).

for Nuisances in Public Ways, &c.;

When any injury is caused to third persons by the state of the premises, it is always primâ facie the tenant who is liable (*p*). For instance, it is the duty of the *occupier* (not of his landlord (*q*)) of a house, having an area fronting the public street, so to fence it as to make it safe to passengers; and it is no defence to an action against him for neglecting to do so, whereby the plaintiff fell down into the area and was hurt, that when he took possession of the house, and as long back as could be remembered, the area was in the same open state as when the accident happened (*r*). The occupier is bound to see that his drains are in order (*s*). Again, the occupier of land is bound to fence off any hole or area upon it which adjoins or is near to a highway, and is primâ facie liable for any damage arising from his neglecting to do so (*t*). If a grating on a public footway is broken, the occupier is primâ facie bound to repair it (*u*).

for Barbed Wire Fence.

The question of the civil liability of an occupier for damage caused by a barbed wire fence on his land is doubtful, but it is submitted that if the fence abut on a public way, the occupier of the land is civilly liable to persons using the way (*x*), as

*Turner* v. *Cameron Coalbrook, &c. Co.*, 5 Exch. 932. See, too, *Litchfield* v. *Ready*, 5 Exch. 939.

(*l*) Ante, Chap. XVI., Sect. 7 (b).

(*m*) Esp. N. P. 384; 4 Co. R. 82 *a*.

(*n*) *Cheetham* v. *Hampson*, 4 T. R. 318; 2 R. R. 397.

(*o*) *Re Williams* v. *Groucott*, 4 B. & S. 149; 32 L. J., Q. B. 239.

(*p*) *Reg.* v. *Watts*, 1 Salk. 357; *Cheetham* v. *Hampson*, 4 T. R. 318; 2 R. R. 397. See, too, *Rich* v. *Basterfield*, 4 C. B. 783; *Chauntler* v. *Robinson*, 4 Exch. 163. As to the duties and liabilities of occupiers of adjoining premises for nuisances from defective drains, &c., *see Humphries* v. *Cousins*, L. R., 2 P. C. D. 239.

(*q*) *Cheetham* v. *Hampson*, 4 T. R. 318; 2 R. R. 397; *Russell* v. *Shenton*, 3 Q. B. 449; *Rich* v. *Basterfield*, 4 C. B. 783; *Bishop* v. *Trustees of Bedford Charity*, 1 E. & E. 697; 28 L. J., Q. B. 215; 29 Id. 53.

(*r*) *Coupland* v. *Hardingham*, 3 Camp. 398; 14 R. R. 764; cited 9 C. B. 417.

(*s*) *Russell* v. *Shenton*, 3 Q. B. 449.

(*t*) *Barnes* v. *Ward*, 3 C. & K. 661; 9 C. B. 392; *Hadley* v. *Taylor*, L. R., 1 C. P. 53; *Indermaur* v. *Dames*, Id. 274.

(*u*) *Gandy* v. *Jubber*, 5 B. & S. 78, 485; 31 L. J., Q. B. 151; cited L. R., 4 C. P. 202. See, too, *Daniels* v. *Potter*, 4 C. & P. 262; *Abbott* v. *Macfie*, 2 H. & C. 744; 33 L. J., Ex. 117; *Gwinnell* v. *Eamer*, L. R., 10 C. P. 658.

(*x*) So held in the Scotch case of *Elgin County Road Trustees* v. *Jones*, 14 Rettie, 48. In Dixon's Law of the Farm, 5th ed.,

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well as criminally under the Barbed Wire Act, 1893, 56 & 57 Vict. c. 32.

Non-repair of Cellar.

The occupier of a house is primâ facie liable for an injury sustained by a person from the want of repair of the covering to a cellar (*y*), as he is so, even on criminal process, where a public nuisance is caused by a ruinous house (*z*). The tenant in actual occupation may also be liable for the acts of persons who are on the property by his permission, though they are not strictly his agents or servants (*a*).

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### SECT. 3.—*Remedy by Injunction.*

In addition to the right to damages, which has been treated of in this chapter, there are many cases in which the parties aggrieved may obtain an injunction, but it is not usual to grant injunctions except in cases where the injury is of a permanent and irreparable nature (*b*); and if the applicant be a tenant, the injunction is usually limited in duration to the length of the tenant's interest in the property (*c*). An interlocutory injunction may be obtained on application made at any stage of an action, and either ex parte or after notice, if the applicant be the plaintiff in the action; if any other party apply, notice must be given to the plaintiff, and the application cannot be made until after appearance by the party applying (*d*).

at p. 81, analogous cases are examined, and the opinion expressed that there is a liability to *neighbours* generally.

(*y*) *Payne* v. *Rogers*, 2 H. Blac. 349; 3 R. R. 415; *Tennant* v. *Golding*, 1 Salk. 21, 360, 770.

(*z*) *Reg.* v. *Watts*, 1 Salk. 357.

(*a*) *Rich* v. *Basterfield*, 4 C. B. 783; per Rolfe, B., in *Reedie* v. *London and North Western Rail. Co.*, 4 Exch. 244; *Bishop* v. *Trustees of Bedford Charity*, 1 E. & E. 697; 28 L. J., Q. B. 215; 29 Id. 53.

(*b*) Story's Eq. Jur., sect. 925.

(*c*) *Simper* v. *Foley*, 2 Johns. & H. 555; 5 L. T. 669.

(*d*) Jud. Act, 1873, s. 15 (8); R. S. C., Ord. LII., r. 4.

# CHAPTER XX.

## RIGHTS AND LIABILITIES ON CESSER OF THE TENANCY.


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### SECT. 1.—*Delivery of Possession, &c., at end of Tenancy.*

Tenant must deliver up the Premises with all Erections, &c.

THE ordinary rule is, that the tenant must, on the expiration or sooner determination of his tenancy, deliver up to his landlord the peaceable and quiet possession of the demised premises, and every part thereof (*a*), together with all erections, buildings, improvements, and fixtures, which he is not entitled to remove; and the growing crops of every description. To this rule, however, there are important exceptions. First, there may be some stipulation in the lease to the contrary (*b*). Secondly, there may be a custom of the country for the tenant to hold over any part of the demised premises, or to take crops (*c*). Thirdly, the tenant of a deceased tenant for life is entitled to emblements or to a prolongation of his term in lieu thereof (*d*).

Tenancy on Sufferance.

If the tenant hold over without objection after the expiration of his term, he becomes a tenant on sufferance (see ante, p. 245); and while he continues such tenant it seems that he may remove such fixtures, &c., as he was entitled to remove during his original tenancy; but it is extremely dangerous to delay such removal until *after* his term expires (*e*).

(*a*) Post, Sect. 2 (a).
(*b*) *Hyatt* v. *Griffiths*, 17 Q. B. 505; *Newson* v. *Smythies*, 1 F. & F. 477; 3 H. & N. 840; 28 L. J., Ex. 97.
(*c*) See post, Sect. 4 (a) (b).
(*d*) Post, Sect. 3.
(*e*) Ante, Chap. XVI., Sect. 8.

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*Tenant's Duty at end of Tenancy.*

If the tenant has let the whole or any part of the premises to a sub-tenant, who is in possession at the time of the determination of the term, he must get him out, for otherwise he will not be in a situation to render that complete possession to which the landlord is entitled (*f*). If he omit to do so, the landlord may maintain an action against him for not having quitted and delivered up possession at the end of the term, and may recover in such action, as special damage, the costs of an ejectment against the sub-tenant (*g*). The landlord is also entitled to recover against him the reasonable damages and costs sustained by him in an action at the suit of a party to whom he had contracted to let the premises, but to whom the tenant's wrongful act had prevented him from delivering possession (*h*).

Ejectment of Sub-tenant. *Henderson* v. *Squire.*

Delivery of Complete Possession.

Power of Landlord to Break in.

A landlord breaking into premises by force at the end of the term renders himself liable to an indictment under the statutes relating to forcible entry (*i*); but these statutes give no civil remedy, and there has been much difference of opinion on the point whether the tenant can recover any and what damages for a forcible entry so indictable. In *Newton* v. *Harland* (*k*) it was held that the landlord could not acquire lawful possession by a forcible entry after the expiration of the term, and that, therefore, an assault and expulsion could not be justified. But *Newton* v. *Harland*, though never expressly overruled (*l*), has been repeatedly questioned (*m*). In *Beddall* v. *Maitland* (*n*), however—which was not a landlord and tenant case,—Fry, J., observed that *Newton* v. *Harland* "settled the law on the subject," and laid down that although damages cannot be recovered merely for the eviction, they can be recovered for an independent wrong committed in the course of the eviction, such as an assault or an injury to furniture; and the law appears to be that a lessor, at the determination of the term, may enter forcibly into possession of the demised premises, and after civilly requesting the tenant to depart, may, in case of his refusal or neglect to comply with such request, gently lay hands upon him to turn or push him out; and in case of any resistance on his part, may use such force and violence as may be necessary to

Damages for Assault, &c. *Beddall* v. *Maitland.*

(*f*) *Harding* v. *Crethorn*, 1 Esp. 57; 5 R. R. 719; *Ibbs* v. *Richardson*, 9 A. & E. 849.

(*g*) *Henderson* v. *Squire*, L. R., 4 Q. B. 170; 38 L. J., Q. B. 73; 19 L. T. 601.

(*h*) *Bramley* v. *Chesterton*, 2 C. B., N. S. 592; 27 L. J., C. P. 23.

(*i*) See post, Chap. XXIII., Sect. 4; *Taunton* v. *Costar*, 7 T. R. 431; 4 R. R. 481.

(*k*) *Newton* v. *Harland*, 1 M. & G. 644, per Tindal, C.J., and Bosanquet and Erskine, JJ. (diss.), Coltman, J. This case was tried three times.

(*l*) Smith, L. & T. 331.

(*m*) *Harvey* v. *Bridges*, 14 M. & W. 437—442; 3 D. & L. 60; 1 Exch. 261; *Jones* v. *Chapman* (in error), 2 Exch. 803, 821; *Davis* v. *Burrell*, 10 C. B. 821, 825; *Pollen* v. *Brewer*, 7 C. B., N. S. 371; *Appleton* v. *Murray*, 8 W. R. 653; 1 Sm. L. C., notes to *Taylor* v. *Cole.*

(*n*) *Beddall* v. *Maitland*, 17 Ch. D. 174; 50 L. J., Ch. 401; 44 L. T. 248; 29 W. R. 484.

overcome such resistance (but no more), and so expel the tenant from the possession without being liable to an action of trespass quare clausum fregit, or for assault, at the suit of the tenant; although he may have made himself liable to an indictment for a forcible entry (*o*). But excess of violence must be avoided, and that creates the principal difficulty and danger in proceeding to expel a tenant in the manner above mentioned, and often renders it more advisable to proceed by action of ejectment (*p*).

No Action for Injury to Furniture by Removal of Roof of House. *Jones* v. *Foley*.

In *Jones* v. *Foley*, the plaintiff had wrongfully refused to give up possession of a cottage at the end of his tenancy. The defendant, about two months afterwards, in view of rebuilding the cottage, had the roof removed, whereby the plaintiff's furniture was unavoidably injured. It was held, that although the defendant had (before having the roof removed) obtained a warrant for delivery of possession within twenty-one days, under the Small Tenements Recovery Act, 1838, 1 & 2 Vict. c. 74 (see post, Chap. XXII., s. 4), and such twenty-one days had not expired, no action was maintainable for the damage thus done (*q*).

Forcible Entry by Landlord.

A proviso for re-entry, so framed as expressly to justify the lessor, on breach of any of the covenants, in forcibly resuming possession of the premises and expelling the tenant, which had long passed without objection (*r*), has been said by Fry, J., to be void as authorizing a forcible entry in contravention of the statutes (*s*).

Forcible Re-entry by Tenant.

Where a landlord having, in respect of a breach of covenant, entered his tenant's premises in his absence, and put locks on the doors, and the tenant on his return broke the locks, it was ruled at Nisi Prius that the landlord, being lawfully in possession of the premises, might justify giving his tenant into custody under the Metropolitan Police Act (2 & 3 Vict. c. 47), ss. 54, 66 (*t*).

Encroachments by Tenant are for Benefit of Landlord. *Earl of Lisburne* v. *Davis*.

Encroachments made by a tenant from the adjoining waste, during the term, are primâ facie for the benefit of the tenant during the term, *and afterwards of his landlord*, unless it appear by some evidence that the tenant *at the time they were made* intended them for his own exclusive benefit, and not to hold them as he held the farm to which they were adjacent (*u*); and the consent of the

(*o*) *Davison* v. *Wilson*, 11 Q. B. 890; *Burling* v. *Read*, Id. 904. See also *Browne* v. *Dawson*, 12 A. & E. 624; *Scott* v. *Matthew Browne & Co.*, 50 L. T. 746.

(*p*) Cole Ejec. 70, 71. And see Smith, L. & T. 331.

(*q*) *Jones* v. *Foley*, [1891] 1 Q. B. 730; 60 L. J., Q. B. 464; 64 L. T. 538; 39 W. R. 211—C. A.

(*r*) See *e.g. Kavanagh* v. *Gudge*, 6 Scott, N. R. 508; 7 Id. 1025; 7 M. & G. 316; 1 D. & L. 928; *Milner* v. *Myers*, 15 L. J., Q. B. 157; *Acocks* v. *Phillips*, 5 H. & N. 183; *Barry* v. *Glover*, 10 Ir. Com. L. R. 113.

(*s*) *Edwick* v. *Hawkes*, 18 Ch. D. 199; 50 L. J., Ch. 577; 45 L. T. 168; 29 W. R. 914.

(*t*) *Davis* v. *Burrell*, 10 C. B. 821.

(*u*) *Doe* d. *Lewis* v. *Rees*, 6 C. & P. 610; *Doe* d. *Earl of Dunraven* v. *Williams*, 7 C. & P. 322; *Doe* d. *Harrison* v. *Murrell*, 8 C. & P. 134; *Doe* d. *Lloyd* v. *Jones*, 15 M. & W. 580; *Andrews* v. *Hailes*, 2

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Encroachments and Inclosures—*contd.*

landlord to an encroachment will not give the tenant the benefit of it (*x*). The landlord may afterwards maintain ejectment to recover possession of them with or without the other premises comprised in the lease (*y*). The covenants to repair, &c., contained in the lease will be held to extend, by implication, to the encroachments and the buildings thereon (*z*). The above-mentioned presumption however, holds only as between the tenant and his landlord, and will not prevail for the landlord's benefit against third persons (*a*). A conveyance by a lessee of the encroachment to his son not appearing to have been delivered, and not followed by possession, does not rebut the presumption that the lessee made the encroachments for the benefit of his lessor (*b*). An indorsement on a lease, by which the lessee agrees to surrender all inclosures made by him at the end of his lease, and to pay 6*d.* annually, as an acknowledgment, is an admission they were made for the benefit of the lessor (*c*).

Encroachment on Landlord's adjoining land.

An encroachment upon adjoining land of the landlord, after occupation by the tenant for more than 12 years, cannot be recovered by the landlord during the term, but is deemed to have been occupied by the tenant as part of the holding, so as to be recoverable by the landlord at the end of the term (*d*).

Custody of Lease.

On the expiration of a lease by forfeiture or otherwise, the lessor is not entitled to have the indenture of lease from the lessee (*e*).

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## SECT. 2.—*Consequences of holding over.*

### (a) *Continuance of Liability.*

Tenant's Liability by Holding over.

The complete possession of the premises which the tenant is bound to give at the end of the tenancy must be given even where a sub-tenant wrongfully holds over and refuses to quit (*f*); the tenant is liable for the period of such holding over, but not for a whole year's rent (*g*). The landlord may, however, discharge the original tenant by accepting the sub-tenant as his immediate

E. & B. 349; *Doe* d. *Croft* v. *Tidbury*, 14 C. B. 304; 23 L. J., C. P. 57; *Kingsmill* v. *Millard*, 11 Exch. 313; *Earl of Lisburne* v. *Davies*, L. R., 1 C. P. 259; 35 L. J., C. P. 193.

(*x*) *Whitmore* v. *Humphries*, L. R., 7 C. P. 1; 41 L. J., C. P. 43; 25 L. T. 496; 20 W. R. 79.

(*y*) *Andrews* v. *Hailes*, 2 E. & B. 349; *Doe* d. *Croft* v. *Tidbury*, 14 C. B. 304; *Doe* d. *Earl of Dunraven* v. *Williams*, 7 C. & P. 332; Cole Ejec. 248.

(*z*) *In re Newbery*, *White* v. *Wakley*, 26 Beav. 17; 28 L. J., Ch. 77.

(*a*) *Doe* d. *Raddeley* v. *Massey*, 17 Q. B. 373; *Doe* d. *Bluck* v. *Moyes*, 13 L. T., O. S. 325.

(*b*) *Doe* d. *Lloyd* v. *Jones*, 15 M. & W. 580.

(*c*) *Doe* d. *Lloyd* v. *Jones*, 15 M. & W. 580.

(*d*) *Tabor* v. *Godfrey*, 64 L. J., Q. B. 245.

(*e*) *Hall* v. *Ball*, 3 M. & G. 252; *Doe* d. *Earl of Egremont* v. *Pulman*, 3 Q. B. 622; *Elworthy* v. *Sandford*, 3 H. & C. 330; 34 L. J., Ex. 42.

(*f*) *Harding* v. *Crethorn*, 1 Esp. 57; 5 R. R. 719.

(*g*) *Ibbs* v. *Richardson*, 9 A. & E. 849.

tenant (*h*). Where four persons, directors of a bank, hired a house for a year, before the expiration of which negotiations were entered into for a further hiring, with an intimation to the lessor that the parties were different, but the negotiations were not perfected, though the premises were held over for another quarter: it was held, that all four were liable in an action for use and occupation, though two had ceased to be directors before the expiration of the first year (*i*). In a second action for subsequent use and occupation of the same premises, it was held, that if premises are let to two persons for a term, at the end of which one holds over with the assent of the other, both continue liable for the time the one actually occupies (*k*); but both will not be liable if the holding over has been without such assent (*l*). Where a tenancy from year to year has been determined by a regular notice to quit, the mere accidental detention of the key by the tenant (who has quitted the premises and removed his goods) for two days beyond the expiration of the term, does not amount to any evidence of use and occupation, so as to make him liable for another quarter (*m*). To hold him liable for a quarter's rent would fix him with a renewed tenancy for a whole year; which could not be created without the assent of *both* parties, and would render a fresh notice to quit necessary. In an action for rent of coal, the issue being whether the defendants, who had given notice to quit, had afterwards waived such notice and agreed to continue the tenancy; it was proved that after the time fixed had expired, they *continued for two months* working out certain portions of the coal, which, however, as they contended, it was usual for a tenant to take away on abandoning such a work. It was ruled, that it was for the jury to decide on this issue, whether or not the defendants, in remaining for the two months, intended to waive the notice and continue the tenancy. The jury found they did not, and the court refused to disturb their verdict (*n*). Where a person who took premises for nine months, with an option at the end of that time of taking a lease for seven, fourteen or twenty-one years, before the expiration of the nine months sub-let the premises for six months after the nine, and the sub-lessee occupied them for that time, it was held, that the lessee was liable for a whole year's rent (*o*).

Liability of one co-tenant for another.

We have already seen (ante, p. 233) that a tenant holding over after the expiration of a lease for years may be taken to hold upon such

Creation of Tenancy from Year to Year by Holding over.

(*h*) *Harding* v. *Crethorn*, 1 Esp. 57; 5 R. R. 719.
(*i*) *Christy* v. *Tancred*, 7 M. & W. 127.
(*k*) *Christy* v. *Tancred*, 9 M. & W. 438; *Tancred* v. *Christy*, 12 M. & W. 316.
(*l*) Id.; *Draper* v. *Crofts*, 15 M. & W. 166.
(*m*) *Gray* v. *Bompas*, 11 C. B., N. S. 520.
(*n*) *Jones* v. *Shears*, 4 A. & E. 832.
(*o*) *Waring* v. *King*, 8 M. & W. 571.

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Creation of Tenancy from Year to Year —*contd.*

of the terms of the former lease as are consistent with a yearly tenancy, and that it is a question of fact whether he does hold on any of such terms or how otherwise. Where a tenant holds over and nothing is said as to the amount of rent to be paid, it is not necessarily to be the same as before, but the landlord may be entitled to an increased rent if the circumstances exclude the first agreement from attaching to the subsequent holding (*p*). Where the landlord has given a notice to quit or pay a specified rent, he may recover that amount of rent if the tenant hold over, it being a question for the jury whether the tenant has acquiesced (*q*). Where the tenant held over, and paid rent after the end of a lease, which contained covenants for a particular mode of husbandry; it was held, that the landlord might compel him to perform such covenants, in the same manner as if they were still expressly agreed upon between them (*r*). A covenant in a lease for years, ending at Michaelmas, that the tenant shall and may retain and sow forty acres of wheat on the arable land demised (consisting of 213 acres), at the seed-time next after the term, and have the standing thereof till the harvest then next following, rent free, with the use of premises for the threshing, &c., till a day named, is a term which may be made incident to a tenancy from year to year (*s*).

### (b) *Double Value (after Landlord's Notice).*

Action for Double Value for wilful Holding over after Landlord's Notice. 4 Geo. 2, c. 28.

A right of action for double the yearly value of the premises is given to the landlord against a tenant—for life, lives, or years—holding over after the landlord's demand of the premises in writing. This right of action is given in the following terms by s. 1 of the Landlord and Tenant Act, 1730, 4 Geo. 2, c. 28:—

> For securing to lessors and land-owners their just rights and to prevent frauds frequently committed by tenants, in case any tenant or tenants for any term *of life, lives, or years*, or other person or persons who are or shall come into possession of any lands, tenements, or hereditaments, by, from, or under, or by collusion with such tenant or tenants, shall *wilfully hold over* any lands, tenements, or hereditaments after the determination of such term or terms, and *after demand made*, and *notice in writing* given, for delivering the possession thereof by his or their landlords or lessors, or the person or persons to whom the remainder or reversion of such lands, tenements, or hereditaments shall belong, his or their agent or agents *thereunto lawfully authorized*, then and in such case such person or persons so holding over shall, *for and during the time he, she and* (*sic*) *they shall so hold over*, or keep the person or persons entitled out of possession of the said lands, tenements and hereditaments

(*p*) *Elgar* v. *Watson*, 1 Car. & M. 494; *Mayor, &c. of Thetford* v. *Tyler*, 8 Q. B. 95.
(*q*) *Anon.*, Lofft, 153; *Roberts* v. *Hayward*, 3 C. & P. 432; *Hyatt* v. *Griffiths*, 17 Q. B. 505.
(*r*) *Roe* d. *Jordan* v. *Ward*, 1 H. Blac. 97; 2 R. R. 728.
(*s*) *Hyatt* v. *Griffiths*, 17 Q. B. 505.

as aforesaid, pay to the person or persons so kept out of possession, their executors, administrators, or assigns, *at the rate of double the yearly value* of the lands, tenements, and hereditaments so detained, for so long time as the same are detained, to be recovered in any of his majesty's courts of record by action of debt, [whereunto the defendant or defendants shall be obliged to give special bail (*ss*)] against the recovering of which said *penalty* there shall be no relief in equity.

Act applies only to Tenancies for Lives or Years.

This is a penal statute, and is to be construed strictly (*t*). It does not extend to weekly tenancies (*u*); nor to a tenancy from quarter to quarter (*x*). One tenant in common may maintain an action for the double value of his moiety (*y*). But tenants in common cannot sue jointly for double value for holding over unless there has been a joint demise (*z*). An action for double value cannot be maintained by husband *and wife* when the tenant holds over the wife's land after the expiration of a term therein granted by the husband alone (*a*). The administratrix of an executor cannot sue for the double value of lands demised by the testator and held over by the defendant; but must obtain letters of administration de bonis non, even though the tenant has attorned to her (*b*). Only the landlord or lessor, or the assignee of the immediate reversion, can sue: not a tenant to whom a fresh lease has been granted to commence on the expiration of the defendant's tenancy (*c*).

The Tenant must hold over *wilfully*.

The tenant must *wilfully* hold over, i.e. contumaciously, and not merely by mistake, under a fair and reasonable claim of title (*d*). Whether his claim to hold over be bonâ fide or a mere pretence is a question for the jury: a claim to hold over by virtue of a custom of the country, which does not apply to the demised premises, will not protect the tenant from liability to double value (*e*). Where a tenant held over possession during a treaty for a further term, which went off, Lord Mansfield held that the penalty in the statute did not apply (*f*). Where one of several tenants wilfully holds over without the assent of his co-tenants, the latter will not be liable (*g*); nor is a tenant liable for the holding over by a sub-tenant without his assent (*h*).

Demand and Notice in Writing.

There must be a "demand made and notice in writing given" pursuant to the act (*i*). The notice and demand may be served

(*ss*) Extinct with mesne process.

(*t*) *Lloyd* v. *Rosbee*, 2 Camp. 453; 11 R. R. 764; *Robinson* v. *Learoyd*, 7 M. & W. 54.

(*u*) See *Lloyd* v. *Rosbee*, 2 Camp. 453; 11 R. R. 764.

(*x*) *Sullivan* v. *Bishop*, 2 C. & P. 359; *Wilkinson* v. *Hall*, 3 Bing. N. C. 508.

(*y*) *Cutting* v. *Derby*, 2 W. Blac. 1077; *Wilkinson* v. *Hall*, supra.

(*z*) *Wilkinson* v. *Hall*, 1 Bing. N. C. 713; Cole Ejec. 647.

(*a*) *Harcourt* v. *Wyman*, 3 Exch. 817.

(*b*) *Tingrey* v. *Brown*, 1 Bos. & P. 310; 4 R. R. 805.

(*c*) *Blatchford*, app., *Cole*, resp., 5 C. B., N. S. 524.

(*d*) *Soulsby* v. *Neving*, 9 East, 313; 9 R. R. 567; *Poole* v. *Warren*, 8 A. & E. 582; *Swinfen* v. *Bacon*, 6 H. & N. 184, 846; 30 L. J., Ex. 33.

(*e*) *Hirst* v. *Horn*, 6 M. & W. 393.

(*f*) *Anon.*, 5 Esp. 215.

(*g*) *Draper* v. *Crofts*, 15 M. & W. 166.

(*h*) *Rands* v. *Clark*, 19 W. R. 48.

(*i*) See Form, App. C., No. 11, post.

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Form of Notice—*contd.*

before the expiration of the term requiring the tenant to deliver up possession on the expiration of his term (*k*); and in such case no further demand or notice is necessary after the expiration of the term; and the double value should be calculated from the expiration of the term for so long as the tenant holds over (*l*). Or the demand and notice may be given within a reasonable time after the expiration of the term (the sooner the better), provided the landlord has done no act in the meantime to acknowledge the continuance of the tenancy, or rather to create a new one: and he will thereupon be entitled to double value calculated from the time of such demand, and not from the expiration of the tenancy (*m*). If the rent was before reserved quarterly and such demand is made in the middle of a quarter, the landlord cannot recover any rent or compensation for use and occupation for the antecedent fraction of such quarter (*m*). The demand and notice should always be given before, or as soon as possible after, the expiration of the term. When the tenancy was only from year to year, the usual written notice to quit is a sufficient demand and notice whereby to satisfy the statute, and no further demand or notice need be made after the tenancy has ceased (*n*). But the notice must amount to a valid and binding notice to quit (*o*). If it requires the tenant to quit on the wrong day, or on the right day at twelve o'clock *at noon*, that is not sufficient (*p*). A notice requiring the tenant to quit on the proper day "or I shall insist on double rent" (instead of double value) is sufficient, and does not give the tenant the option of holding over (*q*). A second notice, given after the expiration of the term, to quit on a subsequent day or to pay double rent, is no waiver of the first notice given before the expiration of the term, or of the double rent which had accrued under it (*r*). A notice to quit lands on a given day, "or at such time as your holding shall expire next after the expiration of half a year from the receipt of this notice," is sufficient in an action for double value (*s*). A receiver or agent authorized to let, and to sue or distrain for rent, has sufficient authority to give the notice (*t*), as also has a receiver appointed in the High Court, with the usual powers, who may give the notice in his own name (*u*).

Double Value cannot be Distrained for.

Double value cannot be distrained for, it not being in the nature of rent, but of unliquidated damages, recoverable only by action

(*k*) *Messenger* v. *Armstrong*, 1 T. R. 53; 1 R. R. 148; *Wilkinson* v. *Colley*, 5 Burr. 2694; *Cutting* v. *Derby*, 2 W. Blac. 1075.

(*l*) Id.; *Soulsby* v. *Neving*, 9 East, 310; 9 R. R. 567; *Booth* v. *Macfarlane*, 1 B. & Adol. 904.

(*m*) *Cobb* v. *Stokes*, 8 East, 358; 9 R. R. 464.

(*n*) *Wilkinson* v. *Colley*, 5 Burr. 2694, 2698; *Cutting* v. *Derby*, 2 W. Blac. 1075; *Hirst* v. *Horn*, 6 M. & W. 393.

(*o*) *Johnstone* v. *Hudlestone*, 4 B. & C. 922.

(*p*) *Page* v. *More*, 15 Q. B. 684.

(*q*) *Doe* d. *Matthews* v. *Jackson*, 1 Doug. 175; *Doe* d. *Lyster* v. *Goldwin*, 2 Q. B. 143; Cole Ejec. 646.

(*r*) *Messenger* v. *Armstrong*, 1 T. R. 53, 54; 1 R. R. 148.

(*s*) *Hirst* v. *Horn*, 6 M. & W. 393.

(*t*) *Poole* v. *Warren*, 8 A. & E. 582.

(*u*) *Wilkinson* v. *Colley*, 5 Burr. 2694; and see *Trent* v. *Hunt*, 9 Exch. 14.

pursuant to the statute. After recovering the possession of demised premises by an ejectment, the landlord may recover double value for the time the tenant held over after the expiration of the notice to quit until possession was obtained in the ejectment (*x*). The action for double value "has no reference to any antecedent remedy which the landlord had to recover possession by ejectment, but is cumulative. The two actions are brought *diverso intuitu;* the ejectment is in order to get possession of the premises wrongfully withheld; the action of debt for the double value is in order to indemnify the landlord for the wrong" (*y*). No previous action of ejectment is *necessary* to entitle the landlord to recover double value (*z*). The action "stands in the place of an ejectment, but is more beneficial and effectual (*a*). When the landlord gives notice the penalty is double the yearly *value* not double the yearly rent, which might not in some cases be an adequate satisfaction (*b*). In estimating the double value, the value of power supplied by the owner of a mill by means of a revolving shaft, and let together with a room in the mill, cannot be included, such power not being "lands, tenements or hereditaments" (*c*).

Action in County Court.

An action for double value not exceeding 50*l.* may be brought in the County Court (*d*), and the defendant cannot oust the jurisdiction by alleging title to the premises in himself, if it be proved that he has admitted himself to have been tenant to the plaintiff at the times when the rent accrued, and from which the holding over commenced (*e*). It is not a dividing of the cause of action within the meaning of s. 81 of the County Courts Act, 1888, 51 & 52 Vict. c. 43, re-enacting s. 63 of the County Courts Act, 1846, to levy one plaint for rent of premises and another for double value for holding them over, the two demands constituting distinct causes of action (*f*).

### (c) *Double Rent (after Tenant's Notice).*

Action for Double Rent for Holding over, at the end of any Tenancy, after Tenant's Notice. 11 Geo. 2, c. 19, s. 18.

By the Distress for Rent Act, 1737, 11 Geo. 2, c. 19, s. 18, a right of action against any tenant holding over after his own notice to quit is given to the landlord as follows:—

Whereas great inconveniences have happened and may happen to landlords whose tenants have power to determine their leases, by giving notice to quit the premises by them holden, and yet refusing to deliver up the possession when the landlord hath agreed with another tenant for the same: Be it enacted that in case any *tenant or tenants shall give notice* of his, her, or their intention to quit the premises by him, her, or them holden, at a time mentioned in such notice, and shall not accordingly deliver up

(*x*) *Soulsby* v. *Neving*, 9 East, 310; 9 R. R. 567.
(*y*) Id. 314.
(*z*) Cole Ejec. 645.
(*a*) *Cutting* v. *Derby*, 2 W. Blac. 1077.
(*b*) *Soulsby* v. *Neving*, 9 East, 313; 9 R. R. 567.
(*c*) *Robinson* v. *Learoyd*, 7 M. & W. 48.
(*d*) *Blatchford*, app., *Cole*, resp., 5 C. B., N. S. 514.
(*e*) *Wickham* v. *Lee*, 12 Q. B. 521.
(*f*) Id.; *Ryal* v. *Rich*, 10 East, 48.

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the possession thereof at the time in such notice contained, then the said tenant or tenants, his, her, or their executors or administrators, shall from thenceforward pay to the landlord or landlords, lessor or lessors, *double the rent* or sum which he, she, or they should otherwise have paid, to be levied, sued for, and recovered at the same time and in the same manner as the single rent or sum before the giving such notice could be levied, sued for or recovered; and such double rent or sum shall continue to be paid *during all the time such tenant or tenants shall continue in possession as aforesaid.*

Holding over need not be wilful.

The tenant need not hold over *wilfully or contumaciously* to render himself liable to double rent, there being no such words in the act, as in the enactment (ante, p. 784) as to "double value." The statute only applies to those cases where the tenant has the power of determining his tenancy by a notice; and where he has actually given a valid notice sufficient to determine such tenancy (*g*). Unlike the enactment as to double value, which, as we have seen, applies to tenants for lives or years only, this statute seems to apply to all kinds of tenancies, and has been held to apply to parol demises from year to year (*h*). If a tenant from year to year give his landlord notice that he will quit upon a contingency, e.g., "as soon as he gains another situation," and do not quit when the contingency happens, he is not liable to an action on the statute for double rent (*i*).

Notice need not be in Writing.

The notice to quit mentioned in the statute need not necessarily be in writing; a parol notice is sufficient to enable the landlord to recover double rent (*k*). A tenant who has given notice and paid double rent may quit at any time without fresh notice, and thereupon his liability to double rent will cease (*l*).

Waiver of the Right to Double Rent.

The acceptance of single rent, accrued due subsequently to the notice, is a waiver of the landlord's right to double rent, although it does not necessarily imply that the tenancy should continue (*m*).

Proceedings for Double Rent.

By the above statute the double rent may be levied, sued for and recovered, at the same times and in the same manner as the single rent might have been levied, sued for and recovered before the giving of such notice. The mode of proceeding, therefore, to recover double rent under the statute, is by distress (*n*), or by action at law. Such action may sometimes be brought in the County Court, where the sum claimed does not exceed 50*l*. (*o*).

Distress.

(*g*) *Johnstone* v. *Hudlestone*, 4 B. & C. 922; 4 L. J., K. B. 71; 28 R. R. 505.

(*h*) *Timmins* v. *Rawlinson*, 3 Burr. 1607; 1 W. Blac. 533; *Sullivan* v. *Bishop*, 2 C. & P. 359, in which the act was ruled not to apply to a weekly tenancy, proceeded upon a mistaken view of *Lloyd* v. *Rosbee*, 2 Camp. 453, and ante, 785 (*u*).

(*i*) *Farrance* v. *Elkington*, 2 Camp. 591; 11 R. R. 807.

(*k*) *Timmins* v. *Rawlinson*, 3 Burr. 1607; 1 W. Blac. 533; *Johnstone* v. *Hudlestone*, 4 B. & C. 922, and supra (*g*).

(*l*) *Booth* v. *Macfarlane*, 1 B. & Adol. 904.

(*m*) *Doe* d. *Cheney* v. *Batten*, Cowp. 243.

(*n*) *Humberstone* v. *Dubois*, 10 M. & W. 765; 2 Dowl., N. S. 506; *Timmins* v. *Rawlinson* and *Johnstone* v. *Hudlestone* supra; Cole Ejec. 649.

(*o*) *Wickham* v. *Lee*, 12 Q. B. 521.

## Sect. 3.—*Emblements.*



### (a) *Nature of Emblements.*

What are Emblements.

The word "emblements" means a right given by law in certain cases to the tenant of an estate of uncertain duration, which has unexpectedly determined, without any fault of such tenant, to take the crops growing upon the land when his estate determines, although the estate itself has ceased (*p*). It is derived from the French *emblavence de bled* (corn sprung or put above ground), and strictly signifies the growing crops of sown land; but the doctrine of emblements extends not only to corn sown, but to roots planted, and other *annual* artificial profits (*q*). The growing crops of those vegetable productions of the soil which are *annually produced by the labour of the cultivator* are emblements (*r*). Fruit trees, therefore, or oak, elm, ash or other trees, cannot be comprehended under emblements (*s*); but there may be a right of emblements in teazles (*t*). Where there is a right to take emblements, they belong either to the tenant himself, whose estate is determined in such a manner as to give him the right; to his grantee or devisee, where he has granted or devised them; or to his personal representatives, where the right arises upon the death of a tenant who has made no disposition respecting them (*u*).

Teazles.

Rights incident to Emblements.

Where there is a right to emblements, ingress, egress and regress are allowed by law to enable the party to enter, cut and carry them away after the estate is determined (*x*): so if a party who is entitled to emblements grant them to another, the grantee may cut and take them away after the death of the grantor (*y*). The right to emblements does not, however, give a title to the exclusive occupation of the land: therefore it seems that if the executors occupy till the corn or other produce be ripe, the landlord may maintain an action for the use and occupation of the land (*z*).

### (b) *Prolongation of Tenancy instead of Emblements.*

Agricultural Tenaut of Landlord having uncertain Interest may occupy till End of current Year of Tenancy.

The right to emblements is practically almost abolished by sect. 1 of the Landlord and Tenant Act, 1851 (14 & 15 Vict. c. 25), which substitutes for claims to emblements the right of continued occupation until the expiration of the current year of the tenancy, in the following terms:—

Where the lease or tenancy of any farm or lands held by a *tenant at rack-rent* (*a*) shall determine by the death or cesser of the estate of any landlord 14 & 15 Vict. c. 25, s. 1.

(*p*) Smith, L. & T. 339 (2nd ed.).
(*q*) *Latham* v. *Attwood*, Cro. Car. 515; Co. Lit. 55 b, note (1).
(*r*) Smith, L. & T. 348 (2nd ed.).
(*s*) Co. Lit. 55 b; Com. Dig. *Biens* (G. 1).
(*t*) *Kingsbury* v. *Collins*, 4 Bing. 202; 5 L. J., C. P. 151; 29 R. R. 354.
(*u*) 2 Blac. Com. 404.
(*x*) Co. Lit. 56 a; *Hayling* v. *Okey*, 8 Exch. 531, 545; Smith, L. & T. 349 (2nd ed.).
(*y*) Shep. Touch. 244.
(*z*) Plowden's Queries, No. 239; Chamb. L. & T. 340.
(*a*) That is, a rent of the full annual value, or near it.

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*Emblements (Prolongation of Tenancy instead of).*

Occupation by Tenant Farmer till end of current Year of Tenancy.

entitled for his life, or for any other uncertain interest, *instead of claims to emblements*, the tenant shall continue to hold and occupy such farm or lands *until the expiration of the then current year of his tenancy*, and shall then quit, upon the terms of his lease or holding, in the same manner as if such lease or tenancy were then determined by effluxion of time or other lawful means during the continuance of his landlord's estate; and the succeeding landlord or owner shall be entitled to recover and receive of the tenant, in the same manner as his predecessor or such tenant's lessor could have done if he had been living or had continued the landlord or lessor, a fair proportion of the rent for the period which may have elapsed from the day of the death or cesser of the estate of such predecessor or lessor to the time of the tenant so quitting, and the succeeding landlord or owner and the tenant respectively shall, as between themselves and as against each other, be entitled to all the benefits and advantages, and be subject to the terms, conditions and restrictions to which the preceding landlord or lessor and such tenant respectively would have been entitled and subject in case the lease or tenancy had determined in manner aforesaid at the expiration of such current year: provided always, that no notice to quit shall be necessary or required by or from either party to determine any such holding and occupation as aforesaid.

This enactment applies only to those tenants *at rack-rent* who before the statute would have been entitled to emblements (*b*); and seems to include all such persons except those who are tenants for their own lives, or the life of another—in which cases the executors of such persons have still a right to emblements. But it applies to all such tenancies in which there might have been a claim to emblements, ex. gr. a tenancy from year to year of a cottage with about an acre of land, cultivated as a garden, and partly sown with corn, and planted with potatoes (*c*). The succeeding owner may after the expiration of the current year of the tenancy distrain for his proportion of the rent (*c*).

### (c) *Who entitled to Emblements.*

General Rule as to Persons entitled to Emblements.

Those only are entitled to emblements who are not within the Landlord and Tenant Act, 1851, 14 & 15 Vict. c. 25, s. 1, above set forth, and have an uncertain estate or interest in land, which is determined, either by the act of God or of the law, between the period of sowing and the severance of the crop (*d*). If the estate, although uncertain in its nature, be determined by the tenant's own act—as by forfeiture for waste committed, or by marriage of a female tenant who held during widowhood—the claim to emblements never arises (*e*); nor does it as against a lessor who enters for a condition broken, or by title paramount (*f*). And where a lease was granted with a con-

(*b*) *Ld. Stradbrooke* v. *Malchy*, 2 Ir. Rep., N. S. 406.
(*c*) *Haines* v. *Welch*, L. R., 4 C. P. 91; 38 L. J., C. P. 118.
(*d*) Smith, L. & T. 339 (2nd ed.).
(*e*) *Oland's case*, 5 W. R. 116: *Bulwer* v. *Bulwer*, 2 B. & A. 470.
(*f*) *Nicholas* v. *Simonds*, 2 Roll. R. 468; *Bulwer* v. *Bulwer*, 2 B. & A. 471; *Johns* v. *Whitley*, 3 Wils. 127.

dition for re-entry in case of the tenant contracting a debt upon which judgment and execution should issue, it was held that the condition was broken and the emblements lost to the tenant, by execution issuing, although it was argued that a tenant under such a condition would be led to cultivate after contracting a debt, because it would never be certain whether the debt would be followed by execution, which was partly the act of the law (*g*).

Tenants for Life and their Sub-tenants.

Tenants for life, whether for their own lives or pur autre vie, are strictly within the rule applicable to persons entitled to emblements (*h*). The same rule applied to the sub-tenants or lessees of tenants for life before the above act, and they had not only the same privileges respecting emblements, but in some instances greater; for in those cases where the tenant for life should not have emblements because the estate was determined by his own act, it should not prejudice his sub-tenant, who could not be answerable for it, and he had, therefore, a right to emblements (*i*).

Clergymen and their Sub-tenants.

The parochial clergy are entitled to emblements (*k*); but a parson who resigns his living is not entitled to emblements, although his lessees and sub-tenants are (*l*).

Tenants from Year to Year.

Tenants from year to year seem to be entitled to emblements (*m*), although not entitled to a prolongation of their term under 14 & 15 Vict. c. 25, s. 1, except where their tenancy is determined by the death of their landlord or the happening of some other uncertain event over which they have no control (*n*).

Strict Tenants at Will.

A strict tenant at will is entitled to emblements where his estate is determined either by his own death or by the act of the landlord; but not to cases where the tenant has himself determined the will (*o*).

Tenants under Execution.

Tenants under execution—as under extent (*p*) or elegit—are entitled to emblements, where the tenancy is put an end to by the judgment being satisfied.

## Sect. 4.—*Outgoing and Incoming Tenants.*

### (a) *Rights of the Parties Generally.*

Tenant has no implied right, apart from "custom."

At common law a tenant who knows when his tenancy will end (whether he be a tenant for years, or a tenant from year to year, having received due notice to quit) has no rights on or out of the land at the end of his tenancy (*q*). But this rule (which may, of course,

(*g*) *Davis* v. *Eyton*, 7 Bing. 154.
(*h*) Co. Lit. 55 b.
(*i*) *Knevett* v. *Poole*, Cro. Eliz. 463; *Bulwer* v. *Bulwer*, 2 B. & A. 470.
(*k*) 28 Hen. 8, c. 11, s. 6.
(*l*) *Bulwer* v. *Bulwer*, 2 B. & A. 470; 21 R. R. 328.
(*m*) *Kingsbury* v. *Collins*, 4 Bing. 207, and supra (*t*).
(*n*) *Kingsbury* v. *Collins*, 4 Bing. 207; *Haines* v. *Welch*, L. R., 4 C. P. 91.
(*o*) Co. Lit. 55 b; *Kingsbury* v. *Collins*, supra; Smith, L. & T. 342 (2nd ed.).
(*p*) *Barden's case*, 2 Leon. 54.
(*q*) *Wigglesworth* v. *Dallison*, 1 Sm. L. C. See *Caldecott* v. *Smythies*, 7 C. & P. 808, per Parke, B.

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be modified by agreement) the common law allows to be modified by custom, by what is called, in relation to agriculture holdings, the "custom of the country."

Variety of Customs.

The customs of the country, as we shall see presently, vary in respect of place, and change in respect of time to a very remarkable degree. Nor are they always for the benefit of agriculture. In forward districts, they will be found to move with the times, or to be superseded by special agreements; but in backward districts this is often not the case. However this may be, the object of all customs of the country applicable to the end of the tenancy is to extend the doctrine of emblements, and to allow him who sows to reap. With this object, the outgoing tenant is allowed to occupy his farm—for periods and under limitations infinitely varying in extent—after the expiration of his tenancy: to re-enter and carry away crops; and to receive compensation for "unexhausted improvements."

Custom must be proved as a Fact.

Every custom of the country must be proved as a fact by the party setting it up (*r*). It need not have existed from time immemorial (*s*): a common usage of the neighbourhood is sufficient.

Custom incorporated in Contract of Tenancy.

The landlord and tenant are presumed to have contracted with reference to the custom, and the custom is incorporated into the contract, whether oral, in writing, or by deed, unless the custom and the terms of the contract are expressly or impliedly inconsistent with it.

*Wigglesworth* v. *Dallison.*

This rule was laid down in the leading case of *Wigglesworth* v. *Dallison* (*t*), in which case a tenant under a lease by deed was held entitled to a way-going crop, and may be found fully expounded in *Hutton* v. *Warren* (*u*), in which case a custom to receive a reasonable allowance for seed and labour bestowed on arable land in the last year of the tenancy, and to leave the manure for the landlord if he would purchase it, was held not to be excluded by a stipulation for the consumption of three-fourths of the hay and straw on the farm.

Remedy of Outgoing Tenant is against Landlord.

In practice there is generally a sale of growing crops, &c., by the outgoing to the incoming tenant, and such a sale is not within the Statute of Frauds, sect. 4, so as to require to be in writing (*x*), and can of course be recovered upon in an action by the outgoing against the

(*r*) *Caldecott* v. *Smythies*, 7 C. & P. 808.

(*s*) *Senior* v. *Armytage*, Holt, N. P. 197; 17 R. R. 627; *Legh* v. *Hewitt*, 4 East, 160; 7 R. R. 545; *Dalby* v. *Hirst*, 1 B. & B. 224; 21 R. R. 577.

(*t*) *Wigglesworth* v. *Dallison*, 1 Doug. 201; 1 Sm. L. C.

(*u*) *Hutton* v. *Warren*, 1 M. & W. 466. For cases where the custom was held excluded on the ground of the contract of tenancy being inconsistent with it, see *Roberts* v. *Barker*, 1 Cr. & M. 808; *Clarke* v. *Roystone*, 13 M. & W. 752.

(*x*) *Mayfield* v. *Wadsley*, 3 B. & C. 357, per Holroyd, J. *Earl of Falmouth* v. *Thomas*, 1 Cr. & M. 82, and *Harvey* v. *Grabham*, 5 A. & E. 61, in which sales of crops were held to be within the 4th section of the statute, were sales by a *landlord*.

incoming tenant (*y*). But it is clear from *Faviell* v. *Gaskoin* (*z*) that the outgoing tenant has, where a custom to be paid for tillages, &c., exists, an absolute right to be paid by the landlord, and not merely a right conditional on there being an incoming tenant. Moreover, a custom that the outgoing tenant shall look to the incoming tenant, to the exclusion of the landlord's liability, cannot be supported in law, such a custom being unreasonable, uncertain, and prejudicial to the interests both of landlords and tenants (*a*). A case may arise however in which the outgoing tenant has agreed to accept the incoming tenant as his debtor for the amount due, instead of the landlord (*b*).

*Faviell* v. *Gaskoin.*

Custom to look to Incomer for Compensation bad.

In the case of the landlord's death, the tenant's remedy is against his real representative for the time being. In *Mansel* v. *Norton* (*c*) the original landlord demised a farm for a term of years which had not expired at his death. The tenant for life under his will paid the tenant for his tenant-right at the expiration of the term, and it was held that he could not recover the amount paid, either from the trustees of a term of 1,000 years or from the remaindermen; Jessel, M.R., observing that if the tenant for life lived long enough, he would get back the outlay from an incoming tenant, but if not, he would only suffer the hardship which occurs in every case where a tenant for life, who has incurred expense for the benefit of the estate, does not live long enough to get the benefit of it.

Remedy against original Landlord's real representative.

*Mansel* v. *Norton.*

In *Stafford* v. *Gardner* (*d*) the plaintiff was outgoing and the defendant incoming tenant. A valuation of tillages was made as between them with the consent of the landlord. The plaintiff owing rent to an amount exceeding that found to be due to him on the valuation, the landlord gave notice to the defendant to pay the amount of the valuation to himself, and not to the plaintiff, which the defendant did. It was held that the plaintiff could not recover the amount of the tillages from the defendant, inasmuch as the contract to be implied between them was subject to the right of the landlord to be paid the arrears of rent out of the valuation; and a more recent case, in which the Norfolk custom to value to the tenant less arrears of rent was recognized as good, is to the same effect (*e*).

Right of Landlord to Rent out of Valuation.

*Stafford* v. *Gardner.*

Farming agreements and leases very frequently provide for the referring of differences as to the amount to be paid for tillages, &c.,

Distinction between Valuation and Arbitration.

(*y*) *Tanner* v. *Washbourne*, 1 F. & F. 330.

(*z*) *Faviell* v. *Gaskoin*, 7 Exch. 273; 21 L. J., Ex. 85.

(*a*) *Bradburn* v. *Foley*, 3 C. P. D. 129; 47 L. J., C. P. 331; 38 L. T. 421; 26 W. R. 423.

(*b*) See as to this question, which is one of fact, *Codd* v. *Brown*, 15 L. T. 536.

(*c*) *Mansel* v. *Norton*, 22 Ch. D. 69; 52 L. J., Ch. 357; 48 L. T. 654; W. R. 325—C. A. Whether there was a tenancy from year to year or under a lease, and whether the payment was by custom or express contract appears doubtful, but immaterial. As to the effect of the Settled Land Act, see p. 11, ante.

(*d*) *Stafford* v. *Gardner*, L. R., 7 C. P. 242; 25 L. T. 876; 20 W. R. 899.

(*e*) *Hastings* (*Lord*), *Ex parte*, *Wilson*, *In re*, 62 L. J., Q. B. 628; 10 M. B. R. 219; 5 R. 455.

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to two persons, one chosen by the landlord, the other by the tenant. If these persons were arbitrators, the submission might be made a rule of the High Court under sect. 17 of the Common Law Procedure Act, 1854, but if they were mere valuers to decide by the use of their own eyes, skill and knowledge, it is otherwise (*f*). Whether they were valuers or arbitrators depended upon the language used.

Valuation of claims.

Where the words were that the tenant should be paid at the end of the tenancy, "the usual and customary valuation as between outgoing and incoming tenant," and that "the persons making such valuation should take into consideration the state of the lands, and if not left in a proper state should determine what sum should be paid to the landlord as compensation therefor, and should deduct such sum from the amount of the valuation," the Court of Appeal held that there was no submission to arbitration which could be made a rule of Court, but an appointment of valuers only (*g*).

Effect of Arbitration Act, 1889.

The consolidating Arbitration Act, 1889, 52 & 53 Vict. c. 49, has repealed and re-enacted, with amendments, s. 17 of the Common Law Procedure Act, 1854, and other enactments relating to arbitration, but the distinction between arbitration and valuation, for the purposes of the new Act, remain the same. Therefore, where on the purchase of a reversion it was agreed between the purchaser and the tenant that the tenant should give up possession before the expiration of his lease and that the compensation to be paid him for so giving up possession, and also for certain trees and shrubs taken by the purchaser, should be determined by two named "arbitrators"—one a seedsman and the other a market-gardener—and in the case of dispute by an umpire, it was held, that an assessment of the amount to be paid was merely a valuation and not an award, so that the tenant could not issue execution upon it under s. 12 of the Arbitration Act, 1889 (*h*).

Service out of Jurisdiction.

An action for compensation under a custom is an action to enforce a contract "affecting land" within R. S. C. Ord. XI., Rule 1 *b*, so that leave is obtainable to serve the writ out of the jurisdiction (*i*).

### (b) *Partial Occupation.*

Occupation of Part, after Tenancy ended.

It is very generally the case, that by the terms of the lease or the custom of the country, outgoing tenants of farms leave, and incoming tenants enter upon, the premises at different periods of the year; as the house and buildings at one time, the arable land at another, and the pasture and meadow land at a third. Sometimes,

(*f*) *Dawdy, In re*, 15 Q. B. D. 426; 54 L. J., Q. B. 574; 53 L. T. 800—C. A.

(*g*) *Dawdy, In re*, supra.

(*h*) *Hammond and Waterton, In re*, 62 L. T. 808. And see *Carus Wilson and Green, In re*, 18 Q. B. D. 7; 55 L. T. 864—C. A.

(*i*) *Kaye* (tenant in Yorkshire) v. *Sutherland* (landlord in Scotland), 20 Q. B. D. 147; 57 L. J., Q. B. 66; 36 W. R. 508; 58 L. T. 56; approved in *Tassell* v. *Hallen*, 61 L. J., Q. B. 159, and Chap. XVI., Sect. 3 (b), ante.

however, the general quitting of the farm takes place at one time; and there exists the privilege for the outgoing tenant to retain possession of the land upon which his away-going crops are growing, and the use of some of the barns and stables for the purpose of threshing and conveying them to market. This privilege is occasionally given on condition of his paying the rent and taxes applicable to the premises which he retains; but, perhaps, more commonly without any such stipulation. The incoming tenant has sometimes also the privilege of entering before the expiration of the existing tenancy, for the purpose of ploughing and preparing for his crops; particularly where there is a Lady-day holding. A custom that the tenant should hold over for half a year after the expiration of his term is bad (*k*); but a custom to take an away-going crop, and house the same in the barns of the farm for a certain time after he has quitted possession of the bulk of the farm, is good (*l*). A stipulation on the occasion of a weekly letting that after the expiration of the tenancy by the usual week's notice the tenant shall have a reasonable time to remove his goods has been held valid (*m*).

Right to retain Possession operates as Prolongation of Term.

Where by the custom of the country, or by the terms of the lease, the tenant has a right to retain possession of any part of the demised premises after the end of the term, ex. gr. a right to retain the barns for the purpose of threshing out his crops, &c., such right will in effect *operate as a prolongation of the term as to such part;* and therefore during that period the landlord may distrain (*n*). For a like reason the outgoing tenant, or his assignees, may maintain trespass (*o*), or defend an action of trespass at the suit of the incoming tenant (*p*), or defend an action of ejectment at the suit of the landlord (confining his defence by notice to the particular part) (*q*), and cannot remove any of the straw, &c., which he has covenanted not to remove "during the leased term" (*r*). So, where there is a right reserved to the tenant to take the away-going crop, it operates as a prolongation of the term on which such crop grows, and the possession of the land continues in the tenant till the crop is or might be cut and carried away (*s*).

The following Table, made up from the information supplied by the schedules to the Report of the Central Associated Chambers of Agriculture, upon Agricultural Customs (*t*), shows the "custom

(*k*) *White* v. *Sayer*, Palm. 211.

(*l*) *Wigglesworth* v. *Dallison*, 1 Doug. 201; 1 Smith, L. C.; *Bearan* v. *Delahay*, 1 H. Blac. 5; 2 R. R. 696; *Boraston* v. *Green*, 16 East, 71; 14 R. R. 297.

(*m*) *Cornish* v. *Stubbs*, L. R., 5 C. P. 334; 39 L. J., C. P. 202.

(*n*) *Bearan* v. *Delahay*, 1 H. Blac. 5; 2 R. R. 696; *Knight* v. *Bennett*, 3 Bing. 364; 4 L. J., C. P. 95; 28 R. R. 643.

(*o*) *Beaty* v. *Gibbons*, 16 East, 116; 14 R. R. 320.

(*p*) *Griffiths* v. *Puleston*, 13 M. & W. 358.

(*q*) *Alcock* v. *Wilshaw*, 2 E. & E. 633; 29 L. J., Q. B. 143.

(*r*) *Earl of St. Germains* v. *Willan*, 2 B. & C. 216.

(*s*) *Boraston* v. *Green*, 16 East, 81; 14 R. R. 297; *Griffiths* v. *Puleston*, supra.

(*t*) See further as to this Report, Sect. 5, post.

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of the country" as regards partial occupation existing in certain districts in 1874:—

Pre-entry and post-occupation by Custom of Country.

| | |
|---|---|
| Berkshire (Newbury). | "Usual" for incoming tenant to enter upon the fallows intended for roots on the previous Lady-day. |
| Cambridgeshire (North of Isle of Ely). | Outgoing tenant retains possession of barns and stackyard, for a reasonable time, to thresh and market corn. |
| Cheshire (Nantwich). | Custom allows incoming tenant to take possession of the meadow land on December 29th preceding Lady-day, and of the land on February 2nd, except one field called an outlet, and the barn and buildings. Possession of this field and of house and premises is given on May 1st. Retainer of possession by outgoing tenant not permitted. |
| Cheshire (Northwich). | Outgoing tenant may retain house and buildings and one grass field to February 2nd; arable to November 1st. |
| Cheshire (Macclesfield). | Incoming tenant takes possession of all the land on February 2nd, except an outlet for cattle. Outgoing tenant retains house, buildings and outlet till May 1st. |
| Cheshire (Middlewich, &c.). | Incoming tenant enters on the land, except an outlet for cattle, on February 2nd. Outgoing tenant retains possession of the premises and outlet till 1st or 12th May. |
| Cheshire (North) | Outgoing tenant retains house, outbuildings and outlet till May 12th. |
| Derbyshire | Incoming tenant prepares the land for spring crops, and is allowed room on the farm for housing his horses and servants. On many estates outgoing tenant claims to hold to the 6th April in lieu of the 25th March. |
| Dorsetshire (Blandford). | Incoming tenant allowed to enter to prepare for roots and green crops. Outgoing tenant allowed the use of barns for threshing and yards for feeding hay, straw, &c., in Michaelmas entries till the following April 1st. |
| Dorsetshire (Central). | A Lady-day tenant sometimes takes possession of a portion of the water meadows in January or February, to commence irrigating them. A Michaelmas tenant will have liberty to enter on the land for wheat in July or August, so as to haul out dung and get his ploughing done in good season. An outgoing Lady-day tenant, having an outgoing crop, will hold all the arable land under corn till October 10th, and barns, yards, part of the stables, and the whole or part of the farm-house till July 6th in the following year; also some of the cottages. |

Pre-entry and post-occupation by Custom of Country—*contd.*

**Dorsetshire** (Blackmoor). ..... Incoming tenant enters in May to put in his turnip crop; in some cases rent being allowed, but in most cases not anything. Outgoing tenant in most cases retains the use of the yards, sheds, barns and part of the dwelling-house for six months after the Michaelmas term.

**Durham** ..... Incoming tenant enters May 13th; but he is empowered, six months previously, to plough all such lands as he is entitled to as incoming lands. Incoming tenant also entitled to all manure made upon the premises for six months previously, and to sow grass-seeds among the corn of outgoing tenant. Outgoing tenant entitled to sow half the tillage land and to retain possession till the harvest following, and the joint occupation of the barn and stackyard for the purpose of threshing his outgoing crops.

**Gloucestershire** (Dean Forest). ..... Principally Lady-day takings. Outgoing tenant has a right to a fold room to consume the straw, and in some instances a right to two rooms in the farm-house till the May following the expiration of the tenancy.

**Gloucestershire** (Stow-on-the-Wold). ..... Incoming tenant enters at Candlemas, to prepare the spring corn, on a Lady-day entry; and early in August, to commence ploughing the clover ley on a Michaelmas entry. Outgoing tenant remains to May 1st, for the purpose of spending the fodder.

**Gloucestershire** (Cotswold Hills). ..... Incoming tenant enters, in case of Michaelmas entry, about August 20th to prepare for wheat crop. Outgoing tenant allowed to thresh out corn and consume fodder, when not taken to by incoming tenant, up to May 20th next after the expiration of the tenancy.

**Gloucestershire** (Cirencester). ..... No pre-entry by custom. In Lady-day entries outgoing tenant may remain about three months and in Michaelmas entries about six months, retaining possession of a portion of the house, barns, stables, yards, &c., for threshing out corn crops, consuming hay, &c.

**Gloucestershire** (Tewkesbury). ..... Incoming tenant entitled to the whole of the pasture land, one-fourth of the arable, and the dwelling-house (excepting two rooms) from the time his tenancy commences. Outgoing tenant retains possession of barn and yard room for spending the straw and keep, stable room for horses (according to the size of the farm) for hauling out the crop, and two rooms in the house for the lodging of a workman until the Lady-day following.

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Pre-entry and post-occupation by Custom of Country—*contd.*

Gloucestershire (Vale of the Severn).....In Lady-day takes and sometimes in Michaelmas takes, incoming tenant prepares the fallows during the summer. "A Michaelmas tenant retains the house, yards and buildings, to consume his produce, if not taken by the incomer."

Gloucestershire (Tetbury).....No pre-entry. In a Michaelmas take outgoing tenant can retain barns and yards till the next Lady-day.

Gloucestershire (East and North of Cheltenham).....In a Lady-day take incoming tenant enters upon all the lands and premises; but under a Michaelmas take he enters upon the old ley and fallows to prepare for wheat on August 1st, and on the wheat stubble immediately after the harvest to plough and prepare for root crops. In a Lady-day take outgoing tenant holds over barns, granary, yards, stable room for four horses and part of the dwelling-house up to May 1st, to thresh out the corn and consume the hay and straw; but on a Michaelmas take he quits on September 29th, but holds over the barn, granary, stabling, and part of the house, up to December 25th, to thresh out the corn only.

Gloucestershire (West of Cheltenham).....Outgoing tenant allowed yard room for the purpose of spending his fodder, straw and roots, barn room and rick-yard room, and a portion of the farm-house. Each and all of these from Michaelmas to Lady-day.

Hampshire (North) ...Incoming tenant may enter six months previous with portion of house and stabling. Outgoing tenant retains part of the house and stables, and the whole of the barns and yards, till the following June.

Hampshire (Andover).....Incoming tenant may enter March 25th to plough for white turnips; at Midsummer to sow turnips; in August to prepare for the wheat crop, or at such a time as outgoing tenant can get his previous green crops fed off. Outgoing tenant retains a convenient part of the house, and the whole of the barns for clearing out his corn until May.

Herefordshire.....Candlemas and Lady-day entries admit of incoming tenant entering after November to plough stubble ground to prepare the same for Lent grain or turnip crop. "Custom permits outgoing tenant to keep the fold yards and buildings with one grass pasture, locally termed a 'boosey' pasture, till May 1st and a barn and granary to thresh and protect his off-going crop of wheat. But all recent special agreements tend to break through this absurd custom."

Pre-entry and post-occupation of part of holding, by Custom of Country—*contd.*

**Herefordshire (West).**—Nearly all Michaelmas entries. Incoming tenant generally enters at Lady-day to work the fallows: but if outgoing tenant does them he is paid for the actual labour performed. Outgoing tenant mostly has to May 1st to thresh out and make off his crops.

**Lancashire (South).**—Incoming tenant may enter land February 2nd, house and buildings May 1st. Outgoing tenant has the house and buildings, with one pasture field, called an "outlet," to his use until May 1st, and is "also allowed to cut and take away straw and all his portion of wheat, which is one-half, when ready, if such has not been arranged previously."

**Lincolnshire.**—Neither pre-entry nor retainer of possession permitted in any part of Lincolnshire.

**Norfolk (Marshland District).**—On Michaelmas farms outgoing tenant retains possession of the barns and stockyard until May 1st.

**Northamptonshire.**—Outgoing tenant has use of premises for the consumption of produce.

**Northamptonshire (Weedon).**—Outgoing tenant has use of premises until May 1st beyond Lady-day for consuming produce.

**Northumberland (Tynedale).**—Incoming tenant may enter on or after February 2nd to plough land for fallow or green crops. Outgoing tenant has use of barn for his away-going crop (if not sold to incoming tenant) till May-day following.

**Nottinghamshire.**—Neither pre-entry nor retainer of possession permitted.

**Oxfordshire and Berkshire (Henley-on-Thames District).**—In some Michaelmas takes incoming tenant allowed to enter in February to work the fallows. Incoming tenant may enter, at least for wheat, the middle of August or 1st of September: for which he has stabling for his horses and lodging for his men. Lady-day tenants are generally allowed possession of a portion of the house, stables and barns till early in June. Michaelmas tenants have the same indulgence till Lady-day following.

**Shropshire.**—Incoming tenant may pre-enter to prepare stubbles, stabling for horses and room for servants being provided. In some parts of Shropshire there is no right of pre-entry. "The custom is becoming less acted upon than formerly; and arrangement is generally made with outgoing tenant to perform the necessary work at a price agreed upon." House generally retained, and a boosey pasture allowed, with a portion of the buildings, for outgoing tenant till May 1st. Outgoing tenant also allowed reasonable time for threshing his wheat, sometimes till February 2nd.

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Pre-entry and post-occupation of part of holding, by Custom of Country—*contd.*

Staffordshire (Wolverhampton) ..... Incoming tenant may enter on February 1st "tenant and man without payment." Outgoing tenant allowed a boosey pasture up to May 5th.

Staffordshire (South) ..... Pre-entry "irregular." Retainer of possession not permitted.

Suffolk (except South) ..... Entry on October 11th. Incoming tenant has to thresh, dress and deliver the corn of outgoing tenant.

Suffolk (South) ..... Incoming tenant may pre-enter only with consent of outgoing tenant, who has use of barn and granary up to Lady-day after quitting at Michaelmas.

Surrey ..... In Michaelmas tenancies outgoing tenant retains the use of the barns, a part of the granaries and cart sheds till the ensuing May-day.

Wiltshire ..... Incoming tenant may pre-enter to prepare for roots and fallow for wheat. In South Wiltshire custom allows outgoing tenant to retain possession of a proportion of the house, barns and buildings, for the purpose of threshing his corn and feeding the straw of the last year's corn crops.

Worcestershire ..... Incoming tenant may enter on February 2nd in a Lady-day take, and is allowed part of the buildings for his own use. Outgoing tenant has the use of part of house, with fold yard and boosey pasture, until May 1st.

Yorkshire (East Riding) ..... Incoming tenant may enter on February 1st for the purpose of ploughing, and stable room must be provided for horses.

Yorkshire (West Riding: Wakefield) ..... Incoming tenant may enter on February 2nd. Outgoing tenant may not retain possession after that day.

Yorkshire (West Riding: Barnsley) ..... Pre-entry not permitted. Most of the holdings from Candlemas for the land, and May 1st for the homesteads.

Yorkshire (North and West: Ripon) ..... Lady-day entry. Incoming tenant can enter at Martinmas upon all arable lands, except the fields on which outgoing tenant has his away-going crops. Outgoing tenant can retain possession of all the arable lands on which the away-going crops are growing, until such crops shall have been valued or harvested.

### (c) *Away-going Crop.*

Right to an away-going Crop.

*Wigglesworth* v. *Dallison*.

It was held in *Wigglesworth* v. *Dallison* (*u*), that a custom that a tenant, whether by parol or deed, shall have the "way-going crop" after the expiration of his term, is good. Such a custom was said by Lord Mansfield, in 1779, to be for the benefit and encouragement of agriculture (*u*), but in modern times strong opinions have been entertained of the propriety of getting rid of it (*x*) chiefly on the ground that it may compel a man to carry on his business in two distinct places; and it has become a common custom for the incoming tenant to buy the standing crop at a valuation from the outgoing tenant, the winter corn crops being so valued where the entry is at Lady-day, and the clover and root crops where the entry is at Michaelmas. Where the lease contains no stipulations as to the mode of *quitting*, the off-going tenant is entitled to his away-going crop according to the custom, even though the terms of *holding* may be inconsistent with such a custom (*y*). The fact of the existence of the usage is to be collected not only from what is usually done in cases of tenancy from year to year, but from the usual course pursued where tenants hold under regular leases. The principle applies equally to the case of a tenancy from year to year as to a lease for a longer term, with respect to the right to take an away-going crop (*z*). Where a tenant held from Lady-day, and there was a custom that the tenant, at the regular expiration of a Lady-day tenancy, should have the away-going crops, and the tenancy was determined on the 1st of June by an award made on a reference of disputes between the landlord and tenant; it was held, that the custom had no operation (*a*).

Against whom the Outgoing Tenant may Claim the Right to an away-going Crop.

Where the out-going tenant is entitled to take an away-going crop, he may avail himself of that right, whether the farm revert back into the hands of his landlord (*b*), or an incoming tenant take possession (*c*). An agreement between the outgoing and incoming tenants with respect to crops does not affect any existing rights of the landlord (*d*). A clause in a lease that the tenant should be entitled to an away-going crop, which was to be left for the landlord or his incoming tenant at a valuation, has been held not to give the tenant the right of possession as against the landlord, after the

(*u*) *Wigglesworth* v. *Dallison*, 1 Doug. 201; 1 Smith, L. C.; ante, 792.
(*x*) Wingrove Cooke on Agricultural Tenancies, A.D. 1850, p. 120; New Edition, 1882, p. 153.
(*y*) *Holding* v. *Pigott*, 7 Bing. 465; *Webb* v. *Plummer*, 2 B. & A. 746; 21 R. R. 479; *Hutton* v. *Warren*, 1 M. & W. 466; *Muncey* v. *Dennis*, 1 H. & N. 216.
(*z*) *Onslow* v. ——, 16 Ves. 173.
(*a*) *Thorpe* v. *Eyre*, 1 A. & E. 926.
(*b*) *Faviell* v. *Gaskoin*, 7 Exch. 273; *Mousley* v. *Ludlam*, 21 L. J., Q. B. 64; 15 Jur. 1107.
(*c*) *Muncey* v. *Dennis*, 1 H. & N. 216.
(*d*) *Petrie* v. *Daniel*, 1 Smith R. 199; 7 R. R. 763.

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determination of the tenancy, but at most only to go on the land for the purposes of an away-going crop, and not to exclude the landlord (*e*). A permission by a landlord to an outgoing tenant to sow more land than by the custom of the country he was entitled to on quitting, is good against the incoming tenant (*f*).

Remedies of the Parties as to Crops, &c.

Where an outgoing tenant has no right to an away-going crop, but cuts and carries away the corn after the expiration of his term, an action of trover may be maintained against him by the landlord (*g*), but not by the incoming tenant (*h*). Where there was an agreement between an outgoing and incoming tenant, that the latter should buy the hay, &c., of the former upon the farm, and that the former should allow to the latter the expenses of repairing the gates and fences of the farm, and that the value of the hay, &c., and of repairs should be settled by third persons; it was held, that the balance settled to be due to the outgoing tenant for his hay, &c., after deducting the value of the repairs, might be recovered by him under a common count for goods sold and delivered, although he failed upon a special count on the agreement, for want of including in it that part of the agreement which related to the valuation of the repairs (*i*).

### (d) *Straw, Hay, and Manure.*

Where an Outgoing Tenant can Claim Remuneration.

In some cases contracts relative to the disposal of manure are entered into between the landlord and tenant which may give the latter, when he leaves the farm, a power of disposing of it to an incoming tenant (*k*). A tenant held under the terms of an expired lease, by which it was stipulated that, on quitting, the tenant should not sell or take away any of the manure in the fold, but should leave it to be expended on the land by the landlord or his succeeding tenant, but there was no provision for payment to the tenant; by the custom, the tenant was bound in the same way, but he would have been entitled to payment: it was held, that, as an express stipulation had been made on the subject, the custom was excluded, and that the tenant was not entitled to be paid for the manure (*l*). A lease containing no provisions as to straw unconsumed on quitting, is not inconsistent with a custom of the country that the tenant shall be paid for the straw and manure on leaving, and therefore the tenant is entitled to be paid for his straw (*m*). Where the tenant is entitled to be paid a fair price for the straw left, but

(*e*) *Strickland* v. *Maxwell*, 2 Cr. & M. 539.
(*f*) *Griffiths* v. *Tombs*, 7 C. & P. 810.
(*g*) *Davies* v. *Connop*, 1 Price, 53; 16 R. R. 693.
(*h*) *Boraston* v. *Green*, 16 East, 71; 14 R. R. 297.
(*i*) *Leeds* v. *Burrows*, 12 East, 1.
(*k*) *Legh* v. *Lillie*, 6 H. & N. 165; 30 L. J., Ex. 25; *Hurst* v. *Hurst*, 4 Exch. 579; *Massey* v. *Goodall*, 17 Q. B. 310.
(*l*) *Roberts* v. *Barker*, 1 Cr. & M. 808; *Webb* v. *Plummer*, 2 B. & A. 746; 21 R. R. 479; *Clarke* v. *Roystone*, 13 M. & W. 752.
(*m*) *Muncey* v. *Dennis*, 1 H. & N. 216; 26 L. J., Ex. 66.

nothing for the manure, he is only entitled to be paid for the straw at a fodder or "consuming" price, viz., one-half the market price (*n*). Where an outgoing tenant had contracted with his landlord to leave the manure on the premises, and to sell it to the incoming tenant at a valuation; it was held, that it gave him a right of *on stand* for the manure on the farm; and that, possession and property remaining in him until the valuation was made, a removal or use of it by the incoming tenant before that was done would render him liable to an action of trespass by the outgoing tenant (*o*). Where a tenant, who was bound to bring back dung for all hay sold by him to be carried off the premises, at the time of his quitting sold a part of a rick then standing to a purchaser, without mentioning his liability to bring back manure; it was held that the succeeding tenant had a right to refuse to permit the hay to be removed until the manure should be deposited (*p*). Where two parties entered into a written agreement, by which one was to take a farm of the other, and to take the straw, chaff, &c., at a valuation, to be made by such competent persons as the two parties should respectively appoint; it was held that such an agreement was entire, and that the two parts could not be separated; and that if one person only was by parol agreement afterwards appointed to make the valuation, an action could not be maintained on the parol agreement so substituted, even though the straw, chaff, &c. had been taken and used (*q*). Where in an action by an outgoing tenant against his landlord for the value of hay and straw left on the premises that the plaintiff held, subject to the terms of a draft lease, by which it was agreed, first, that the tenant was to consume the hay and straw on the premises, and not to sell it except as afterwards mentioned; secondly, that the tenant might sell his hay and wheat-straw (except the last year's), provided for each load he brought back two loads of dung, or equivalent manure on the lands; and thirdly, that all the hay and straw not used for fodder, arising from the last year's crop, should be left on the determination of the tenancy, the tenant being paid at a fair valuation; and the words "fair valuation" had been substituted in the draft for the words "consuming price;" the court held, without considering the effect of the alteration in the draft, that the tenant was entitled to be paid according to a "fair valuation;" and that those words did not mean a "consuming price" (*r*). Where it is stipulated that no hay or straw shall be sold off the land during the term without the consent

(*n*) *Clarke* v. *Westrope*, 18 C. B. 765; 25 L. J., C. P. 287.
(*o*) *Beaty* v. *Gibbons*, 16 East, 116; 14 R. R. 320.
(*p*) *Smith* v. *Chance*, 2 B. & A. 753; 21 R. R. 485.
(*q*) *Harvey* v. *Grabham*, 5 A. & E. 61.
(*r*) *Cumberland* v. *Bowes*, 15 C. B. 348; 24 L. J., C. P. 46.

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Straw, Hay, and Manure —*contd.*

of the landlord or his agent, unless an equivalent in the shape of manure be returned on the land, it should be clearly expressed whether the market value or price of the straw is to be returned, or only so much manure as the straw would have made (*s*). A farm lease contained a covenant by the lessee that he "should not nor would *during the last year* of the term thereby granted sell or remove from the said farm and lands any of the hay, straw and fodder *which should arise and grow in the said farm and lands:*" it was held, that the prohibition was not restricted to hay, straw, and fodder which arose and grew on the farm in the last year of the term, but extended to that which had arisen and grown at any time during the term (*t*). Where the tenant agrees to pay an additional rent of 10*l.* for every ton of "hay, straw, or other dry fodder," of the growth of the premises which shall be sold off or taken away or removed therefrom, such stipulation extends to hay of such bad quality as not to be fit for food for cattle (*u*).

### (e) *Tillages.*

When Outgoing Tenant entitled to Remuneration.

Arable land in some localities, especially where unsuited to the growth of turnips and other root crops, is fallowed at certain periods, in order not only that it may be cleansed of couch and other weeds, but that it may be refreshed, and the vegetative powers, which have been exhausted by cropping, restored. This process requires a considerable outlay of capital whilst the land is perfectly unproductive during the fallow season; but the benefit derived is considered to extend to a series of subsequent crops. It is desirable that the regular rotation of fallowing upon a farm should be kept up, notwithstanding any change of the tenants; but it is not to be expected that a tenant should lay out capital in the process of fallowing, from which he cannot derive the complete benefit before his tenancy expires. From these circumstances has arisen the right which an outgoing tenant has to remuneration for tillage which is not exhausted at the time of his quitting. This usage has been held to be a valid and reasonable usage (*x*) for obvious reasons.

An agreement that an outgoing tenant shall be paid for tillages on the expiration of his tenancy is not inconsistent with the terms of a tenancy from year to year (*y*).

Where a farm was taken for fourteen years, and the tenant was to pay a given sum for tillages and improvements done before he

(*s*) *Lowndes* v. *Fountain*, 11 Exch. 487; 25 L. J., Ex. 49.

(*t*) *Gale* v. *Bates*, 3 H. & C. 84; 33 L. J., Ex. 235.

(*u*) *Fielden* v. *Tattersall*, 7 L. T. 718.

(*x*) *Dalby* v. *Hirst*, 1 B. & B. 224; 3 Moo. 536; 21 R. R. 577; *Hutton* v. *Warren*, 1 M. & W. 466; *Senior* v. *Armytage*, *Bart.*, Holt, 197.

(*y*) *Brocklington* v. *Saunders*, 13 W. R. 46, Q. B.

entered, and to receive the value of such as he should leave; and in the first year he said he would leave, to which the landlord said he might, but no new bargain was made as to the tillages and improvements; it was held, that he was not entitled to the value of such as he left on so quitting (*z*). By the terms of a written agreement it was stated, that a certain quantity of manure had been spread on the land, and the tenant agreed, when given up by him, to leave the land in the same state, or allow a valuation to be made; it was held, that this agreement excluded a custom, as inconsistent with it, that the tenant should pay half-tillage on going in, and receive it on going out (*a*).

Representatives of Deceased Tenant.

An administrator of a deceased tenant is entitled to be paid according to the custom of the country for manure, tillages, &c.; but if he sued a person who purchased from another who claimed as devisee of the deceased tenant the declaration, before the Judicature Act, had to be in trover (*b*). An outgoing tenant, administratrix of a late tenant, having (after having had the farm for above a year) assigned to an incoming tenant, in consideration of a debt due to him, all her goods and effects, and all stock, corn, grain, on the farm, and all her estate and interest thereon and therein: held, that this comprised tenant right or tillages on the farm (*c*).

Mode of valuing tillages, &c.

The valuation of tillages, &c. between outgoing and incoming tenants should be made in like manner, mutatis mutandis, as hereinbefore mentioned with respect to valuation of dilapidations and fixtures (*d*). Where straw, &c. was consumed by the incoming tenant before any valuation thereof had been made or any valuers named or umpires appointed: it was held, that the outgoing tenant was entitled to recover the value under a count for money payable for straw, &c. (*e*).

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## Sect. 5.—*Compensation for "Temporary, Durable, and Permanent" Improvements.*

Frequent reference has been made in this work to the custom of the country.

Parliamentary Report, 1848.

Prior to the year 1848, there appears to have been no documentary record of the complicated and varying customs existing in different districts throughout the kingdom. In 1848, a Select Committee of the House of Commons, appointed at the instance of Mr. Pusey,

(*z*) *Whittaker* v. *Barker*, 1 Cr. & M. 113.
(*a*) *Clarke* v. *Roystone*, 13 M. & W. 752. See also *Womersley* v. *Dally*, 26 L. J., Ex. 219.
(*b*) *Searson* v. *Robinson*, 2 F. & F. 351.
(*c*) *Cary* v. *Cary*, 10 W. R. 669.
(*d*) Ante, Chap. XVI., Sect. 9.
(*e*) *Clarke* v. *Westrope*, 18 C. B. 765; 25 L. J., C. P. 287.

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presented an exhaustive report upon the subject (*f*), which, however, is not at the present day perfectly reliable.

Agriculture Chambers Report, 1873.

But in 1873 there were published by the Central Chamber of Agriculture three reports on "Unexhausted Improvements" (*g*), and the last of these reports was accompanied by numerous schedules showing the then existing customs of the country in various districts of England in a tabular form.

In the second report it was observed:—

New Custom since 1848.

Your committee desire to draw the particular attention of the Council to the marked difference between customs prevailing to-day and those existing in the year 1848, when Mr. Pusey's Select Committee of the House of Commons issued its report. For example:—In Lincolnshire, at that time, no allowances were given for guano or other highly concentrated manures, which are now universally allowed for in that county. Compensation for drainage was then only partially introduced, though it is now a general custom in Lincolnshire. At that time there was no allowance in Staffordshire for purchased oilcake, feeding stuffs, and artificial manure, or for marling, boning, liming, planting quickset hedges, or draining, all which are now subjects of compensation in, at any rate, the southern division of that county. In Cambridgeshire, in that part called the Isle of Ely, allowance for oilcake, for artificial manures, and for claying, is new, since the date of Mr. Pusey's inquiry. In Nottinghamshire allowances for draining were only partially introduced at that time, but are now universally the custom, together with compensation of road-making, planting quickset hedges, executing irrigation works, and making main drains, watercourses and reservoirs. In Cheshire there was at that period no allowance for either draining or planting quickset hedges, which, however, obtains in North Cheshire at the present time. In parts of Oxfordshire compensation for chalking and boning has been introduced since 1848. In South Wiltshire allowance for purchased manures is new. In parts of Gloucestershire artificial manures are now allowed for, and compensation is given for draining, though neither of these improvements was recognised by custom in 1848. And in parts of Dorsetshire a small allowance for oilcake, feeding-stuffs, and purchased manures, and also for draining, has been introduced, though there was no custom of the kind mentioned in the House of Commons' report. *This is sufficient to show that an inquiry and report of so early a date as* 1848 *is wholly insufficient to enable anyone to arrive at a correct conclusion regarding the established customs of the various counties in the present day.*

Customs Founded on no Principle.

Your committee would direct attention to the absence of any uniform principle upon which customs might be supposed to have originated. Thus guano is allowed for in some counties when applied to corn crops, in other counties only when applied to root or green crops; and in the latter case, some counties or districts pay for all, and some for only half the quantity used in the last year; and while some counties pay for no guano used in the last year but one of the tenancy, other counties pay for one-third of what is applied in that year. For oilcake the allowances vary from half the value of cake used in the last year,

(*f*) This report was reprinted in 1866.

(*g*) The committee consisted of Sir Michael Hicks-Beach, M.P., Mr. G. F. Muntz, Mr. E. Heneage, Mr. C. S. Read, M.P., Mr. Masfen, Mr. Fowler, Mr. Little, Mr. Russon, and Mr. Lipscomb.

with nothing for cake used in the year before that, to one-fourth of the last year's and one-eighth of the previous year's cake, or two-thirds of the last year's and one-third of the previous year's consumption of oilcake. Compensation for tile draining ranges so diversely that improvement is calculated in some counties to extend over six years, and in other counties up to fourteen years. Planting quickset is spread over varying periods from three to ten years. Liming arable land is supposed to benefit the tenant from five years down to only two years; and liming pastures is taken as lasting three years in some counties up to six years in others.

The returns show that in some counties, in lieu of money compensation for purchased feeding-stuffs and manures, the outgoing tenant is entitled to an away-going crop; but a large number of the returns show that in many counties and districts no compensation whatever for temporary improvements is secured by custom either in money or crop, and up to the present time your committee have not received a single intimation of the existence of any custom securing to the tenant compensation for buildings, excepting structures not attached to the freehold, which he is, of course, at liberty to remove.

Fixtures—no Compensation for.

In the third report (presented in 1874) the committee observed :—

Your committee have experienced much difficulty in ascertaining what is understood to constitute an "established custom." According to the common acceptation of the term, a custom must have obtained from time immemorial (*h*); *but your committee find from the returns received that customs affecting allowances to an outgoing tenant have been considerably changed by additions from time to time within living memory. This state of transition is especially remarkable at the present time.* But it is to be observed that, while the process of gradually introducing, extending, and altering custom is going on in some districts, the greater portion of England still remains without any custom affording compensation for the tenant's capital expended in improvements.

Customs Changed by Additions since Living Memory.

Returns have been received from fifty-five districts, namely,—Berkshire, Newbury; Cambridgeshire, Isle of Ely, North; Cheshire, Northwich; Cheshire, Knutsford; Cheshire, Nantwich; Cheshire, North; Derbyshire; Devonshire, East; Devonshire, Central; Dorsetshire, Vale of Blackmoor; Dorsetshire, Central; Dorsetshire, Blandford; Durham; Essex, North; Gloucestershire, West; Gloucestershire, Cotswold; Gloucestershire, Cirencester; Gloucestershire, West of Cheltenham; Gloucestershire, East and North of Cheltenham; Gloucestershire, Forest of Dean; Gloucestershire, Valley of the Severn; Gloucestershire, Tetbury; Gloucestershire, Stow-on-the-Wold; Gloucestershire, Ledbury; Gloucestershire, Tewkesbury; Hampshire, North; Hampshire, Andover; Herefordshire; Kent, the Weald; Kent, East; Lancashire, South; Lancashire, North; Lincolnshire; Lincolnshire, Marshes; Norfolk; Norfolk, Marshland; Northamptonshire, South; Northamptonshire, Weedon; Northumberland, Tyneside; Nottinghamshire; Oxfordshire, Henley-on-Thames; Shropshire; Somersetshire, North; Staffordshire; Staffordshire, South; Suffolk; Suffolk, Sudbury; Warwickshire; Wiltshire, Swindon; Wiltshire, South; Worcestershire; Yorkshire, North and East Ridings, Malton; Yorkshire, North and West Ridings, Ripon; Yorkshire, West Riding, Wakefield; Yorkshire, West Riding, Barnsley; Yorkshire, East Riding.

(*h*) But see the law as to this, *Senior* v. *Armytage*, Holt, N. P. 197; 17 R. R. 627.

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*Compensation for Improvements by Custom.*
Agriculture Chambers Report, 1873 —*contd.*

The area reported upon includes districts extending from the most northern to the most southern, and from the most eastern to the most western limits of England.

From the variations in practice occurring within comparatively limited districts, as revealed by your committee's inquiry, it is evident that customs cannot be correctly defined and classified as "county" customs, and that, so far from each county possessing a distinct and peculiar usage co-extensive with its area, a map of England in which the prevalence of each custom should be represented by a distinguishing colour would exhibit a series of most irregularly-shaped and unequally-distributed patches—the most conspicuous feature being the very small proportion of the surface of England enjoying any custom of adequate compensation even for purchased feeding-stuffs and manures.

Customs not "County" Customs.

The labour of your committee has principally consisted in preparing the forms of inquiry, and collecting, arranging and tabulating the information communicated; and they must refer the council to the voluminous details condensed in the summary schedules, it being impossible to convey, in any general statement within the ordinary limits of a report, either a full knowledge of their contents, or the comparisons and deductions which it is hoped, will render them of great value.

"Temporary," "Durable," and "Permanent" Improvements.

The schedules annexed to this report divided improvements (*i*) into three classes—(1) "temporary," being allowances for crops, cultivation, and farmyard manure, and for purchased feeding-stuffs, and purchased manures; (2) "durable," being allowances for liming, boning, &c.; and (3) "permanent," being allowances for tile draining, making roads, &c. These three classes correspond to the "third class," "second class," and "first class" improvements for which compensation was given by the Agricultural Holdings Act of 1875 in cases where that Act was applicable, but not to the improvements mentioned in the first schedule to the Agricultural Holdings Act, 1883, which improvements are differently classified, though they are of the same kind.

In the two former editions of this work subsequent to 1875, a table was printed, made up from the schedules to this report, showing the compensation payable by custom for the temporary, durable, and permanent improvements. The Act of 1875, by allowing compensation to be claimed under the custom, instead of under the Act (see s. 62) rendered a knowledge of the custom still necessary. The Act of 1883 (see s. 57) has substituted compensation under that Act for compensation under the custom, so that a knowledge of the custom is now but of little value, and the table, therefore, is now omitted.

Allowances for Crops, Cultivation, and Farmyard Manure.

The allowances, however, for crops, cultivation, and farmyard manure, where not provided for by contract, are still in very

(*i*) The schedules also contain valuable information as to the rights of pre-entry, prohibited crops, &c. See Table showing rights of pre-entry, ante, 796.

numerous cases provided for by custom. Such allowances are entirely outside the Agricultural Holdings Act, and are expressly saved by s. 60 of the Act of 1883.

Ch. XX. s. 5.
*Compensation for Improvements by Custom.*

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Sect. 6.—*Compensation in respect of Allotments or Cottage Gardens.*

The tenant of an allotment, i.e. of "any parcel of land *not more than two acres in extent* and cultivated as a garden or farm" (which definition does not include a plot having in it vegetables, fruit trees and flowers occupied by a seedsman for the purpose of his business (*k*)), or of a cottage garden, i.e. an "allotment" attached to a cottage, has, on the determination of his tenancy, a special and indefeasible right to compensation for crops and other matters, by virtue of the "Allotments and Cottage Gardens Compensation for Crops Act, 1887," 50 & 51 Vict. c. 26.

Allotments and Cottage Gardens Compensation for Crops Act.

This Act, which is printed at length in the Appendix, after defining, by s. 4, "holding" as "allotment or cottage garden," and allotment as any parcel of land of not more than two acres in extent, and "tenant" as holder of a holding under a landlord for any term: by s. 5, enacts as follows:—

Compensation for Crops, Labour, Manure, &c.

Upon the determination of the tenancy of a holding after the commencement of this Act, the tenant shall be entitled notwithstanding any agreement to the contrary to obtain from the landlord compensation in money for the following matters and things, that is to say:—

(*a*) For crops, including fruit, growing upon the holding in the ordinary course of cultivation, and for fruit trees and fruit bushes growing thereon, which have been planted by the tenant with the previous consent in writing of the landlord. — Crops and Fruit.

(*b*) For labour expended upon and for manure applied to the holding since the taking of the last crop therefrom in anticipation of a future crop. — Labour. Manure.

(*c*) For drains and for any outbuildings, pigsties, fowlhouses, or other structural improvements made by the tenant upon his holding with the written consent of his landlord. — Structural Improvements.

No basis of assessment of compensation is prescribed by the Act. By s. 7 if the parties do not agree, the difference is to be settled by an arbitrator, to be appointed as prescribed by s. 8 by the justices of the peace for the petty sessional division in which the holding is situated, and by s. 9 to act without remuneration if practicable.

Reference to Arbitration.

By s. 16 the award is final and conclusive in every case, and neither the submission nor award may be made a rule of any court, or is removable by any process into any court.

Award Final.

The Agricultural Holdings Act (which will be examined in the next chapter) is to a certain extent excluded. That is to say, if a claim be made under the Allotments Compensation Act, no claim

Exclusion of Agricultural Holdings Act.

(*k*) *Cooper* v. *Pearse*, [1896] 1 Q. B. 562; 65 L. J., M. C. 95; 74 L. T. 495; 44 W. R. 494.

CH. XX. s. 6. *Compensation in respect of Allotments or Cottage Gardens.*

can be made under the Agricultural Holdings Act, but it appears to be open to the tenant to make a claim under the Agricultural Holdings Act if he so pleases. By s. 18—

> No claim for compensation shall be made under the Agricultural Holdings (England) Act, 1883, for any matter or thing in respect of which a claim for compensation is made under this Act, and in any case in which the provisions of that Act and of this Act conflict the provisions of this Act shall prevail.

Application of Act to Tenant under "Allotments Act, 1887."

If, however, the allotment be held under a sanitary authority in execution of the "Allotments Act, 1887," 50 & 51 Vict. c. 48 (p. 40, ante), and the tenancy be determined by the sanitary authority under s. 8, sub-s. 2 of that Act, it is specially provided by the same sub-section that—

> In every such case the sanitary authority in default of agreement between the incoming and outgoing tenant shall on demand pay to the tenant whose tenancy is so determined any compensation due to him as outgoing tenant; and such compensation shall be assessed by an arbitrator appointed by the sanitary authority; or, if the tenant so elect, either by an arbitrator appointed under the Allotments and Cottage Gardens Compensation for Crops Act, 1887, or by a reference under the Agricultural Holdings Act, 1883.

## SECT. 7.—*Compensation to Tenant ejected by Mortgagee.*

Common Law Rule—No Compensation.

At common law the tenant of a mortgagor is, like the mortgagor himself, a mere trespasser, so that such tenant can be ejected by the mortgagee without notice (*l*) and thus lose all his crops and any right to compensation for them by the mortgagee.

Conveyancing Act—Limited Compensation.

The Conveyancing Act, 1881, s. 18 (ante, p. 60) by allowing a mortgagor in possession to make leases where the mortgage was made subsequently to that Act in a certain form prescribed by that Act, has to a great extent cured this hardship on the tenant.

Tenants' Compensation Act—Full Compensation.

In cases to which the Conveyancing Act does not apply and where the tenancy is of *land*, the Tenants' Compensation Act, 1890, 53 & 54 Vict. c. 57, gives the occupier a remedy against the mortgagee. After reciting that it is expedient to amend the Agricultural Holdings Act (post, p. 817), and the Allotments and Cottage Gardens Compensation for Crops Act, 1887 (ante, p. 809), "in so far as they relate to the compensation paid to tenants for improvements where land is under mortgage," and enacting that the Act is to be construed as one with those Acts, it is enacted that—

> Where a person occupies land under a contract of tenancy with the mortgagor, whether made before or after the commencement of this Act, when it is not binding on the mortgagee of such land, then—

(*l*) *Keech* v. *Hall*, 1 Dougl. 21, and p. 55, ante.

Ch. XX. s. 7.
*Compensation to Tenants of Mortgaged Land.*

(1) The occupier shall as against the mortgagee who takes possession, be entitled to any compensation which is, or would but for the mortgagee taking possession be due to the occupier from the mortgagor as respects *crops*, improvements, *tillages* or other matters connected with the land, whether under the principal acts, or the *custom of the country*, or agreements sanctioned by the principal acts ;

Provided that any sum ascertained to be due to the occupier for such compensation or for any costs connected therewith, may be set off against any rent or other sum due from him in respect of the land, and recovered as compensation under the principal acts, but unless so set off shall as against the mortgagee be charged and recovered in accordance only with section thirty-one of the Agricultural Holdings Act, 1883 (see p. 831, post) as if the mortgagee were the landlord within the meaning of that section.

Application of Tenants' Compensation Act, to Compensation under Custom.

It will have been seen from the italicised words of the above enactment that though the act is primarily concerned with compensation due under the Agricultural Holdings Act and the Allotments Act, it also gives compensation for crops, tillages or other matters connected with the land, where such compensation is given by the custom of the country. In two respects, however, the act appears to be deficient. (1) It gives no right to take away-going crops, and (2) it gives no compensation for matters which are neither within the acts nor a custom, but are provided for by special clauses in the contract of tenancy.

The act further (sub-s. 2) provides that—

Right of Occupier to Notice, or failing Notice to Fuller Compensation.

(2) Before the mortgagee deprives the occupier of possession of the land otherwise than in accordance with the said contract, he shall give to the occupier six months' notice in writing of his intention so to deprive him, and if he so deprives him compensation shall be due to the occupier for his crops, and for any expenditure upon the land which he has made in the expectation of holding the land for the full term of his contract of tenancy in so far as any improvement resulting therefrom is not exhausted at the time of his being so deprived, and such compensation shall be determined in like manner as compensation under the principal acts, and shall be set off, charged and recovered in manner before provided in this section.

This sub-section shall only apply where the said contract is for a tenancy from year to year, or a term of years not exceeding twenty-one, at a rack-rent.

All improvements seems to be comprised within this comprehensive sub-section, whether reasonable or not, and whether for the benefit of an incoming tenant or not. The meaning of the act is that the tenant if coming within the last paragraph of sub-s. 2 is to be entitled both to notice, and also to compensation as described in sub-s. 1.

# CHAPTER XXI.

## THE AGRICULTURAL HOLDINGS ACT.


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### SECT. 1.—*Object and Application of the Act.*

Fivefold Division of the Act.

THE Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), which was passed on the 25th August, 1883, and came into operation on the 1st January, 1884, deals with five distinct matters. First, it gives agricultural tenants compensation for certain specified improvements, as will be presently explained. Secondly, it gives to such tenants the property in fixtures, subject to the landlord's option of purchase. Thirdly, it relaxes in favour of such tenants the rigour of the law of distress. Fourthly, it converts into a year's notice the half-year's notice impliedly required by law in case of an implied tenancy from year to year. Fifthly, it allows the landlord of any tenant holding from year to year to resume possession, for the purpose of making certain specified improvements, of a part of the demised premises, by a partial notice to quit. The last four of these divisions have been already dealt with in the text (*a*); and the act itself is printed at length in Appendix A.

(*a*) As to fixtures, see p. 673; as to distress (in respect of which some of the sections have been applied to *tenancies generally* by the Law of Distress Amendment Act, 1888, which has repealed, and with slight amendments re-enacted, such applied sections), see p. 463; as to the year's notice to quit, and as to the resumption of part of the land for improvements, see p. 361.

Ch. XXI. s. 1.
*Application of Ag. Hold. Act.*

It is now proposed to deal with the first and main division of the act, that by which, as it is expressed in the 1st section :—

Compensation for Improvements.

Where a tenant has made on his holding any improvement comprised in the First Schedule hereto, he shall on and after the commencement of this act be entitled on quitting his holding at the determination of a tenancy to obtain from the landlord as compensation under this act for such improvements such sum as fairly represents the value of the improvement to an incoming tenant ; provided always, that in estimating the value of any improvement in the First Schedule hereto there shall not be taken into account as part of the improvement made by the tenant what is justly due to the inherent capabilities of the soil.

"On Determination of Tenancy."

By sect. 61, the interpretation clause, which should always be referred to when any difficulty of construction arises, "determination of tenancy" means "the cesser of a contract of tenancy by effluxion of time or from any other cause," a definition which (see p. 825, post) is not very clear, but which would seem to include not only determination by notice to quit, but also determination by surrender, and perhaps even determination by forfeiture.

To what Holdings the Act applies.

By the effect of sections 1, 54 and 61, the act seems to apply to the following holdings, however small in extent, and to no others :—

*Holdings either wholly agricultural or wholly pastoral, or partly agricultural and partly pastoral, or wholly or partly cultivated, as market gardens, held under a landlord for a term of years, or for lives, or for lives and years, or from year to year* (*b*), *by a tenant holding no employment under such landlord.*

Tenancies at will, therefore, and tenancies for less than two years, are excluded from the operation of the act. Nor would the act seem to apply to the fictitious tenancies (though from year to year) created by a mortgage deed.

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## Sect. 2.—*The Repealed Act of* 1875.

### (a) *Generally : Power to exclude Act.*

Commencement.

The Agricultural Holdings Act, 1875 (38 & 39 Vict. c. 92), which was passed on the 13th August, 1875, and commenced on the 15th February, 1876 (sect. 58), is repealed by sect. 62 of the Act of 1883, but with such important savings for rights to compensation for the improvements to which it applies, if executed before the commencement of the Act of 1883, that it is necessary to say a few words about the Act of 1875.

Act applied only to Holdings of Two Acres or more. Act applied where applicable, unless excluded by Writing.

The act applied only to a "holding either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral," and did not apply to such holdings unless they amounted to two acres or more. But the act applied to all such tenancies, if created after

(*b*) See *King* v. *Eversfield*, 46 W. R. 52, and p. 833 (*k*), post.

CH. XXI. s. 2. *Application of Repealed Act of* 1875.

the commencement of the act, and to all such tenancies from year to year, current at the commencement of the act, unless the operation of the act had been formally excluded by writing. But although it might not have been excluded in writing, the landlord and tenant might displace its operation (1) by mutual agreement, and (2) by taking advantage of the custom of the country. Such is shortly the effect of sects. 54, 56, 57, 58, 59 and 60, which are now subjoined.

Power to displace Act by Agreement. Sect. 54.

By sect. 54, "nothing in this act shall prevent a landlord and tenant, or intending landlord and tenant, from entering into and carrying into effect any such agreement as they think fit, or shall interfere with the operation thereof." By sect. 55, parts only of the act might be adopted by mutual agreement in writing.

Adoption of Parts of Act.

Exclusion of Act by Writing from Tenancies beginning after it.

By sect. 56, "this act shall apply to every contract of tenancy beginning after the commencement of this act, unless in any case the landlord and tenant agree in writing, in the contract of tenancy *or otherwise*, that this act, or any part or provision of this act, shall not apply to the contract; and in that case, this act, or the part or provision thereof to which that agreement refers (as the case may be), shall not apply to the contract."

Tenancy from Year to Year.

By sect. 57, "in any case of a contract of tenancy from year to year or at will, current at the commencement of this act, this act shall not apply to the contract, if, within two months after the commencement of this act, the landlord or the tenant gives notice in writing to the other to the effect that he (the person giving the notice) desires that the existing contract of tenancy between them shall remain unaffected by this act; but such a notice shall be revocable by writing; and in the absence of any such notice, this act shall apply to the contract. In every other case of a contract of tenancy current at the commencement of this act, this act shall not apply to the contract."

Operation of Act on Custom of Country. Sects. 59, 60.

By sect. 59, a tenant might not claim compensation both under the act and under a custom of the country "in respect of the same work or thing;" and by sect. 60 there was a saving for (inter alia) rights under "any customs of the country."

### (b) *Compensation, under the Act of* 1875, *on Basis of Outlay.*

Three Classes of "Improvements."

The Act of 1875 (sects. 5—19) dealt, and dealt separately, with three "classes" of "improvements." The first class included thirteen kinds of improvement, such as drainage and other works of construction of an extensive and expensive character; the second, six kinds, such as boning of land with undissolved bones and other expensive modes of fertilizing the land; the third, two kinds only, both arising from manure.

The improvements of the first class were, by sect. 5, as follows:— (1) Drainage of land; (2) Erection or enlargement of buildings; (3) Laying down of permanent pasture; (4) Making and planting of osier beds; (5) Making of water meadows or works of irrigation; (6) Making of gardens; (7) Making or improving of roads or bridges; (8) Making or improving of watercourses, ponds, wells, or reservoirs, or of works for supply of water for agricultural or domestic purposes; (9) Making of fences; (10) Planting of hops; (11) Planting of orchards; (12) Reclaiming of waste land; (13) Warping of land.

*1st Class:*— Drainage, Buildings, and Pasture, &c.

By sect. 10, the consent in writing of the landlord had to be obtained previously to executing any of the above [1st class] improvements, otherwise the tenant was not entitled to compensation.

By sect. 6, any of the above improvements could not "in any case be deemed to continue unexhausted" beyond the end of *twenty* years "after the year of tenancy in which the outlay thereon is made."

Durability of 1st Class Improvement, 20 Years.

By sect. 7, the amount of the tenant's compensation in respect of any of the above improvements was "the sum laid out by the tenant on the improvement, with a deduction of a proportionate part thereof for each year while the tenancy endures after the year of tenancy in which the outlay is made, and while the improvement continues unexhausted."

Amount of *Outlay*, the Basis of Compensation.

Here it is important to observe the main distinction between the Acts of 1875 and 1883, that whereas the Act of 1875 provided, except in the case of a third-class improvement, a compensation on the basis of outlay, the Act of 1883 uniformly provided, as did the Act of 1875 in the cases of a third-class improvement, a compensation on the basis of value to an incoming tenant.

The improvements of the second class were (sect. 5) as follows:— (1) Boning of land with undissolved bones; (2) Chalking of land; (3) Clay burning; (4) Claying of land; (5) Liming of land; (6) Marling of land.

*2nd Class:*— Boning, Chalking, &c.

By sect. 6 any of the above improvements could not "in any case be deemed to continue unexhausted" beyond the end of **7** years "following after the year of tenancy in which the outlay thereon is made."

Durability of 2nd Class Improvement, 7 Years.

By sect. 12, "the tenant shall not be entitled to compensation in respect of any of the above improvements unless not more than **42** and not less than **7** days before beginning to execute it, he has given to the landlord notice in writing of his intention to do so;" "nor," proceeds the section, "where it is executed after the tenant has given or received notice to quit, unless it is executed with the previous consent in writing of the landlord."

Notice to Landlord.

By sect. 8, the amount of compensation was "the sum *properly* laid out by the tenant on the improvement,

Amount of Compensation.

CH. XXI. s. 2. *Compensation under Repealed Act of* 1875.

with a deduction of a proportionate part thereof for each year while the tenancy endures after the year of tenancy in which the outlay is made, and while the improvement continues unexhausted." The qualification "properly," it will be observed, did not occur in sect. 7, which regulated the amount of compensation for first class improvements.

*3rd Class* :—

The third class improvements were, by sect. 5, as follows :—

Manure. Consumption of Cake. Durability of 3rd Class Improvement, 2 Years.

Application to land of purchased artificial or other purchased manure : and consumption on the holding, by cattle, sheep, or pigs, of cake or other feeding-stuff not produced on the holding, but by sect. 6, the above improvements "shall not in any case be deemed to continue unexhausted" beyond the end of **2** years "following after the year of tenancy in which the outlay thereon is made."

Deductions, &c., from Compensation.

Under sects. 16—19 the tenant's compensation for an improvement of any of the three classes was subject to deduction for arrears of rent, damage by waste and other matters.

### (c) *Assessment of Compensation under Act of* 1875.

Notice to Landlord of intended Claim.

By sect. 20 of the act, a tenant was not entitled to obtain compensation unless one month at least before the determination of the tenancy he gave notice to the landlord of his intention to claim it ; and the landlord might, where such notice was given, give "before the determination of the tenancy, or within **14** days" thereafter, a counter-notice of an intention to claim compensation on his part. By sect. 21, the amount and mode and time of payment of compensation were to be settled by a reference, in case the parties did not agree. Sects. 22—41, which followed, contained a procedure for assessment of compensation, differing so slightly from the sections in pari materiâ of the Act of 1883 that it is not necessary to say anything about them ; especially as in *Smith* v. *Acock* (*c*) it was held that a claim under the Act of 1875 might be dealt with under the procedure of the Act of 1883, although the compensation, as has been already pointed out, would have to be assessed on a different basis in many cases.

*Smith* v. *Acock*.

### (d) *The General Exclusion of the Act of* 1875.

Operation of Act of 1875 in general excluded.

It is beyond doubt that the operation of the act was, as a general rule, excluded by landlords, and its permissive character was severely criticised. On the 1st of May, 1876, the proprietors of the "Mark Lane Express" published a supplement to that journal, showing in a tabular form, from very copious returns furnished "chiefly by

(*c*) *Smith* v. *Acock*, 53 L. T. 230.

*Exclusion of Act of* 1875.

farmers and land agents, with a few landowners," how far, how, and why the act had been excluded. These returns, it was correctly said, showed conclusively (1) that the Act in May, 1876, was very nearly a dead letter; (2) that it was the landlords who, in the vast majority of instances, had given notice to exclude it; and (3) that the tenant farmers for the most part did not desire to come under the act. The reasons for this indifference, if not hostility, on the part of the tenant farmers were various;—most being satisfied with existing agreements, many having confidence in their landlords, preferring a custom of the country, or dreading litigation, and some few believing the act to be in the interest of landlords rather than of tenants.

Extent of operation of Act of 1875.

It must be borne in mind, however, that the act applied to all Crown and Duchy of Lancaster or Cornwall lands, and that inadvertence and other causes tending to prevent the exclusion of the act in *writing*, it must necessarily have come into operation to a considerable extent, especially on small holdings.

### (e) *Repeal of the Act of* 1875.

Repeal of Act of 1875.

The Act of 1875 is repealed by sect. 62 of the Act of 1883 as from the 1st January, 1884, but that section expressly provides that the repeal shall not affect anything done or pending under the Act of 1875, or "any right to compensation in respect of improvements" to which the Act of 1875 applies, "and which were executed before the commencement of the act" [1st Jan., 1884], or "any right to compensation in respect of any improvement" to which the Act of 1875 applies, "although executed by a tenant after the commencement of this act [1st Jan., 1884], if made under a contract of tenancy current" [see sect. 61 of the Act of 1883] "at the commencement of the act."

Partial continued operation of Act of 1875.

So much for the wholly permissive and prospective Act of 1875. Let us now pass to the wholly compulsory and partly retrospective compensation clauses of the Act of 1883.

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## Sect. 3.—*Compensation under Agricultural Holdings Act,* 1883 (*d*).

No Common Law Right to Compensation.

At common law a tenant had no right (*e*) to compensation for any improvements or acts of husbandry. The common law implies a contract on the part of an agricultural tenant to cultivate in a

(*d*) This section is partly adopted from the introduction to Lely and Pearce-Edgcumbe's Law of Agricultural Holdings. The Act of 1883 is printed at length in Appendix A., post.

(*e*) For the exception in the peculiar case of "emblements," see Chap. XX., Sect. 3, ante.

CH. XXI. s. 3.
*Compensation under Act of 1883.*

husband-like manner (*f*), so that a landlord can at common law recover damages from a tenant for doing less than sufficient on the land, but it implies no contract on the part of the landlord to compensate the tenant for doing more than sufficient, or even to pay him for the seeds and labour of the last year of the tenancy.

Compensation by Custom.

Out of this hardship to the tenant arose and multiplied those various "customs of the country" already adverted to (*g*), under which the tenant became entitled to be paid, in the majority of counties for seed and labour of a last year, in a large number of districts for artificial manure, and in a few districts, pre-eminently in Lincolnshire, for drainage and buildings.

Compensation by Contract.

The indefinite character of many of the customs, and the increasing necessity for the application of artificial manures, led to the embodiment in many contracts of tenancy of elaborate compensation clauses, usually based upon the custom of the country in districts where there was a compensation custom, but developing the rights of the tenant with greater precision than that which the rights under the custom had attained.

Policy of the Act to exclude Compensation by Custom, and to maintain Compensation by Contract.

It is the policy of the Agricultural Holdings Act, 1883, to exclude compensation by custom, that is, implied contract, in all the cases in which compensation is given by the act. By sect. 57, "a tenant shall not be entitled to claim compensation by custom in respect to any improvement for which he is entitled to compensation under or in pursuance of this act." But it is equally the policy of the act to maintain compensation by express contract. By sect. 3, compensation for the more permanent improvements, such as buildings, is not payable unless the landlord has previously agreed to their being executed, and by sect. 5, where "compensation" is provided in writing in the case of a contract of tenancy current at the commencement of the act, or where "fair and reasonable" compensation is provided in writing for improvements (other than those for which the consent of or notice to the landlord is required) in the case of a contract of tenancy beginning after the commencement of the act, such agreement in writing prevails over the act, and a "substituted compensation" under the agreement is payable instead of the compensation under the act.

Determination of Tenancy.

The right to compensation by sect. 1 of the act vests in a tenant on "quitting his holding at the determination of his tenancy;" and by sect. 6, "determination of tenancy" means "the cesser of a contract of tenancy by reason of effluxion of time, or from any other cause," a definition which clearly includes determination by notice to quit and surrender, and also—though this may admit of

(*f*) *Legh* v. *Hewitt*, 4 East, 154; *Powley* v. *Walker*, 5 T. R. 373.

(*g*) Ante, Chap. XX., Sect. 4, p. 806.

*Compensation under Act of 1883.*

doubt, on the ground that forfeiture, resulting as it does from the wrongful act of the tenant, is not ejusdem generis with effluxion of time—determination by forfeiture.

Compensation to "Sitting Tenant."

No compensation is payable to a "sitting tenant," that is to a tenant whose tenancy continues after the execution of the improvement; but in the case where a tenant holds under a limited owner, and wishes, after executing an improvement, to have his contract of tenancy renewed, the 43rd section of the act allows—though it does not enjoin—the limited owner, on renewing the contract and estimating the future rent, to leave out on account against the tenant, notwithstanding the requirement of a "best rent" by sect. 7, sub-sect. 2, of the Settled Land Act (ante, p. 7), any increase in the value of the holding which may have arisen from any improvement made or paid for by the tenant.

The act, as has been already pointed out, applies by virtue of sects. 1, 54, and 61, to

To what Holdings Act applicable.

*Holdings, however small, either wholly agricultural or wholly pastoral, or partly agricultural and partly pastoral, or wholly or partly cultivated as market gardens, held under a landlord for a term of years, or for lives, or for lives and years, or from year to year by a tenant holding no employment under such landlord.*

Tenancy from Year to Year.

A tenancy on which rent is payable on the usual quarterly days in any year is a tenancy from year to year, although determinable by three months' notice at any time, instead of at the end of a current year of the tenancy, as tenancies from year to year are usually determinable (*h*).

To what Improvements.

The improvements to which, and to which only, the act applies, are specified in the First Schedule, and are :—

1. *Buildings, ensilage, pasture, osier beds, water meadows, irrigation works, gardens, roads, bridges, watercourses, &c., fencing, hop-planting, fruit-planting, warping, and embankment against floods.*

1. *Buildings, Pasture, &c.*

Consent of Landlord.

These improvements require the written consent of the landlord. For none of them, by sect. 3, is compensation payable—

"Unless the landlord or his agent duly authorized in that behalf, has previously to the execution of the improvement, and after the passing of this act [25th August, 1883], consented in writing to the making of such improvement."

Substituted Compensation.

"Any such consent may be given by the landlord unconditionally, or upon such terms as to compensation or otherwise, as may be agreed upon between the landlord and the tenant, and in the event of any agreement being made between the landlord and the tenant, any

(*h*) *King* v. *Eversfield*, [1897] 2 Q. B. 475; 66 L. J., Ch. 809; 46 W. R. 51—C. A., reversing Day, J.

CH. XXI. s. 3. *Compensation under Act of 1883.*

compensation payable thereunder shall be deemed to be substituted for compensation under the act."

Upon this section it should be observed that buildings and fencing, if no compensation be payable for them, become the property of and removable by the tenant, subject to the landlord's power of purchase, under sect. 34 of the act (ante, p. 673). As to the terms of compensation, it is conceived that they must involve some substantial benefit to the tenant, and must not neutralize s. 55 of the act, which will presently be considered (p. 821), so as to deprive him altogether of the right to compensation which that section declares to be inviolate.

2. *Drainage.*

2. *Drainage.*

This improvement requires a previous written notice to the landlord. By s. 4, no compensation is payable for drainage—

Notice to Landlord.

"Unless the tenant has not more than three months and not less than two months before beginning to execute such improvement, given to the landlord, or his agent duly authorized in that behalf, notice in writing of his intention so to do, and of the manner in which he proposes to do the intended work."

The omission to give the required notice within the required time will be fatal to the claim for compensation, unless in accordance with a proviso to s. 4 the landlord and tenant may have dispensed with the notice, and made some special agreement between themselves as to drainage.

Effect of Notice.

Upon the notice being given, one of three results may happen. Either—

(1.) The landlord and tenant may agree on the compensation to be paid, which compensation is to be "substituted" for compensation under the act, *or*

(2.) The landlord may execute the drainage himself "in any reasonable and proper manner he may think fit" and charge the tenant with not more than 5 per cent. on the outlay, *or*

(3.) "In default of any such agreement or undertaking [of the landlord to execute the drainage], and also in the event of the landlord failing to comply with his undertaking within a reasonable time, the tenant may execute the improvement himself, and shall in respect thereof be entitled to compensation under this act."

In the third part of the schedule are comprised:

3. *Boning, &c., and Manures.*

*Boning with undissolved bones, chalking, clay-burning, claying, liming, marling. Application of purchased manure, and consumption on the holding by cattle, sheep, or pigs of cake or other feeding stuff not produced on the holding.*

*Cake.*

To obtain compensation for these improvements neither the consent of, nor any notice to, the landlord is required before executing

*Compensation under Act of 1883.*

the improvement, but notice (of which hereafter, post, p. 825) must be given before claiming the compensation.

By s. 2, if any of the above improvements were executed within ten years before the commencement of the act [1st January, 1884], and if *neither* the Act of 1875, *nor* contract, *nor* custom secure compensation to the tenant, then the Act of 1883 is retrospective, and compensation under it is payable although the improvement may have been executed before the commencement of the act: but in the case of buildings and the other improvements mentioned in the first part of the schedule, and in the case of drainage, the landlord must have some time during the year 1885 declared in writing his consent thereto, for the compensation to be payable. In the case of boning and the other improvements mentioned in the third part of the First Schedule, no such consent on the part of the landlord is required.

How far Act retrospective.

The Act of 1875 was purely permissive, as we have seen (ante, p. 814). The Act of 1883, on the other hand, as far as the right to compensation is concerned, is purely compulsory. Such is the undoubted effect of s. 55, which is as follows:—

Avoidance of Agreement inconsistent with Right to Compensation.

> Any contract, agreement, or covenant made by a tenant, by virtue of which he is deprived of his right to claim compensation under this act in respect of any improvement mentioned in the First Schedule hereto (except an agreement providing such compensation as is by this act permitted to be substituted for compensation under this act), shall, so far as it deprives him of such right, be void both at law and in equity.

Nor, it is submitted, can the tenant's right to compensation be indirectly got rid of by any agreement on his part not to make improvements at all. Such an agreement would, it is submitted, be so contrary to the spirit of the act and to the public policy of stimulating the general fertility of the soil of the country, that the words "right to claim compensation" ought not to be construed strictly, but ought to be taken to include "right to receive compensation." Such an agreement therefore, if made, may be disregarded, and the tenant may proceed to execute the improvements mentioned in the act, and to claim compensation for them as if it had not been made (*i*).

Act does not apply to Tenancy at Will.

It should be pointed out, however, that the act (see ante, p. 819) does not apply to a tenancy at will, so that such tenancies, however long continued or however often renewed, if the continuance or renewal be purely voluntary on the landlord's part and not in pursuance of any agreement with the tenant, do not entitle the tenant to compensation.

(*i*) See further on this subject, Lely and Pearce-Edgcumbe's Agricultural Holdings Act, 2nd ed., p. 133.

CH. XXI. s. 3.
*Compensation under Act of 1883.*

An agreement inconsistent with the right to compensation is void only, and not illegal so as to subject any party proposing or making it to penalties, and it is void only in itself, and does not avoid any other stipulation of the contract of tenancy of which it may form a part.

Agreement void, not illegal.

Substituted Compensation generally.

Although the act is compulsory in principle, it is not compulsory in detail, but allows the parties to agree upon a "substituted compensation," that is a compensation of a character determined by themselves—upon the basis of outlay for instance, instead of upon the basis of value to an incoming tenant, as determined by s. 1 of the act. This is expressly provided by s. 3 of the act in relation to buildings and other improvements mentioned in Part I. of the First Schedule, by s. 4 in relation to drainage, and by s. 5 in relation to boning and other improvements mentioned in Part III. of the First Schedule. By s. 17, where compensation is claimed, and "substituted compensation" has been provided, the amount of such substituted compensation is to be determined by a reference under the act as hereafter described (post, p. 826) and not by action.

Substituted Compensation for Boning, &c., must be "Fair and Reasonable."

The substituted compensation for boning and other improvements mentioned in Part III. of Sched. 1, must be "fair and reasonable," otherwise the provisions of any agreement attempting to provide it will be void, and the compensation will have to be assessed on the basis fixed by the act itself of the value to an incoming tenant. For sect. 5 provides that "where in the case of a tenancy under a contract of tenancy beginning after the commencement of this act any particular agreement in writing secures to the tenant for any improvement mentioned in the third part of the First Schedule hereto, and executed after the commencement of this act, *fair and reasonable* compensation, having regard to the circumstances existing at the time of making such agreement, then, in such case, the compensation in respect of such improvement shall be payable in pursuance of the particular agreement, and shall be deemed to be substituted for compensation under this act."

The "particular agreement in writing" mentioned in this section need not be separate from the contract of tenancy itself, but it is essential that it should deal with and give compensation for each of the items of improvement mentioned in the third part of the First Schedule; otherwise, so far as regards any omitted item, the "particular agreement" will be void, and the statutory basis of value to an incoming tenant will come into force.

Meaning of "Fair and Reasonable."

The compensation is to be "fair and reasonable having regard to the circumstances at the time of the agreement." In practice it will be often difficult to say what satisfies these words, especially where an agreement is of long standing. The questions that will arise appear

to be questions of fact for the arbitrators, but it seems that the burden of proving fairness, &c., will lie upon the landlord. Where district "Chambers of Agriculture" have framed "scales" of compensation, it is submitted that any agreement incorporating such scales would be primâ facie fair and reasonable. It is perhaps desirable that a contract of tenancy providing for substituted compensation should expressly state that it is intended to be "substituted," and should also recite the particular circumstances, if any.

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## Sect. 4.—*Special Compensation under Market Gardeners' Compensation Act*, 1895.

### (a) *Generally.*

As we have seen (ante, p. 819), holdings either wholly or partly cultivated as market gardens are within the purview of the Act of 1883. The Market Gardeners' Compensation Act, 1895, 58 & 59 Vict. c. 27, which is to be construed liberally in favour of the tenant (*k*), greatly extends the provisions of the Act of 1883 in relation to a "market garden," i.e., by s. 6, "a holding or that part of a holding which is cultivated wholly or mainly for the purpose of the trade or business of market gardening," subject however in a great measure to the consent of the landlord.

### (b) *Tenancies created after 1st January*, 1896.

By sect. 3 of the Act of 1895—

Where after the commencement of this act [i.e., by s. 2, on or after January 2nd, 1896] it is agreed in writing that a holding shall be let or treated as a market garden, the following provisions shall have effect:—

(1) The provisions of section 34 of the principal act [of 1883 as to removal of fixtures: see p. 673, ante] shall extend to every fixture or building affixed or erected by the tenant to or upon such holding for the purposes of his trade or business of a market gardener.

(2) The improvements numbered (1) "erection or enlargement of buildings," (6) "making of gardens," and (11) "planting of orchards or fruit bushes" in part i. of the first schedule [in which are enumerated improvements for which, if executed with landlord's consent, compensation is payable to tenant: see p. 819, ante] to the principal act shall, as far as regards such holding, cease to be comprised in the said schedule.

(3) The following improvements shall as far as regards such holding be deemed to be comprised in part iii. of the said schedule [in which (see p. 820, ante) are enumerated improvements for which compensation is

(*k*) *King* v. *Eversfield*, [1897] 2 Q. B. 475; 66 L. J., Ch. 809; 46 W. R. 51—C. A., per Lord Esher, M.R.

CH. XXI. s. 4. *Compensation to Market Gardeners.*

payable to the tenant, whether the landlord consented to their execution or not]:—

Fruit. (i.) Planting of standard or other fruit trees permanently set out;

(ii.) Planting of fruit bushes permanently set out;

Vegetables. (iii.) Planting of strawberry plants;

(iv.) Planting of asparagus and other vegetable crops;

Buildings. (v.) Erection or enlargement of buildings for the purposes of the trade or business of a market gardener.

Improvements purchased from former outgoer. (4) Section fifty-six of the principal act [by which the tenant has the right to compensation for improvements purchased, with the consent of the landlord, from the outgoing tenant] shall be read and construed as if the words "with the consent in writing of his landlord" were not included therein.

Removal of Fruit Trees and Bushes. (5) It shall be lawful for the tenant to remove all fruit trees and fruit bushes planted by him on the holding and not permanently set out; but if the tenant shall not remove such fruit trees and fruit bushes before the termination of his tenancy, such fruit trees and fruit bushes shall remain the property of the landlord, and the tenant shall not be entitled to any compensation in respect thereof.

### (c) *Tenancies current on 1st January*, 1896.

Application of Act to "Current Tenancies." Having in sect. 3 provided general compensation, by express agreement of the parties, in the case of tenancies created or modified after the 1st January, 1896, the act next proceeds, in sect. 4, to deal with the very large number of cases in which a tenancy had been created before that date, and to provide specific compensation by tacit agreement of the parties, for specific improvements, in the following terms:—

Market Gardeners' Compensation Act, s. 4. "Where under a contract of tenancy current at the commencement of this act [i.e., on 1st January, 1896], a holding is at that date in use or cultivation as a market garden with the knowledge of the landlord, and the tenant thereof has then executed thereon, without having received previously to the execution thereof any written notice of dissent by the landlord, any of the improvements in respect of which a right of compensation or removal is given to a tenant by this act, then the provisions of this act shall apply in respect of such holding as if it had been agreed in writing after the commencement of this act, that the holding should be let or treated as a market garden."

Limited Application of Sect. 4. "Then." From the words "has *then* executed," it seems that this section applies only to acts done by a market gardener between the date of the passing [6th July, 1895] and the date of the commencement [1st January, 1896]; but however long the current tenancy under which such acts were done may last, compensation will be payable at the end of it.

Knowledge of the Landlord. It is conceived that the knowledge of the agent of the landlord will be equivalent to knowledge of the landlord himself, but the point is doubtful.

Sect. 5.—*The Claim for Compensation: and Notice of it.*

Ch. XXI. s. 5.

*Notice of Claim for Compensation.*

Two months' notice of any claim should be given. For by s. 7 of the Agricultural Holdings Act, 1883 :—

Notice of Claim by Tenant.

A tenant claiming compensation under this act shall, two months at least before the determination of the tenancy, give notice in writing to the landlord of his intention to make such claim.

Counter-notice by Landlord.

Where a tenant gives such notice, the landlord may, before the determination of the tenancy, or within fourteen days thereafter, give a counter-notice in writing to the tenant of his intention to make a claim in respect of any waste or any breach of covenant or other agreement.

Every such notice and counter-notice shall state, as far as reasonably may be, the particulars and amount of the intended claim.

The omission to give the notice in time would seem to be fatal (*l*), though this very important point cannot be said to be without doubt, on the ground that in the corresponding s. 20 of the repealed Act of 1875, express negative words were used.

Notice to Agent is Notice to Landlord.

A notice to the landlord's agent is primâ facie a sufficient notice to the landlord himself (*m*).

Time for Claiming where Occupation of Part, after Tenancy Ended.

*Paul, in re, Portarlington, ex parte.*

As we have seen (ante, p. 796) it is very common for a tenant to have a right by custom to retain part of the holding for a short fixed period after the determination of the tenancy strictly so called. In *Paul, in re, the Earl of Portarlington, ex parte* (*n*), it was held that for the purposes of s. 7 the determination of the tenancy takes place at the end of such short fixed period, and not at the end of the tenancy strictly so called, and therefore that a notice of intention to claim, given two months before the end of such period, was good. This was in a Dorsetshire case, where the farm was about 1,200 acres, of which the tenancy strictly so called determined on the 11th October, but the tenant, by custom, held over about 160 acres of meadow until the following February 11th, and the barns, rickyards and some outbuildings until the following July. Notice was given on November 29th, and the County Court Judge holding it to be in time, afterwards made an order appointing a referee, which order the High Court, without calling on counsel for the tenant, declined to prohibit. But the difficulty of the double prolongation, till February for the meadow and till July for the buildings (*o*), does not seem to have been considered, and in connection with a main reason for the decision—that the landlord on any other construction of s. 7 would

(*l*) See per Lord Coleridge, C.J., in *Schofield* v. *Hincks*, 37 W. R. 157.

(*m*) *Ingham* v. *Fenton*, 10 T. L. R. 113.

(*n*) *Paul, In re, Portarlington* (*Earl of*), *Ex parte*, 24 Q. B. D. 247 ; 59 L. J., Q. B. 30 ; 61 L. T. 835.

For similar decision, prior to *Black* v. *Clay*, p. 826, infra, in Scotland (where, by s. 7 of the Scotch Act of 1883, *four* months' notice is necessary), see *Strang* v. *Stuart*, 4th Series Sess. Ca., Vol. XIV. (14 Rettie), p. 637 ; "Land Agents Record," July 9th, 1887.

(*o*) See this point decided against the tenant in Scotland, *Hannan* v. *Ramsay*, 1 Sheriff Court Reports (March 10th, 1885), p. 236, approved in *Strang* v. *Stuart*.

CH. XXI. s. 5. *Notice of Claim for Compensation.*

lose his remedy for waste—it may be pointed out that it would only be the right to counterclaim under the Act, and not the right to sue at common law that would be lost to the landlord. Nor perhaps was sufficient weight given to the argument of inconvenience to the landlord and incoming tenant, or to the argument that as to the 1,000 acres, at any rate the tenancy determined on the 11th October, and that the claim for the 160 acres might have been estimated prospectively, as every claim partly is. However this may be, the main question in the *Portarlington case* appears now to be concluded by the Scotch case of *Black* v. *Clay* (*p*), in which the House of Lords held upon s. 2 of the Agricultural Holdings (Scotland) Act, 1883, 46 & 47 Vict. c. 62 (of which the words are precisely similar to those of s. 7 of the English act, except that they require four months' notice instead of two), that a notice given after the determination of the first of three periods of determination, but more than four months before the determination of the second, was given in time. The three periods of quitting were (1) of houses, except barns, grass and fallow; (2) arable land, and (3) barns and cothouses. Lord Watson was of opinion that a notice in time only for the third period would have been too late on the ground that barns and cothouses could contain no subject-matter of compensation within the act, and therefore were not a holding within the act, and Lord Herschell did not dissent from this opinion, which has now been given effect to by express judicial decision (*q*).

Time for Claim, where part held over by custom.

*Black* v. *Clay.*

*Morley* v. *Carter.*

Counterclaim.

The landlord's right to counterclaim *under the act* does not arise unless the tenant claims. He is not bound however to counterclaim, but may bring his action against the tenant at law.

## SECT. 6.—*The Reference.*

Reference Compulsory.

If the parties cannot agree upon the amount payable, a reference is compulsory: the tenant has no right of action for the compensation, nor, if he be sued by the landlord for arrears of rent, can he counterclaim for the compensation (*r*). By s. 8 the difference "shall be settled by a reference," and by s. 57, a tenant is not entitled to claim compensation otherwise than in manner authorized by the act.

Determination of Claims Outside Act by same Reference.

It will of course frequently happen that the tenant has claims against the landlord in respect of matters outside the act, as for seeds and labour and minor acts of husbandry either under a custom or

(*p*) *Black* v. *Clay*, [1894] A. C. 368; 71 L. T. 446; 6 R. 362; per Lords Herschell, Watson and Morris, Lord Shand concurring.

(*q*) In *Morley* v. *Carter*, [1898] 1 Q. B. 8; 66 L. J., Q. B. 843; 77 L. T. 337, per Wright and Kennedy, JJ.

(*r*) *Gaslight and Coke Co.* v. *Holloway*, 52 L. T. 434: *Schofield* v. *Hincks*, 58 L. J., Q. B. 147; 60 L. T. 573; 37 W. R. 157.

by express contract of tenancy. It may frequently be desired that both sets of claims—those under the act and those outside the act—should come before the same arbitrators. This can easily be done, but care should be taken to ensure an arbitrament of the two sets of claims by separate awards.

Appointment of Referees and Umpire.

By s. 9 the reference may be to a single referee jointly appointed, or to two referees, one appointed by each party. If two referees are appointed, they must appoint an umpire before entering on the reference. Notice in writing of every appointment of a referee must be given to the other party. By s. 10 provision is made for the appointment of an umpire by the Land Commissioners, since superseded by the Board of Agriculture (p. 834, post), or the Judge of the County Court "within the district whereof" [see s. 61] "the holding or the larger part thereof is situate," or by consent [see s. 11] the registrar of such Court. Consent to the jurisdiction of the registrar is essential, and any award not stating consent will be set aside upon proof that no consent was in fact given, and Ord. XL., r. 7, of the County Court Rules, 1889, so far as it dispensed with consent, was *ultra vires* (*s*).

Submission irrevocable.

By s. 12 "neither party shall have power to revoke a submission or the appointment of a referee, without the consent of the other."

Procedure and Evidence.

By s. 13 the referees may call for vouchers and other evidence, and may administer oaths; and by s. 14 a reference may, after notice to the parties, proceed in the absence of either party.

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## Sect. 7.—*The Assessment of Compensation.*

Value to an Incoming Tenant.

By s. 1 of the act the compensation is to be "such sum as fairly represents the value of the improvement to an incoming tenant, provided always, that there shall not be taken into account as part of the improvement made by the tenant what is justly due to the inherent capabilities of the soil."

The extremely difficult questions arising upon this section are mainly questions of fact. Outlay, the basis adopted by the Act of 1875, is now purposely superseded by the basis of value to an incoming tenant, so that in many cases a heavy outlay, which has resulted in far less value than might reasonably have been expected at the time it was incurred, may give ground for little or no compensation on the ground of the conditions of agriculture having changed. Compensation too may often (and with more justice) be forfeited in cases where the outlay was great, but the execution extravagant or negligent. The "incoming tenant" is a hypothetical

(*s*) *Griffiths and Morris, In re*, [1895] 1 Q. B. 866; 64 L. J., Q. B. 386; 72 L. T. 290; 43 W. R. 652; 15 R. 301. Order XL., rule 7, has now been repealed and superseded by Order XL., rule 7 a, App. A., post.

CH. XXI. s. 7. *Assessment of Compensation.*

one, and what the particular incoming tenant, if any, may think the improvement to be worth is no necessary criterion of the statutory value. Although there may be no incoming tenant or prospect of one, compensation is none the less payable.

Inherent Capabilities of the Soil.

The expression "Inherent capabilities of the soil" appears to have been derived from a passage in Mr. Butt's Treatise on the Irish Land Act, which has been cited with approval by an Irish Court (*t*). It is no doubt unjust that the landlord as owner of the soil should have to pay the tenant for an increased value derived not from the labour or skill of the tenant but from the quality of the soil itself. The proviso however merely seems to express what would have been implied without it.

Set-off against Compensation.

By s. 6 the landlord has certain important grounds of set-off. First, there may be set off any benefit which he has given [such as reduction of rent] in consideration of the tenant executing the improvement. Secondly, "in the case of compensation for manures, the value of the manure which would have been produced by the consumption on the holding of any hay, straw, roots, or green crops sold off or removed from the holding within the last two years of the tenancy or other less time for which the tenancy has endured, except as far as a proper return of manure to the holding has been made in respect of such produce so sold off or removed therefrom." Thirdly, there may be set off arrears of rent, and also "any sums due in respect of any waste committed or permitted (*u*) by the tenant," or in respect of any breach of covenant or agreement in connection with the contract of tenancy, committed not more than four years before the determination of the tenancy. The same section provides for an augmentation of the compensation in respect of any breach of covenant or agreement in connection with the contract of tenancy by the landlord.

Augmentation of Compensation.

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### SECT. 8.—*The Award, and Appeal therefrom.*

Time for Award.

By s. 16, the award (which by s. 15 must be in writing and signed) must be made by a single referee within 28 days after his appointment, by two referees within 28 days after the appointment of the last appointed of them, "or within such extended time, if any, as they from time to time jointly fix by writing under their hands, so that they make their award ready for delivery within a time not exceeding in the whole 49 days after the appointment of the last appointed of them," and by an umpire (s. 19)

(*t*) See *Adams* v. *Dunscath*, 19 L. R., Ir. 109.

(*u*) As to voluntary and permissive waste, see ante, Chap. XVI., Sect. 5.

within 28 days after notice of the reference to him, or within such extended time as may be appointed by the County Court Registrar.

Form of the Award.

The award must be very precise and particular. By s. 19 it must, so far as possible, specify the improvements for which compensation is awarded, the time at which each improvement was executed, and the sum awarded in respect of each improvement. In *Shrubb* v. *Lee* (*x*), however, an award of a gross sum in full satisfaction of all claims by either party was upheld, although the tenant had claimed and the landlord counterclaimed under the act, apparently on the ground that because matters outside the act were included in the reference, the obligation of the umpire to be specific as to matters within the act was dispensed with, but it is very hard to see how so distinct a statutory requirement ought not to have its full effect. The decision if correct and given full effect to would nullify the statute to a very large extent, as in the large majority of cases claims outside the act are referred to the same arbitrators as claims within it. It is submitted, however, that the decision must be confined in its effect to cases where there is a specific agreement *after* both kinds of claims have been made, to refer *all* matters in difference.

*Shrubb* v. *Lee*.

Payment of the Compensation Money.

By s. 21 the award must fix a day for the payment of the money awarded, and such day must not be sooner than one month after the delivery of the award. By s. 24 the money awarded, if not paid within fourteen days after such day, is recoverable upon order made by the judge of the County Court.

Award in favour of Landlord.

This procedure is not applicable to a case where the amount found due to the landlord on his counterclaim overtops that found due to the tenant on the claim, so as to admit of the balance being recoverable by order of the County Court. If the award find a balance due to the landlord, and the County Court Judge make an order thereon, both the judge and the landlord will be prohibited from further proceeding in the matter, so far as the award is in respect of matters not within the act, i.e., so far as it adjudges any payment to the landlord on his counterclaim (*y*).

Award on Matters outside Act.

Moreover the procedure is not applicable to matters, such as tillages, for which the act does not provide compensation, and a County Court will be prohibited from proceeding on an order enforcing an award in respect of such matters, although it may deal also and deal separately with matters within the act, although the applicant for the prohibition had agreed by his lease that the matters outside the act should be dealt with by procedure and award under the act as if they were within it,

(*x*) *Shrubb* v. *Lee*, 59 L. T. 376.

(*y*) *Holmes and Formby, In re*, [1895] 1 Q. B. 174; 64 L. J., Q. B. 391; 71 L. T. 842; 43 W. R. 205; 15 R. 114.

CH. XXI. s. 8. *Award and Appeal.*

Matters outside Act—*contd.*

and afterwards acquiesced in the jurisdiction of the County Court. This was held with reluctance but without hesitation by the Court of Appeal in *Farquharson* v. *Morgan* (*z*), on the ground that where total absence appears on the face of proceedings in an inferior Court, the High Court is bound, consent or no consent, to issue a prohibition.

Costs of Award.

By s. 20 the costs of the reference "shall be borne and paid by the parties in such proportion as to the referees or umpire appears just, regard being had to the reasonableness or unreasonableness of the claim of either party in respect of amount or otherwise and to all the circumstances of the case." By the same section "the award may direct the payment of the whole or any part of the costs aforesaid by either party to the other," but the costs may be taxed by the County Court Registrar.

Costs as between solicitor and client cannot be given (*a*).

Appeal to County Court.

By s. 22 the award is questionable only as provided by s. 23, and by s. 23, *where the sum claimed exceeds* 100*l.*, either party may within seven days after delivery of the award, appeal against it to the judge of the county court on all or any of four specified grounds. These grounds are:—

(1) Invalidity of award, as to which ground Russell on Arbitrations should be consulted:
(2) Improper application or omission to apply the provisions of the act as to "substituted compensation:"
(3) The awarding of compensation of set-off where none due:
(4) The non-awarding of compensation where due.

It will be seen that an appeal as to mere amount is excluded. The judge must hear and determine the appeal, and may remit the case to be reheard.

Appeal to High Court from County Court.

The decision of the county court judge on appeal is final, "save that the judge shall at the request of either party state a special case on a question of law for the judgment of the High Court of Justice, and the decision of the High Court on the case and respecting costs and any other matter in connection therewith shall be final, and the judge of the county court shall act thereon."

Appeal by Motion.

This paragraph, it will be observed, prescribes a mode of appealing inconsistent with that *by motion*, as prescribed by s. 120 of the County Courts Act, 1888 (see ante, p. 550), and the rules of court thereunder, while section 124 of the same act enacts that "no judgment or order of any judge [i.e. judge of a County Court], nor any action or matter brought before him or pending in his

(*z*) *Farquharson* v. *Morgan*, [1894] 1 Q. B. 552; 63 L. J., Q. B. 474; 70 L. T. 152; 42 W. R. 306; 9 R. 202—C. A.

(*a*) *Griffiths and Morris, In re*, [1895] 1 Q. B. 866; 64 L. J., Q. B. 386; 72 L. T. 290; 43 W. R. 652; 15 R. 301.

court, shall be removed by appeal, motion, certiorari or otherwise into any court whatever save and except in the manner, and according to the provisions in this act mentioned." Is there, therefore, an implied repeal of the final paragraph of s. 23 of the Agricultural Holdings Act, 1883? This is a very doubtful question. *Reg.* v. *Kettle* (*b*), and the fact that the point might have been but was not taken in *Shrubb* v. *Lee* (*c*), seem to point to an implied repeal, and looking to the strong *negative* words of s. 124 it is submitted on the whole that an implied repeal of the final paragraph of s. 23 of the Agricultural Holdings Act, 1883, has been effected. However this may be, the point must be taken to be still an open one for judicial decision (*d*).

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## Sect. 9.—*Recovery of Compensation awarded, and Charge on Holding.*

Recovery of Compensation Money.

The compensation money is recoverable from the landlord personally unless he be a trustee, in which case it is recoverable by process against the holding only, and no person is liable for its payment.

Charge on Holding.

If the landlord be a tenant for life of a settled estate or incumbent of a benefice, he may, on paying the compensation money, obtain from the County Court a charge upon the holding and may assign such charge to a land company incorporated by statute—that is, he may borrow the money of such company and make the holding the security for the repayment of the loan.

Executors.

The executors of a tenant for life who has been compelled to pay compensation under the act to an outgoing tenant whose tenancy had been determined before the death of the landlord, are entitled to a charge on the holding in respect of the amount so paid (*e*).

Landlord, unless Trustee, may not deliver up the Land in lieu of the Money.

A trustee landlord may by s. 31 give the tenant a charge on the holding in lieu of the compensation money, so that in effect he may force the tenant to take the holding itself in lieu of such money. A landlord entitled to the rents and profits as trustee, or in any character otherwise than for his own benefit, is by s. 31 not personally liable for the compensation money.

But all landlords who are beneficial owners are personally liable to the whole extent of their assets, even if there be no incoming tenant, or even if the holding be so much depreciated notwithstanding the improvements, as not to have a saleable value equal to the

(*b*) *Reg.* v. *Kettle*, 17 Q. B. D. 761.
(*c*) *Shrubb* v. *Lee*, 59 L. T. 376.
(*d*) See per Wills, J., in *Wilkinson* v. *Jagger*, 20 Q. B. D. 428, a case under the repealed Friendly Societies Act, 1875.
(*e*) *Gough* v. *Gough*, [1891] 2 Q. B. 665; 60 L. J., Q. B. 726; 65 L. T. 110; 39 W. R. 593—C. A.

CH. XXI. s. 9.
*Recovery of Compensation Money.*

compensation money. It appears that even in such an extreme case the landlord may not rid himself of the liability for the compensation money by handing over the land in lieu of it.

Payment of Compensation Money by Incoming Tenant.

The compensation money is primarily payable by the landlord in like manner as compensation due under a custom is (*f*); but s. 56 of the act makes provision for the case of the outgoing tenant receiving the compensation money direct from the incoming tenant to avoid circuity and in conformity with the practice in connection with compensation due by custom. By this section—

Claim by Incoming Tenant having Paid Outgoing Tenant with consent of Landlord.

Where an incoming tenant has, with the consent in writing of his landlord, paid to an outgoing tenant any compensation payable under or in pursuance of this act in respect of the whole or part of any improvement, such incoming tenant shall be entitled on quitting the holding to claim compensation in respect of such improvement or part in like manner, if at all, as the outgoing tenant would have been entitled if he had remained tenant of the holding, and quitted the holding at the time at which the incoming tenant quits the same.

Under this section an outgoing tenant who takes to the improvements of his predecessor, will not be entitled to be reimbursed the amount paid, but only to be paid such amount as shall represent the value of the improvements to his successor.

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### SECT. 10.—*Compensation to Tenant of Mortgaged Land.*

Act of 1883 gave no right against Mortgagee.

Inasmuch as the act deals only with contracts between landlords and tenants, it has no application to a case where an owner of land first mortgages and afterwards lets, so as to give the tenant under such letting a right to claim under the act against the mortgagee, with whom he had no contract. It might, however, always happen in cases to which the Conveyancing Act (ante, p. 60) did not apply that a tenant to a mortgagor landlord, who became insolvent, might lose all compensation under the act, as he could not recover it from the mortgagor landlord on the ground of his insolvency, or from the mortgagee in possession on the ground that the act did not apply. An actual hardship arising out of this state of law having been disclosed by the *Lambcote Grange case* (*g*) the Tenants' Compensation Act, 1890, 53 & 54 Vict. c. 57, was passed to prevent its recurrence. Under this act—which as it applies to compensation under a custom and otherwise, as well as to compensation under the Agricultural Holdings Act, is more fully treated elsewhere (ante, p. 810)—the tenant of land under mortgage may recover by charge upon the land

Tenants' Compensation Act.

(*f*) See *Faviell* v. *Gaskoin*, 7 Ex. 273, and Chap. XX., Sect. 4, ante.

(*g*) A County Court case. See Law Journal Newspaper for 1890, pp. 358 an 371, for a report of, and comment on it.

only, under s. 31 of the act, compensation for improvements under the act, or agreements sanctioned by it, as if the mortgagee were the landlord within the meaning of section 31.

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## Sect. 11.—*Concluding Observations.*

The Interpretation Clause.

The act is printed at length in the appendix. The interpretation clause (s. 61) should always be consulted before an opinion is given on any particular section. In particular, it may be observed that *landlord* means "any person for the time being entitled to receive the rents and profits;" and *tenant* "the holder of land under a landlord for a term of years or for lives and years, or from year to year," including executors (*h*), &c., or any person deriving title from a tenant.

Crown Lands.

The act by ss. 35 and 36 applies to Crown and Duchy lands.

Consents, where Landlords Ecclesiastical.

The various powers given by the act may not, by ss. 38—40, be exercised by an archbishop or bishop without the written approval of the Ecclesiastical Commissioners, by incumbents of benefices without that of the patrons, and by charity trustees without that of the Charity Commissioners.

Comparative advantages of compensation under the act and of "substituted compensation."

A serious practical question for both landlord and tenant will always be, whether to leave the compensation to depend entirely upon the act, or to incorporate by way of "substituted compensation" a definite scale of allowances. The district Chambers of Agriculture, which are usually constituted by persons equally representing landlords and tenants, have drawn up elaborate scales of allowances, and the Central Chamber has issued a report upon them (*i*) recommending for general adoption under the head of "Consumption on the holding by cattle, sheep, or pigs, of cake or other feeding stuff not produced on the holding," the following scale:—

"$\frac{1}{8}$th of the cost of linseed cake and meal, cotton cake and meal, rape cake, or malt culm, and $\frac{1}{6}$th of the cost of corn cake, malt or other manufactured feeding stuffs of similar manurial value, which have been consumed on the farm during the last year of the tenancy, and $\frac{1}{6}$th of the cost of linseed cake and meal, cotton cake and meal, rape cake, or malt culm; and $\frac{1}{12}$th the cost of corn cake, malt or other manufactured feeding stuffs of similar manurial value which have been consumed on the farm during the year preceding the last

(*h*) As to executors of a landlord who was tenant for life, and their right to obtain a charge upon the holding under s. 29, see *Gough* v. *Gough*, [1891] 2 Q. B. 665; 60 L. J., Q. B. 726; 65 L. T. 110; 39 W. R. 593—C. A.

(*i*) See the Scales and the Report, Lely and Pearce-Edgcumbe's Agricultural Holdings, p. 345.

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year of the tenancy, and providing that the quantity allowed for straw do not exceed the average of the two next preceding years. For hay, straw, roots, and pulse purchased, $\frac{1}{4}$th of the last year's consumption, and for corn $\frac{1}{6}$th."

The Central Chamber recommended no scale applicable to other improvements for general adoption. The scales recommended by the District Chambers, and much more the above scale where applicable, will, it is conceived, be considered by arbitrators to be primâ facie fair and reasonable.

A substituted compensation has the advantage of comparative certainty, and is probably more for the advantage of the tenant than the landlord. The compensation under the act is more liable to reduction than increase from unforeseen causes, and is probably more for the advantage of the landlord than the tenant.

Substitution of Board of Agriculture for Land Commissioners.

The powers and duties of the Land Commissioners under the Act (see s. 10 as to appointment of umpire, p. 827, ante) are by s. 2 of the Board of Agriculture Act, 1889, 52 & 53 Vict. c. 30, and Part II. of Sched. I. of that Act, transferred to the Board of Agriculture.

# CHAPTER XXII.

## RECOVERY OF THE PREMISES BY THE LANDLORD.


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CH XXII. s. 1.

*Recovery of Premises by Peaceable Re-entry.*

## SECT. 1.—*By Peaceable Re-entry.*

UPON the determination of contract of tenancy, whether by effluxion of time, forfeiture, or in any other manner (see Ch. VIII.), the demised premises belong to the landlord, who may resume possession of them, subject, in the case of proceeding for a forfeiture caused otherwise than by non-payment of rent (see ante, p. 356), to notice to the tenant beforehand, and to the tenant obtaining "relief against forfeiture," without any process of law whatever (*a*). This resumption should in all cases be peaceable, for if it be not, the landlord subjects himself to an indictment for forcible re-entry (*b*). But even if the resumption should not be peaceable, the landlord, if his right to resume were good, cannot be sued by the tenant, except in respect of some personal damage done in the course of the entry (*c*). In some cases, no doubt, peaceable re-entry (which is believed to be rare in practice) may be the proper remedy for a landlord to adopt, but if the re-entry be for forfeiture, relief to the tenant may be granted just as much after a peaceable re-entry as after re-entry by action (*d*); and in the majority of cases it will be desirable for the landlord to perfect his legal title by obtaining a writ of possession.

## SECT. 2.—*By Proceedings in the High Court.*

### (a) *Generally.*

Recovery of Land.

Land, being different in its legal nature from other property, has always been recoverable by a process different from the ordinary process of law. The proceeding was known technically, and is still known popularly, as an action of ejectment. The details of this action were formerly very cumbrous, and were based upon a legal fiction of a demise to a fancied person, John Doe; this was abolished by the Common Law Procedure Act, 1852, more than forty years ago, but the name "ejectment" and a certain distinction between it and other actions, the most conspicuous of which was the absence of pleadings, were maintained until the Judicature Acts came into force in 1875. Under those acts the name has disappeared, and is replaced by the term, "Action for the recovery of land." This action, when brought in the High Court of Justice, follows in its details for the most part the ordinary course of an action in that Court.

Former Action of Ejectment.

Present Action.

(*a*) *Taylor* v. *Cole*, 3 T. R. 292; 1 R. R. 706.
(*b*) Post, Chap. XXIII., Sect. 5.
(*c*) Ante, Chap. XX., Sect. 1.
(*d*) The words of sect. 14, sub-s. 1 and 2 of the Conveyancing Act (ante, p. 349), are, "where the lessor is proceeding by action *or otherwise*."

(b) *Special Proceedings under Common Law Procedure Act, where half-year's Rent in arrear, &c., &c.*

Special Procedure if half-year's Rent in Arrear, and Right of Re-entry for Non-payment.

The Common Law Procedure Act, 1852, sect. 210, provides that the landlord, where one half-year's rent is in arrear, *and* he has a right to re-enter for non-payment, *and* proves that no sufficient distress can be found on the premises, may recover judgment and execution as if the rent had been legally demanded, in the manner pointed out by that section, which also bars the lessee from relief against forfeiture, unless proceeded for "within 6 months after execution executed." The niceties that attend re-entries at common law which, as appears from the preamble to the repealed and substantially reproduced 4 Geo. 2, c. 28, s. 11, this section is intended to relieve the landlord from, have been already noticed (ante, p. 340), as well as the cases upon the section and upon relief against forfeiture (ante, p. 338), except *Hare* v. *Elms* and other cases as to sub-lessees (post, p. 839). Sect. 210 is here subjoined (omitting words repealed by the Statute Law Revision Act, 1892), together with ss. 211 and 212 :—

If rent in arrear, and right of re-entry, legal demand of rent dispensed with.

*C. L. P. Act*, 1852, s. 210.]—In all cases between landlord and tenant, as often as it shall happen that one half year's rent shall be in arrear, and the landlord or lessor to whom the same is due hath right by law to re-enter for the non-payment thereof, such landlord or lessor shall and may, without any formal demand or re-entry, serve a writ in ejectment for the recovery of the demised premises, or in case the same cannot be legally served, or no tenant be in actual possession of the premises, then such landlord or lessor may affix a copy thereof upon the door of any demised messuage (*e*), which service (*e*) shall stand in the place and stead of a demand and re-entry; and in case of judgment against the defendant for non-appearance, if it shall be made appear to the court where the said action is depending, by affidavit, or be proved upon the trial in case the defendant appears, that half a year's rent was due before the said writ was served, and that no sufficient distress was to be found on the demised premises, countervailing the arrears then due, and that the lessor had power to re-enter, then and in every such case the lessor shall recover judgment and execution, in the same manner as if the rent in arrear had been legally demanded, and a re-entry made; and in case the lessee or his assignee, or other person claiming or deriving under the said lease, shall permit and suffer judgment to be had and recovered on such trial in ejectment, and execution to be executed thereon, without paying the rent and arrears, together with full costs, and without proceeding for relief in equity within six months after such execution executed, then and in such case the said lessee, his assignee, and all other persons claiming and deriving under the said lease, shall be barred and foreclosed from all relief or remedy in law or equity, other than by bringing error for reversal of such judgment, in case the same shall be erroneous, and the said landlord or lessor shall from thenceforth hold the said demised premises discharged from such lease (*e*); provided that nothing herein contained shall

Judgment for landlord, on proof of this, and that no sufficient distress.

Tenant suffering judgment without proceeding for relief in six months, barred from relief.

Saving for mortgagee of lease.

(*e*) Here follow words repealed by the Statute Law Revision Act, 1892.

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extend to bar the right of any mortgagee of such lease or any part thereof who shall not be in possession, so as such mortgagee shall and do, within six months after such judgment obtained and execution executed, pay all rent in arrear, and all costs and damages sustained by such lessor or person entitled to the remainder or reversion as aforesaid, and perform all the covenants and agreements which, on the part and behalf of the first lessee, are and ought to be performed.

If relief proceeded for, rent to be paid.

*C. L. P. Act*, 1852, *s.* 211.]—In case the said lessee, his assignee, or other person claiming any right, title, or interest, in law or equity, of, in, or to the said lease, shall, within the time aforesaid, proceed for relief in any Court of Equity, such person shall not have or continue any injunction against the proceedings at law on such ejectment, unless he does or shall, within forty days next after a full and perfect answer shall be made by the claimant in such ejectment, bring into court and lodge with the proper officer such sum and sums of money as the lessor or landlord shall in his answer swear to be due and in arrear over and above all just allowances, and also the costs taxed in the said suit, there to remain till the hearing of the cause, or to be paid out to the lessor or landlord on good security, subject to the decree of the court; and in case such proceedings for relief in equity shall be taken within the time aforesaid, and after execution is executed, the lessor or landlord shall be accountable only for so much and no more as he shall really and bonâ fide, without fraud, deceit, or wilful neglect, make of the demised premises from the time of his entering into the actual possession thereof; and if what shall be so made by the lessor or landlord happen to be less than the rent reserved on the said lease, then the said lessee or his assignee, before he shall be restored to his possession, shall pay such lessor or landlord what the money so by him made fell short of the reserved rent for the time such lessor or landlord held the said lands.

If rent paid before trial, proceedings on ejectment to cease.

*C. L. P. Act*, 1852, *s.* 212.]—If the tenant or his assignee do or shall, at any time before the trial in such ejectment, pay or tender to the lessor or landlord, his executors or administrators, or his or their attorney in that cause, or pay into the court where the same cause is depending, all the rent and arrears, together with the costs, then and in such case all further proceedings on the said ejectment shall cease and be discontinued; and if such lessee, his executors, administrators, or assigns, shall, upon such proceedings as aforesaid, be relieved in equity, he and they shall have, hold, and enjoy the demised lands, according to the lease thereof made, without any new lease.

Relief against Forfeiture generally, and in Chambers, C. L. P. Act, 1860, s. 1.

As to relief against forfeiture more generally, and by summons in chambers, it is further provided as follows by s. 1 of the Common Law Procedure Act, 1860, 23 & 24 Vict. c. 126:—

In the case of any ejectment for a forfeiture brought for non-payment of rent, the court or a judge shall have power, upon rule or summons, to give relief in a summary manner, but subject to appeal *as hereinafter mentioned* (*f*), up to and within the like time after execution executed, and subject to the same terms and conditions in all respects as to payment of

(*f*) Sects. 4—11, as to appeal, are, with others, repealed by the Statute Law Revision Act, 1892, as (it is presumed) having been superseded by s. 19 of the Judicature Act, 1873, and the Rules of the Supreme Court as to appeal.

rent, costs and otherwise, as in the Court of Chancery; and if the lessee his executors, administrators or assigns, shall upon such proceeding be relieved, he and they shall hold the demised lands according to the lease thereof made, without any new lease.

Limitation of s. 210 of Act of 1852 to cases where no sufficient Distress.

It appears to have been generally considered that the limitation of time for relief imposed by sect. 210 of the Act of 1852 is universal (*g*), and is not limited to cases where amongst other requirements no sufficient distress can be found. It is submitted, however, on the grounds (1) of the language of the section itself, and (2) of the very strong distinction between the cases where the landlord can realize the rent by distress and the case where he cannot so realize it, that the six months' restriction of time has no operation unless no sufficient distress can be found, and that where such distress can be found the equitable jurisdiction to grant relief is unlimited in point of time, and limited only by the discretion of the court.

Relief refused to Sub-lessee not bringing Lessee before Court. *Hare* v. *Elms*.

In *Hare* v. *Elms* (*h*) the question was raised by original lessors, against whom an application by mortgagees of a sub-lessee had been made (within 6 months after execution) against forfeiture for non-payment of rent as to whether the applicants had any equity to such relief. The Court refused the relief on the ground that the lessees were not brought before the court, but appears to have considered, that if they had been so brought, or if the applicants had made adequate excuse for not so bringing them, the relief ought to have been granted (*i*).

### (c) *Special Proceedings under Common Law Procedure Act*, 1852, *against Tenant holding over.*

Ejectment of tenant holding over, if contract of tenancy *in writing*.

The 213th section of the Common Law Procedure Act, 1852, provides a special procedure for ejecting a tenant holding over after the expiration of the tenancy, the contract for which was made in writing, in the following terms (*k*) :—

"Where the term or interest of any tenant now or hereafter holding under a lease or agreement in writing any lands, tenements or hereditaments for any term or number of years certain, or from year to year,

(*g*) See e.g. notes to *Peachy* v. *Duke of Somerset*, at p. 1263 of White & Tudor's Leading Cases in Equity; Day's Common Law Procedure Act, 4th ed., at pp. 204, 347, citing *Doe* d. *Hutchings* v. *Lewis*, 1 Burr. 619, per Lord Mansfield; also *Roe* d. *West* v. *Davis*, 7 East, at p. 366, per Lord Ellenborough.

(*h*) *Hare* v. *Elms*, [1893] 1 Q. B. 604; 62 L. J., Q. B. 187; 68 L. T. 223; 41 W. R. 297; 5 R. 189.

(*i*) See further *Webber* v. *Smith*, 2 Vern. 103; *Berney* v. *Moore*, 2 Ridgeway, 310. From the original decree in *Webber* v. *Smith*, which was cited to the Court in *Hare* v. *Elms*, it appears that, the lessors consenting, relief was given to such of the sub-lessees as agreed to stand in the shoes of the original lessee, and that the bill was dismissed as to such of the sub-lessees as refused to incur that liability.

(*k*) This section is practically superseded by Order III., Rule 6, p. 843, and Order XIV., p. 844, infra, which provide a still more expeditious procedure, and are not confined to tenancies contracted for in writing.

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shall have expired, or been determined either by the landlord or tenant by a regular notice to quit, and such tenant, or any one holding or claiming by or under him, shall refuse to deliver up possession accordingly, after lawful demand in writing made and signed by the landlord or his agent, and served personally upon, or left at the dwelling-house or usual place of abode of such tenant or person, and the landlord shall thereupon proceed by action [*of ejectment*] for the recovery of possession, it shall be lawful for him, at the foot of the writ [*in ejectment*], to address a notice to such tenant or person, requiring him to find bail, if ordered by the court or a judge, and for such purposes as are hereinafter next specified; and upon the appearance of the party, or an affidavit of service of the writ and notice, it shall be lawful for the landlord, producing the lease or agreement, or some counterpart or duplicate thereof, and proving the execution of the same by affidavit, and upon affidavit that the premises have been actually enjoyed under such lease or agreement, and that the interest of the tenant has expired or been determined by regular notice to quit, as the case may be, and that possession has been lawfully demanded in manner aforesaid, to move the court, or apply by summons to a judge at chambers, for a rule or summons for such tenant or person to show cause within a time to be fixed by the court or judge on a consideration of the situation of the premises, why such tenant or person should not enter into a recognizance by himself and two sufficient sureties in a reasonable sum, conditioned to pay the costs and damages which shall be recovered by the claimants in the action; and it shall be lawful for the court or judge, upon cause shown, or upon affidavit of the service of the rule or summons, in case no cause should be shown, to make the same absolute in the whole or in part, and to order such tenant or person, within a time to be fixed upon a consideration of all the circumstances, to find such bail, with such conditions and in such manner as shall be specified in the said rule or summons, or such part of the same so made absolute; and in case the party shall neglect or refuse so to do, and shall lay no ground to induce the court or judge to enlarge the time for obeying the same, then the lessor or landlord filing an affidavit that such rule or order has been made and served, and not complied with, shall be at liberty to sign judgment for recovery of possession and costs of suit [*in the form contained in the schedule (A) to this Act annexed, marked* 21, *or to the like effect*]" (*l*).

Defendant must not claim under Distinct Title.

This enactment does not apply where the defendant bonâ fide claims to hold possession, not as the claimant's tenant, but under some distinct title, and makes an affidavit of such title in answer to the application (*m*).

There must be a Lease or Agreement *in Writing*, for a Term certain, or from Year to Year.

It must be observed that to entitle a landlord to proceed under this section there must be a lease or agreement in writing under which the defendant held till the term ended, or was duly determined by a regular notice to quit: and the tenancy must have been for a term or number of years certain, or from year to year. A quarterly tenancy is not sufficient (*n*); nor a tenancy for years

(*l*) The words in italics are repealed by the Statute Law Revision Act, 1892. For forms of proceedings under the section, see Cole Ejec. 698, 702, 717—722.

(*m*) *Doe* d. *Sanders* v. *Roe*, 1 Dowl. 4.

(*n*) *Doe* d. *Carter* v. *Roe*, 10 M. & W. 670; 2 Dowl., N. S. 449; 12 L. J., Ex. 27.

determinable on lives (*o*); nor a lease for fourteen years, determined at the end of the first seven years by a six months' previous notice pursuant to a proviso therein contained (*p*). Further, the term must have expired, or been determined by a regular notice to quit; and it is not sufficient that the term has become forfeited and determined for non-performance of covenants or conditions. There must also have been a lawful demand in writing of possession made and signed by the landlord or his agent (*q*). But the usual notice to quit may of itself be a sufficient demand to satisfy the statute (*r*). It must be served as directed by the act, and if possible an express refusal to deliver up possession should be obtained; otherwise it may be difficult to satisfy the court or a judge that there has been such a refusal.

Demand of Possession.

Refusal to Deliver up.

After a sufficient refusal (express or to be implied) has been obtained a writ in the ordinary form may be issued, but with a *notice at the foot* addressed to the defendant, requiring him, if ordered by the court or a judge, to give bail by himself and two sufficient sureties, conditioned to pay the costs and damages which shall be recovered in action. Such writ must be served in the usual manner.

Writ of Ejectment, with Notice for Bail.

Service of Writ.

If the defendant do not appear, final judgment may be signed and execution issued in the usual manner.

Judgment by Default.

When the defendant appears, an application should be made to the court, or to a judge at chambers, founded upon a sufficient affidavit, to compel the defendant to enter into a recognizance with two sureties, pursuant to the statute. The notice of motion or summons must be served in the usual manner, and an affidavit of service made. Upon the hearing of such motion or summons, the court or judge will fix the sum and time "upon a consideration of all the circumstances" (*s*). A sum equal to one year's value of the premises, with a reasonable sum for costs (about 40*l.*) (*t*), is usually required; but not a sum to cover the mesne profits (*u*). The amount will not be increased by reason of any dilapidations, or of any damage done to the business by shutting up the premises, or the like (*x*).

Application for Bail.

On Hearing of Application, Sum and Time fixed.

Usual Bail.

After the time, or the enlarged time (if any), allowed by the order for putting in bail has elapsed, "the lessor or landlord filing an affidavit that such [*rule or*] order has been made and served and not

Judgment for Want of Bail.

(*o*) *Doe* d. *Pemberton* v. *Roe*, 7 B. & C. 2.

(*p*) See *Doe* d. *Cardigan* v. *Roe*, 1 D. & R. 540, decided under the former act, 1 Geo. 4, c. 37.

(*q*) Form, Appendix C., No. 10.

(*r*) *Wilkinson* v. *Colley*, 5 Burr. 2694, 2698; *Hirst* v. *Horn*, 6 M. & W. 393.

(*s*) *Doe* d. *Marquis of Anglesea* v. *Brown*, 2 D. & R. 688; Cole Ejec. 384.

(*t*) *Doe* d. *Levy* v. *Roe*, 6 C. B. 272.

(*u*) *Doe* d. *Sampson* v. *Roe*, 6 Moo. 54.

(*x*) *Doe* d. *Marks* v. *Roe*, 6 D. & L. 87; *Doe* d. *Levy* v. *Roe*, 6 C. B. 272.

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complied with (*y*), shall be at liberty to sign judgment for recovery of possession and costs of suit in the form contained in [*schedule (A) to this act annexed, marked No.* 21, *or to the like effect*]" (*y*).

(d) *Recovery of Mesne Profits in any Action of Ejectment.*

15 & 16 Vict. c. 76, s. 214. Recovery of Mesne Profits.

By the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 214, "Whenever it shall appear on the trial *of any ejectment* at the suit of a landlord against a tenant that such tenant or his attorney hath been served with due notice of trial, the judge before whom such cause shall come on to be tried shall, whether the defendant shall appear upon such trial or not, permit the claimant on the trial, *after proof of his right to recover possession* of the whole or of any part of the premises mentioned in the writ in ejectment, to go into *evidence of the mesne profits thereof* which shall or might have accrued from the day of the expiration or determination of the tenant's interest in the same down to the time of the verdict given in the cause, or to some preceding day to be specially mentioned therein; and the jury on the trial finding for the claimant, shall in such case give their verdict upon the whole matter, both as to the recovery of the whole or any part of the premises, and also as to the amount of damages to be paid for such mesne profits; and in such case the landlord shall have judgment within the time hereinbefore provided, not only for the recovery of possession and costs, but also for the mesne profits found by the jury: provided always, that nothing hereinbefore contained shall be construed to bar any such landlord from bringing any action for the mesne profits which shall accrue from the verdict, or the day so specified therein, down to the day of the delivery of possession of the premises recovered in the ejectment." This section applies to all actions of ejectment as between landlord and tenant, and is not confined to cases in which security has been given, pursuant to sect. 213. Mesne profits may be recovered under sect. 214, although the writ and issue do not contain any claim in respect of them (*z*).

Proof of Notice of Trial.

If the tenant appear at the trial, that of itself amounts to sufficient proof that due notice of trial has been given, and no further evidence on that point is necessary (*a*).

Optional to Proceed under Sect. 214, or otherwise.

It is optional with the landlord to proceed for mesne profits under this section, or to bring a subsequent action of trespass for mesne profits, &c., or for double value, or double rent (*b*). But where bail has been put in, pursuant to sect. 213, the recognizance

(*y*) Cole Ejec. 385; see form, Id. 719.
(*z*) *Smith* v. *Tett*, 9 Exch. 307.
(*a*) *Doe* d. *Thompson* v. *Hodgson*, 2 Moo. & R. 283; 12 A. & E. 135; Cole Ejec. 292, 388.
(*b*) 15 & 16 Vict. c. 76, s. 218.

is conditioned "to pay the costs *and damages* which shall be recovered by the claimant in the action;" and this will of course include any damages recovered in the ejectment in respect of mesne profits, &c. (*c*).

Former Procedure when Right accrued after certain Terms.

By sect. 217, a special procedure was provided where the right of re-entry into any lands in any county except Middlesex accrued in or after Hilary or Trinity Terms. It would probably be held, since the decision in *The Governors of Christ's College* v. *Martin* (*d*), that the old terms subsist for the purposes of this enactment; and that a landlord may avail himself of the provisions of the section so far as they can be considered as still in force and of advantage to him, but an obligation imposed by the enactment on the tenant to appear within ten days may be taken to be at an end, as in all cases now the appearance by a defendant must be in eight days (*e*). The object of the enactment (*f*) (which was printed at length in former editions of this work) was to enable landlords to proceed to trial at the ensuing assizes, and to prevent tenants and persons claiming through or under them, from wrongfully holding over until the second assizes, which, but for this section, they might have done in many cases.

Object of Sect. 217.

### (e) *Special Proceedings, under Order XIV., against Tenant holding over.*

The Rules of the Supreme Court, 1883 (Order III., Rule 6, and Order XIV.), provide a summary and expeditious procedure, first introduced in 1883, and superseding the procedure under sect. 213 of the Common Law Procedure Act, 1883, above mentioned, for recovery of the demised premises from a tenant holding over.

Special Indorsement of Writ by Landlord against Tenant holding over.

By Order III., Rule 6, "In actions for the recovery of land, with or without a claim for rent or mesne profits, by a landlord against a tenant whose term has expired or has been duly determined by notice to quit, or against persons claiming under such tenant, the writ of summons may, at the option of the plaintiff, be specially indorsed with a statement of his claim," and "such special indorsement shall be to the effect of such of the forms in Appendix C., sect. 4, as shall be applicable to the case."

Meaning of "Landlord."

The word "landlord" in this rule does not extend to the representatives of a landlord, but only includes a landlord party to the contract of tenancy, or a landlord who is such by estoppel, as where the tenant has paid rent to him (*g*).

(*c*) Cole Ejec. 388.
(*d*) *Christ's College Governors* v. *Martin*, 36 L. T. 537.
(*e*) R. S. C., Order II., r. 3; Appendix A., Part I., No. 1.
(*f*) See *Doe* d. *Antrobus* v. *Jepson*, 3 B. & Adol. 402; *Doe* d. *Rankin* v. *Brindley*, 4 B. & Adol. 84.
(*g*) *Casey* v. *Hellyer*, 17 Q. B. D. 97; 55 L. J., Q. B. 207; 34 W. R. 337.

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By Order XIV., Rule 1, a judge at chambers is empowered to make an order for final judgment in the following terms :—

Application for Final Judgment.

Where the defendant appears to a writ of summons specially indorsed under Order III., Rule 6, the plaintiff may on affidavit made by himself or by any other person who can swear positively to the facts, verifying the cause of action and the amount claimed, if any, and swearing that in his belief there is no defence to the action, apply to a judge for liberty to enter final judgment for recovery of the land (with or without rent or mesne profits, as the case may be, and costs). The judge may thereupon, unless the defendant by affidavit or otherwise shall satisfy him that he has a good defence to the action on the merits, or disclose such facts as may be deemed sufficient to entitle him to defend, make an order empowering the plaintiff to enter judgment accordingly.

By Order XIV., Rule 7 (Rule 5 of the "Rules of the Supreme Court, 1885,") "the court or a judge may with the consent of all parties, dispose of the action finally and without appeal in a summary manner, and on such terms as to costs or otherwise as the court or judge shall think just."

By Rule 2 of Order XIV., the application for leave to sign final judgment must be made by summons returnable not less than four clear days after service, accompanied by a copy of the affidavit and exhibits referred to therein. By Rule 3, the defendant may show cause against the application by affidavit, stating whether the defence goes to the whole or to part only of the claim, and the judge may order the defendant to attend and to be examined upon oath or to produce any leases or other documents. By Rule 4, judgment may be given for part of the claim, and by Rule 5, against one defendant only without prejudice to a right of action against others. By Rule 6, leave to defend may be given unconditionally or on terms as the judge may think fit.

Leave to Defend.

To what Cases the Procedure applies.

The procedure under Order XIV. applies only to cases where a tenancy has been determined either by effluxion of time or by notice to quit, which notice may have been given either by the landlord or the tenant. It does not apply to a determination by forfeiture (*h*) or surrender (*i*), but it has been held to apply to a contract of tenancy created between mortgagor and mortgagee and determined by the mortgagee (*k*). This was held in *Daubuz* v. *Lavington*, a case afterwards followed with approval in *Hall* v. *Comfort* (*l*), in which the mortgagor had attorned tenant to the mortgagee, and it was also provided that the mortgagee might at any time after a certain day (being six months from the date of the mortgage deed) enter upon the premises demised by way of mortgage, and determine the tenancy thereby created without giving notice to quit.

Demise by way of Mortgage.

(*h*) See *Cundley* v. *Sharpley*, 15 M. & W. 58.
(*i*) See *Doe* d. *Tindal* v. *Roe*, 2 B. & Ad. 922.
(*k*) *Daubuz* v. *Lavington*, 13 Q. B. D. 347 ; 51 L. T. 206.
(*l*) *Hall* v. *Comfort*, 18 Q. B. D. 11 ; 56 L. J., Q. B. 185 ; 55 L. T. 550 ; 35 W. R. 48.

Where a special indorsement of a writ as claiming mesne profits is good in itself it is not invalidated by a statement setting up a claim for double value to the same amount in the affidavit filed in support of an application for final judgment under Order XIV. (*m*); and inasmuch as under section 214 of the Common Law Procedure Act, 1852 (ante, p. 842), the Court may give mesne profits down to verdict, and the landlord's right to sue for mesne profits from verdict down to delivery of possession is expressly reserved, there is jurisdiction on a writ specially indorsed with a claim for recovery of land and mesne profits, to make an order giving the landlord possession of the land and mesne profits to be calculated up to the date of his obtaining possession (*mm*).

(f) *Proceeding by Ordinary Action.*

Ascertain clearly Right of Entry.

If neither s. 210 of the C. L. P. Act, 1852 (ante, p. 837), nor s. 213 of that act (ante, p. 839), nor Order XIV. (supra) should apply, or if leave to defend should be given to the tenant under Order XIV., the landlord will have to proceed by ordinary action, before commencing which he should ascertain clearly that he has a right of entry, i.e. a legal right to actual possession of the property, and not merely a right to the reversion and its incidents, such as rent, &c. A mere breach of covenant is not sufficient to support an ejectment, unless the lease or agreement contains a proviso for re-entry applicable to such covenant, but the remedy is only by action for damages (*n*).

Demand of Possession before Action.

Sometimes a demand of possession is necessary before an ejectment can be maintained (*o*), although the defendant is not entitled to the usual notice to quit. This happens when the defendant is, by construction of law or otherwise, a tenant at will to the plaintiff, and such tenancy has not been legally determined (*p*).

Notice, under Conveyancing Act, before proceeding for Forfeiture.

If the action be intended to be brought upon a forfeiture for a breach of covenant *other than the covenants to pay rent*, or *against alienation*, or, *in a mining lease, for inspection of books*, or upon a forfeiture *for a bankruptcy* or *an execution*, a notice must be served on the tenant and other persons interested before bringing it. This very important condition is imposed by sect. 14, sub-sect. (1), of the Conveyancing Act, 1881, 44 & 45 Vict. c. 41 (*q*), in the following terms :—

"A right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease shall not be enforceable by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and if

(*m*) *Southport Tramways Co.* v. *Gandy*, [1897] 2 Q. B. 66 ; 66 L. J., Q. B. 532 ; 76 L. T. 815 ; 45 W. R. 684—C. A.

(*mm*) Ib.

(*n*) Lit. s. 325 ; *Doe* d. *Wilson* v. *Phillips*, 2 Bing. 13.

(*o*) See form of such demand, post, Appendix, C., Sect. 9 ; but it need not be in writing.

(*p*) See ante, 240.

(*q*) See the section at length, ante, 349, Chap. VIII., Sect. 6, sub-s. (b), and see it for the definitions of lessee, &c., the exceptions for the covenant to pay rent, &c., the manner of the service of the notice, &c.

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the breach is capable of remedy requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach."

Procedure as in other Actions, With certain Exceptions.

The procedure in an "action of ejectment," or, as it is now called, "an action for the recovery of land," is the same, for the most part, as that in use in ordinary actions. There are, however, some points in which this action is peculiar, and these will be duly noticed, and it may be well to call attention to some few details as to the writ under the old practice.

Writ to have Names of Defendants.

The writ should be directed to the persons in possession by name (*r*). The christian and surname or title of dignity (*s*) of each person in possession as *tenant or sub-tenant* of all or any part of the property claimed, should be correctly stated. But the court, even under the old practice, refused to set aside the writ, or the copy and service, when the writ was faulty by reason only of a misnomer (*t*).

Effect of Misnomer.

Only Tenants and Sub-tenants in Possession to be named.

Only persons in possession as tenants or sub-tenants should be named as defendants in the writ. Generally speaking, the occupation of a servant is considered as the occupation of his master by his servant (*u*). But the servant of a deceased tenant may so act as to render himself liable to be sued personally in an ejectment (*v*); and if he appear to the writ it will be no defence that he occupied merely as the servant of another person (*x*).

Tenants who have Sub-let.

If there be a tenant in possession who occupies by a sub-tenant, the former *may* be named in the writ as one of the defendants (*y*); but it is sufficient to name the sub-tenant, leaving him to give notice of the writ to his immediate landlord, pursuant to 15 & 16 Vict. c. 76, s. 209.

Vacant Possession.

If the possession of the premises is *vacant*, the writ should be directed to the person who would have been tenant in possession if he had not abandoned the possession (*z*). If he be dead, the writ should be directed, not to him, but to his executors or administrators (*a*). If

(*r*) See the repealed s. 168 of the C. L. P. Act, 1852.

(*s*) Titles of dignity should be thus stated, viz.: The Most Noble A., Duke of B.; The Most Honorable C., Marquis of D.; The Right Honorable E., Earl of F.; The Right Honorable G., Viscount H.; The Right Honorable J., Baron K.; The Right Honorable L. M. [this is applicable to members of Her Majesty's Privy Council]; The Honorable N. O. [Sons of Peers]; Sir P. Q., Baronet; Sir R. S., Knight; and the like. The title or addition of M.P., or Esquire, need not be given, but may sometimes be added by way of courtesy.

(*t*) *Doe* d. *Stanton* v. *Roe*, 6 M. & S. 203; *Wells* v. *Ld. Suffield*, 4 C. B. 750; 5 D. & L. 177.

(*u*) *Becke* v. *Beaumont*, 16 East, 33; *Mayhew* v. *Suttle*, 4 E. & B. 347.

(*v*) *Doe* d. *Atkins* v. *Roe*, 2 Chit. R. 179; *Doe* d. *Cuff* v. *Stradling*, 2 Stark. 537.

(*x*) *Doe* d. *James* v. *Stanton*, 2 B. & A. 371; 1 Chit. R. 143.

(*y*) *Roe* v. *Wiggs*, 2 Bos. & P., N. R. 330.

(*z*) Id. 85.

(*a*) *Doe* d. *Crouch* v. *Roe*, 13 L. J., Q. B. 80; *Doe* d. *Pamphilon* v. *Roe*, 1 Dowl., N. S. 186.

there be no rightful executor or administrator, an executor de son tort, *who has taken possession*, may be sued (*b*).

The property claimed should be described in the writ with reasonable certainty (*c*), but a general description will usually be sufficient.

Description of the Property.

The form of indorsement given in the Rules of the Supreme Court is as follows :—

Indorsement of Writ.

"The plaintiff's claim is to recover possession of a house, No.——, in —— Street [*or of a farm called Blackacre*], situate in the parish of ——, in the county of ——" (*d*).

Parish and County.

The parish and county wherein the property lies should be correctly stated. The prescribed form above given says "in the parish of ——, in the county of ——." If any mistake be made, an amendment will generally be permitted at the trial, unless it appear that the defendant has been actually misled or prejudiced by the misdescription (*e*).

Names of Claimants.

The writ should state correctly the names of all the persons in whom the title is alleged to be: but the Rules of the Supreme Court give "the court or a judge" ample powers for adding parties at any stage of the proceedings (*f*), and for allowing one or more of many parties having the same interest to sue on behalf of all (*g*). The writ need not attempt to distinguish whether all or any of the plaintiffs claim jointly or severally.

Joinder of Claim for Mesne Profits, &c.

The plaintiff cannot, without leave of the court or a judge, join any cause of action with an action for the recovery of land, except claims in respect of mesne profits or arrears of rent or double value in respect of the premises claimed, or any part thereof, and damages for breach of any contract under which the same or any part thereof are held, or for any wrong or injury to the premises claimed (*h*).

The application for leave to join another cause of action must be made before the issue of the writ (*i*).

Service of Writ.

The writ must be served in the same way as in other actions, except where the possession is vacant, in which case service may, "when it cannot otherwise be effected, be made by posting a copy of the writ upon the door of the dwelling-house or other conspicuous part of the property" (*k*).

(*b*) See note (*a*) on p. 846.
(*c*) See the repealed s. 168 of the C. L. P. Act, 1852.
(*d*) R. S. C., Appendix A., Part III., Sect. 4.
(*e*) See *Doe* d. *Marritt* v. *Edwards*, 1 Moo. & R. 319; 6 C. & P. 208.
(*f*) R. S. C., Ord. XVI., r. 13.
(*g*) Id. r. 9. And see *Blake* v. *Done*, 31 L. J., Ex. 100.
(*h*) R. S. C., Ord. XVII., r. 2. For instances in which joinder of other causes of action have been allowed, see *Tawell* v. *The Slate Co.*, 3 Ch. D. 629; *Whetstone* v. *Davis*, 1 Ch. D. 99; 45 L. J., Ch. 49; *Cook* v. *Enchmarsh*, 2 Ch. D. 111; 45 L. J., Ch. 504; *Allen* v. *Kennet*, 24 W. R. 845; *Kitching* v. *Kitching*, 24 W. R. 901.
(*i*) *Pilcher* v. *Hinds*, 11 Ch. D. 905; 48 L. J., Ch. 587—C. A.
(*k*) R. S. C., Ord. IX. r. 9.

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When the property is within the jurisdiction of the High Court of Justice, an order may be made allowing the writ to be served on a defendant out of the jurisdiction (*l*).

Substituted service may be allowed in some cases (*m*).

Service on several Defendants.

Generally speaking, each defendant should be served separately. But where several defendants are in possession as joint tenants, and that is distinctly shown by affidavit, service on any one of them of a writ in the old form has been held to be sufficient (*n*).

On Executors.

Therefore, also, service on one of several executors is sufficient, provided the affidavit shows them to be joint tenants in possession as such executors (*o*).

On Parish Officers.

Churchwardens and overseers are not considered as joint tenants, and therefore each must be served separately (*p*).

On Companies.

The writ if issued against a corporation aggregate should be served on the mayor or other head officer, or on the town clerk or secretary, or if a special act provide a special manner of service, then in the manner authorized by such special act (*q*).

Where vacant Possession.

We have already seen that there is a special provision for service in the case of vacant possession ; but it must not be supposed that the possession of land is "vacant" merely because nobody happens to be upon it at the time of issuing or serving the writ. That frequently happens when there is a tenant in possession. There may be a legal or constructive possession without any actual occupation, or during the tenant's absence (*r*). If he has left any of his goods or chattels on the premises, or any part thereof—ex. gr. beer in a cellar, or hay in a barn—he thereby virtually retains possession of the premises, and it would be improper to proceed in ejectment as in case of a vacant possession, especially if his place of residence be known (*s*). But if the affidavit show that the person named as defendant in the writ was recently in possession as tenant of the premises sought to be recovered, and that he has since abandoned and deserted the possession of them, and cannot be served, personally or otherwise, with a copy of the writ, and that nobody was in or upon the premises, or any part thereof, at the time when a copy of the writ was posted upon the door of the dwelling-house or other conspicuous part of the property, service in the special form will probably suffice.

(*l*) R. S. C., Ord. XI., r. 1. And see *Daniel* v. *Woodroffe*, 7 Dowl. 494, where *personal* service out of the jurisdiction was held to be sufficient.

(*m*) R. S. C., Ord. IX., r. 2. See, too, *Doe* v. *Roe*, 1 D. & R. 514 ; *Doe* d. *Harrison* v. *Roe*, 10 Price, 30.

(*n*) *Doe* d. *Overton* v. *Roe*, 9 Dowl. 1039 ; *Doe* d.—— v. *Roe*, 1 D. & L. 873 ; *Doe* d. *Bennett* v. *Roe*, 7 C. B. 127.

(*o*) *Doe* d. *Strickland* v. *Roe*, 4 D. & L. 431 ; 1 Bail. C. C. 210 ; *Doe* d. *Paul* v. *Hurst*, 1 Chit. R. 162.

(*p*) *Doe* d. *Weeks* v. *Roe*, 5 Dowl. 405.

(*q*) R. S. C., Ord. IX., r. 8. See the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 135 ; the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 138 ; the Commissioners Clauses Act, 1847 (10 & 11 Vict. c. 16), s. 90.

(*r*) See *Doe* d. *Burrows* v. *Roe*, 7 Dowl. 326 ; *Doe* d. *Johnson* v. *Roe*, 12 L. J., Q. B. 97.

(*s*) *Savage* v. *Dent*, 2 Stra. 1064 ; 1 Chit. R. 506, n.

By the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, s. 202, tenants to whom a writ in ejectment are required to give notice thereof to their landlords, in the following terms:—

Notice of Ejectment to Defendant's Landlord.

Every tenant to whom any such writ in ejectment shall be delivered, or to whose knowledge it shall come, shall forthwith give notice thereof (*t*) to his landlord, or to his bailiff or receiver, under penalty of forfeiting the value of three years' improved or rack-rent of the premises demised or holden in the possession of such tenant, to the person of whom he holds, to be recovered by action in any court of common law having jurisdiction for the amount.

In such action the plaintiff, being considered as a "party grieved," may recover the above penalty, together with full costs of suit.

There is a corresponding enactment in s. 140 of the County Courts Act, 1888 (p. 868, post), which exactly reproduces s. 53 of the repealed County Courts Act, 1856.

Of course when the claimant in the ejectment is the immediate landlord of the defendant, no such notice need be given.

Appearance by Defendants named in the Writ.

Any person *named* as a defendant in the writ may appear within the time appointed. His right to do so cannot be questioned upon a summary application to strike out or set aside the appearance, founded upon an affidavit stating that he is not in possession, by himself, or his tenants, of any part of the property claimed, as that would be to allow the plaintiff to contradict his own statement made by his having named the person in question as a defendant to the action, and would amount to trying the whole question on affidavits (*u*). But, if he defend for more than he is in possession of by himself or his tenants, an application may be made to confine his appearance and defence.

Any person named in the writ may defend not only for the land in his own possession, but also for other land claimed in the writ and in the possession of his tenants, whether the latter be named in the writ or not (*x*).

By Servant of Tenant.

If a mere servant, bailiff or other person having no title be named as a defendant in the writ, and served with a copy, he should not appear; for he may be personally liable as a trespasser, and his capacity of servant, &c. will afford no defence, and he may be condemned in the costs of the action (*y*). He should hand over the copy writ to his employer, and leave him to defend or not as he may think fit. If judgment be signed against him for want of appearance no costs will be recoverable (*z*); except, perhaps, as damages in a subsequent action of trespass for mesne profits, &c. (*a*);

(*t*) See Form, post, App. C., No. 24.
(*u*) *Doe* d. *Turner* v. *Gee*, 9 Dowl. 612.
(*x*) Cole Ejec. 123.
(*y*) *Doe* d. *Cuff* v. *Stradling*, 2 Stark. 187; *Doe* d. *James* v. *Stanton*, 2 B. & A. 371.
(*z*) Gray on Costs, 196.
(*a*) Cole Ejec. 339.

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nor will the judgment be any evidence in such subsequent action that the party served with the writ, and who suffered judgment by default, was in actual possession of the land either as a tenant or trespasser, at the time of such service or judgment (*b*).

Appearance by Persons not named.

Any person not named as a defendant in the writ of summons may, by leave of the court or a judge, appear and defend on filing an affidavit showing that he is in possession of the land either by himself or his tenant (*c*). Any person appearing to defend an action for the recovery of land as landlord, in respect of property whereof he is in possession only by his tenant, must state in his appearance that he appears as landlord (*d*).

Court will exercise Discretion in allowing such Appearance.

Nice questions of title will not be entered into on such application to appear under these rules; but nevertheless the court, or judge or master, will exercise some discretion in granting or refusing the application (*e*). Where a person claims in opposition to the title of the tenant in possession, he can in no light be considered as his landlord, and should not be allowed to be a co-defendant with the tenant (*f*). Where it is shown that the tenant obtained possession from the claimant, a third person claiming adversely will not be permitted to defend as landlord of such tenant (*g*). So where the tenant obtained possession from a person through whom the plaintiff claims, and such tenant has attorned and paid rent to the plaintiff, even subsequent to the commencement of the ejectment, a third person claiming adversely, and wishing to shift the burden of proof, will not be permitted to appear and defend as landlord of the tenant in possession (*h*). But the word "landlord" extends to all persons claiming title consistent with the possession of the occupier, whether he has actually received any rent or not (*i*). It seems that a mortgagee may defend as landlord of the mortgagor whom he has permitted to remain in possession (*k*). But a mortgagee, who has no interest in the result of an ejectment, ought not to be put forward merely to serve the purposes of the mortgagor or his tenant in possession (*l*). In an ejectment by a lessor against a lessee for a forfeiture for breaches of covenant, an elegit creditor of the lessee who has not obtained actual possession under the writ, nor receipt of any rent, will not be permitted to appear, he not being in possession by himself or his tenant within the meaning of the act (*m*). Two persons claiming separately will

(*b*) Id. 124, 642.
(*c*) R. S. C., Ord. XII., r. 25.
(*d*) Id. r. 19.
(*e*) *Butler* v. *Meredith*, 11 Exch. 85, 94; *Whitworth* v. *Humphries*, supra.
(*f*) *Fairclaim* d. *Fowler* v. *Shamtitle*, 3 Burr. 1295.
(*g*) *Doe* d. *Horton* v. *Rhys*, 2 Y. & J. 88.
(*h*) *Whitworth* v. *Humphries*, supra.
(*i*) *Lovelock* d. *Norris* v. *Doncaster*, 4 T. R. 122; *Doe* d. *Hebblethwaite* v. *Roe*, cited 3 T. R. 783.
(*k*) *Doe* d. *Tilyard* v. *Cooper*, 8 T. R. 645.
(*l*) *Doe* d. *Pearson* v. *Roe*, 6 Bing. 613.
(*m*) *Croft* v. *Lumley*, 4 E. & B. 614; 24

not be permitted to defend as landlords of the same tenant for the same land (*n*). But one person may, it would seem, defend as landlord of the whole premises, and another as assignee of a sub-lease of part (*o*).

A person not named as a defendant in the writ, but who is in possession by himself or his tenant, will be allowed to appear and defend without giving security for costs, notwithstanding he resides abroad (*p*).

Notice of Appearance by Person not named in Writ.

Where a person not named as defendant in the writ of summons has obtained leave of the court or judge to appear and defend, he must enter an appearance according to the ordinary rule (*q*), "intituled in the action against the party named in the writ as defendant, and shall forthwith give notice of such appearance to the plaintiff's solicitor, or to the plaintiff if he sues in person, and shall in all subsequent proceedings be named as a party defendant in the action" (*r*).

Defences as Landlord.

When a person appears as "landlord" of a particular tenant in possession, he is at liberty to set up any defence which such tenant might have set up had he appeared to the action, except the want of a notice to quit from the claimant to the tenant in possession, who has suffered judgment by default (*s*). Whatever estoppels from disputing the claimant's title would have bound the tenant in possession will bind him equally (*t*), whether by act in pais or by admissions of the tenant (*u*).

Defence for Part only of Land claimed.

"Any person appearing to a writ of summons for the recovery of land shall be at liberty to limit his defence to a part only of the property mentioned in the writ, describing that part with reasonable certainty in his memorandum of appearance, or in a notice intituled in the cause, and signed by him or his solicitor. Such notice shall be served within four days after appearance; and an appearance where the defence is not limited as above-mentioned shall be deemed an appearance to defend for the whole" (*x*). If one of several defendants, who has a good defence as to part only, joined in defending for the whole, he will thereby render himself liable to the general costs of the suit, if the claimant recover any part (*y*). It is, therefore, most important for such a defendant to give a

L. J., Q. B. 78, 80; *Thompson* v. *Tomkinson*, 11 Exch. 442.

(*n*) *Doe* d. *Lloyd* v. *Roe*, 15 M. & W. 431.

(*o*) See *Chester* v. *Wortley*, 17 C. B. 410.

(*p*) *Butler* v. *Meredith*, 11 Exch. 85; 24 L. J., Ex. 239; overruling *Doe* d. *Hudson* v. *Jameson*, 4 M. & R. 570.

(*q*) R. S. C., Ord. XII., rr. 1—15.

(*r*) Id. r. 27.

(*s*) *Doe* d. *Davis* v. *Creed*, 5 Bing. 327.

(*t*) *Doe* d. *Knight* v. *Lady Smythe*, 4 M. & S. 347; *Doe* d. *Manners* v. *Mizen*, 2 Moo. & R. 56; *Doe* d. *Willis* v. *Birchmore*, 9 A. & E. 662.

(*u*) *Doe* d. *Mee* v. *Sutherland*, 4 A. & E. 784.

(*x*) R. S. C., Ord. XII., r. 21. 2. 28.

(*y*) *Doe* d. *Bishton* v. *Hughes*, 5 Tyr. 957; 4 Dowl. 412; Cole Ejec. 128.

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proper notice in due time. Any defendant who defends for part only *and fails*, is liable, with the other defendants, to all the plaintiff's costs (*z*).

A form of notice limiting a defence is given in the Appendix A. to the Rules of the Supreme Court (*a*).

Form of Notice for.

Default of Appearance.

"In case no appearance shall be entered within the time limited for appearance, or if an appearance be entered but the defence be limited to part only, the plaintiff shall be at liberty to enter a judgment that the person whose title is asserted in the writ shall recover possession of the land or of the part thereof to which the defence does not apply" (*b*), and affidavit of service of writ must be filed before judgment can be so entered (*c*).

Procedure upon Claim for Recovery of Land and also for Mesne Profits.

If the plaintiff has indorsed on his writ a claim for mesne profits, arrears of rent or damages for breach of contract, he may still enter judgment for possession as if that was the only subject-matter of his claim, and proceed for the rest of the claim as in ordinary cases (*d*). It was formerly the rule that, in such a case, no costs should be recovered under the judgment, but that they might be recovered in a subsequent action for mesne profits, &c. (*e*). And this would seem to be still the case, as the rule of court, unlike those relating to judgment for want of appearance, in money claims, is silent as to costs. But under Order LXV. of the Rules of the Supreme Court, a judge would have power to grant costs on a special application for that purpose.

Venue.

The venue in actions of ejectment was formerly local, but local venues are now abolished, the plaintiff being at liberty to propose any place at which the court sits for trial of the action, subject to alteration by order of a judge, which order may be discharged or varied by a divisional court (*f*).

Particulars.

The statement of claim should contain such particulars as will avoid the necessity of the defendants making any special application for particulars.

Defendant in Possession not to plead Title.

The defendant, if in possession, need not plead his title, R. S. C., Order XXI., rule 21, prescribing that:—

No defendant who is in possession by himself or his tenant need plead his title, unless his defence depends upon an equitable estate or right, or he claims relief upon any equitable ground against any right or title asserted by the plaintiff. But except in the cases hereinbefore mentioned, it shall be sufficient to state by way of defence that he is so in possession, and it

(*z*) *Johnson* v. *Mills*, L. R., 3 C. P. 22; 37 L. J., C. P. 57.

(*a*) R. S. C., Ord. XII., r. 29, Appendix A., Part II., Form No. 3.

(*b*) R. S. C., Ord. XIII., r. 8.

(*c*) Id. r. 2.

(*d*) R. S. C., Ord. XIII., r. 9.

(*e*) *Doe* v. *Davies*, 1 Esp. 358; 5 R. R. 745; *Doe* v. *Huddart*, 2 C., M. & R. 316; 4 Dowl. 437; *Grace* v. *Morgan*, 2 Bing. N. C. 554.

(*f*) R. S. C., Ord. XXXVI., r. 1.

shall be taken to be implied (*g*) in such statement that he denies or does not admit the allegations of fact contained in the plaintiff's statement of claim.

Pleading.

Specimens of pleadings in an action for the recovery of land by a landlord from his tenant may be found in the Appendix to the Rules of the Supreme Court (*h*).

Application for Relief against Forfeiture.

The defendant may either in the plaintiff's action or in any action brought by himself apply to the court for relief against a forfeiture incurred otherwise than by non-payment of rent under s. 14 of the Conveyancing Act, which section has been already set out and commented on (ante, p. 349). If the forfeiture be for non-payment of rent, relief may be granted under the Common Law Procedure Act, 1860, s. 1 (ante, p. 356), either before or after trial.

Counterclaim.

The defendant may set up any counterclaim, but the court or a judge may order the claim and counterclaim to be separately tried (*i*).

Discovery.

In *Wallen* v. *Forrestt* (*k*), a tenant holding over was not allowed, in an action of ejectment by the landlord, to interrogate him as to whether his title had expired. The defendant in an action for possession of demised premises on forfeiture for breach of covenant may be ordered to make an affidavit of documents, but may refuse to disclose any documents which would establish the case of forfeiture against him (*l*).

Want of Prosecution.

If a plaintiff who is bound to deliver a statement of claim fails to do so, the defendant may apply for judgment dismissing the action with costs for want of prosecution (*m*).

Default in Pleading by Defendant.

If a defendant is in default with his pleading, the plaintiff may enter a judgment, that the person whose title is asserted in the writ of summons shall recover possession of the land with his costs (*n*). If a claim for mesne profits, &c. be added in the writ, the plaintiff may have judgment for them, and an inquiry, if required, as to the amount as in other actions for pecuniary debts or damages (*o*).

Non-appearance of a Party at Trial.

Formerly in the event of the defendants not appearing at the trial, the plaintiff was entitled to judgment in ejectment without proof (*p*), but had to prove his claim for mesne profits, &c. as in other undefended actions. Under the present practice there is only one rule applying to all actions, viz. "If when an action is called on for trial, the plaintiff appears and the defendant does not appear, then the plaintiff may prove his claim, so far as the burden of proof lies upon

(*g*) This implication is in affirmance of *Danford* v. *McAnulty*, 8 App. Cas. 456; 52 L. J., Q. B. 652; 49 L. T. 207.

(*h*) R. S. C., Appendix C., Sect. vii.; and see post, Appendix E., Sect. 2 (b).

(*i*) R. S. C., Ord. XXI., r. 15.

(*k*) *Wallen* v. *Forrestt*, L. R., 7 Q. B. 239.

(*l*) *Seaward* v. *Donnington*, 44 W. R. 696—C. A.

(*m*) R. S. C., Ord. XXVII., r. 1.

(*n*) Id. r. 7.

(*o*) Id. r. 8, and rr. 2—6.

(*p*) 15 & 16 Vict. c. 76, s. 183.

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him" (*q*). If "the defendant appears and the plaintiff does not appear, the defendant, if he has no counterclaim, shall be entitled to judgment dismissing the action; but if he has a counterclaim, then he may prove such claim so far as the burden of proof lies upon him" (*r*).

Number of Counsel heard.

Only one counsel will be allowed to address the jury on behalf of the claimants, whether they claim under the same or distinct titles (*s*): but, of course, one may open the case, and another sum up the evidence, as may be arranged between them. Only one counsel will be allowed to address the jury on behalf of the defendants except where they appear to the action and defend *separately* in respect of different parts of the property, or under distinct titles (*t*): but the counsel for each defendant who defends separately may cross-examine the plaintiff's witnesses, and may also produce and examine witnesses for his own client (*t*); and it seems that the counsel for one defendant may open the defence, and the counsel for another sum up the evidence, as may be arranged between them.

Right to begin.

The claimant is generally entitled to begin, because the onus of proof lies on him to show his title: but the defendant will be allowed to begin upon admitting the whole of the plaintiff's case (i.e. each and every link of his title), and relying upon a totally distinct title (*u*).

Evidence for Plaintiff, Proof of Title.

Proof of a sufficient title in any one or more of the claimants will support the action, either for the whole or for part of the property, according to the evidence (*x*). But where a title is shown to less than the whole, the evidence for the claimants must show to what particular part or share they are entitled; the onus of proof on this point lies on them (*y*), and the defendant is entitled to have a verdict entered for him as to such part, or the residue, to which no such title is shown (*z*).

What kind of Title may be proved.

The claimants must either prove a title by estoppel (*a*), or a legal title to actual possession of the property claimed, or some part or share thereof; and it must appear that such title was vested in them, or some or one of them (*b*), on the day mentioned in the writ (*c*), and from thence until the writ was served (*d*).

(*q*) R. S. C., Ord. XXXVI., r. 31.
(*r*) Id. r. 32.
(*s*) *Doe* d. *Fox* v. *Bromley*, 6 D. & R. 292, 294.
(*t*) *Doe* d. *Hogg* v. *Tindall*, 3 C. & P. 565; Moo. & M. 314.
(*u*) *Doe* d. *Bather* v. *Brayne*, 5 C. B. 655.
(*x*) See, for example, *Doe* d. *Rowlanson* v. *Wainwright*, 5 A. & E. 520: *Elliss* v. *Elliss*, E., B. & E. 81; 27 L. J., Q. B. 316; *Lloyd* v. *Davis*, 15 C. B. 76, 79.
(*y*) *Doe* d. *Hellyer* v. *King*, 6 Exch. 791; 2 Low, M. & P. 493; *Doe* d. *Bowman* v. *Lewis*, 13 M. & W. 241; 2 D. & L. 667.
(*z*) *Alcock* v. *Wilshaw*, 2 E. & E. 633; 29 L. J., Q. B. 143; *Owen* v. *Owen*, 3 H. & C. 89, 95; 33 L. J., Ex. 237.
(*a*) *Doe* d. *Bord* v. *Burton*, 16 Q. B. 807.
(*b*) Supra (*x*).
(*c*) Cole Ejec. 94, 288.
(*d*) *Doe* d. *Gardner* v. *Kennard*, 12 Q. B. 244; *Newby* v. *Jackson*, 1 B. & C. 454.

The claimant's evidence must show a legal right to actual possession. The claimant must generally recover upon the strength of his own title, and not upon any weakness or defect in the defendant's title (*e*). But, as between landlord and tenant, the evidence is generally of a title by estoppel.

Commencement of Title.

The claimant's title to actual possession must be shown to have accrued on or before the day on which possession is claimed in the writ. Therefore, where the defendant was tenant at will, it must appear that the will was determined on or before the day mentioned in the writ (*f*). It is, however, sufficient that the claimant's right of entry accrued on the very day on which possession is claimed in the writ, even in an action for a forfeiture (*g*). But the claimant's title must be shown to have continued down to and until the service of the writ (*h*). If the day be erroneously stated in the writ prior to that on which the claimant's title accrued, the judge at nisi prius may, if he thinks fit, allow the date to be amended, even in an action for a forfeiture (*i*). But this, of course, is in the discretion of the judge (*k*).

Evidence of the Lease or Agreement.

In ejectment between landlord and tenant, or their respective representatives, the claimant must always prove the lease or agreement in writing (if any), or the oral contract, under which the defendant, or the person through whom he claims, held possession.

The claimant must prove that the lessee had possession of the premises sought to be recovered, or some part thereof, under or by virtue of the lease or agreement in writing, or of the oral letting, as the case may be.

Encroachments.

Encroachments may be recovered together with and as part of the demised premises; or if all the premises originally demised have been delivered up to the landlord, they may be recovered separately (*l*): and they may be so recovered at any time within the period limited for the recovery of the demised premises, i.e. within twelve years (*m*) after the expiration of the term. But an encroachment made by the tenant before the commencement of his tenancy cannot be recovered (*n*).

Assignment of the Term to the Defendant.

If the defendant be not the lessee, it must be proved that he came into possession under or after the lessee. Such evidence (in the absence of proof to the contrary) will show that he entered

(*e*) See Cole on Ejec. 87.
(*f*) *Goodtitle* d. *Galloway* v. *Herbert*, 4 T. R. 680; *Doe* d. *Jacobs* v. *Phillips*, 10 Q. B. 130.
(*g*) See *Doe* d. *Graves* v. *Wells*, 10 A. & E. 427.
(*h*) See note (*e*), supra.
(*i*) *Doe* d. *Edwards* v. *Leach*, 3 M. & G. 229; 9 Dowl. 877; *Doe* d. *Simpson* v. *Hall*, 5 M. & G. 795; 1 D. & L. 49.
(*k*) See *Doe* d. *Loscombe* v. *Clifford*, 2 C. & K. 448.
(*l*) *Andrews* v. *Hailes*, 2 E. & B. 349.
(*m*) 37 & 38 Vict. c. 57.
(*n*) *Dixon* v. *Baty*, L. R., 1 Ex. 259; 14 W. R. 836.

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into possession as assignee of the term (*o*). Proof that the defendant has on his own account paid some of the rent reserved by the lease or agreement, would be strong evidence of his being such assignee.

Assignment of the Reversion to the Claimant.

If the claimant be not the lessor, his title to the reversion must be deduced and proved by the production of proper conveyances of the reversion. But if it be shown that the defendant has paid to the plaintiff some of the rent reserved by the lease or agreement, or that he has submitted to a distress made by the plaintiff for such rent, and so in effect admitted his title, that will be sufficient, as he will be estopped from denying the title of a person whom he has treated as his landlord (*p*).

Where a forfeiture is relied on, it must appear that the reversion was assigned to and became vested in the claimant before such forfeiture (*q*); and that the proviso for re-entry extends to the claimant as such assignee (*r*). Before the Conveyancing Act, if "assigns" were mentioned, but not heirs or executors, it seems that the assigns could take advantage of the condition only during the lessor's life, but not afterwards (*s*); but the Conveyancing Act appears to have altered the law in this respect (*t*).

The Right of Entry.

It must appear that on or before the day mentioned in the writ of ejectment the term or tenancy expired by effluxion of time, or that it was duly determined by notice, by an act causing a forfeiture, or otherwise, as the case may be (*u*). The forfeiture (if any) must have accrued on or before the day mentioned in the writ of ejectment, and whilst the claimant was the owner of the reversion.

Mesne Profits.

If the claimant seek to recover mesne profits he must prove—1. His right to recover possession of the whole or part of the premises mentioned in the writ. No mesne profits are recoverable in an ejectment, except as between landlord and tenant. It is optional with the landlord whether he will seek to recover in the ejectment any mesne profits. Such option may be exercised at the trial without any previous notice in that behalf (*x*); but the writ must have been indorsed with a claim for mesne profits (*y*). 2. The value of the mesne profits from the day of the expiration or determination of the defendant's interests in the same, down to the time of the verdict, or to some preceding day to be specially mentioned therein, must be proved as in an action for mesne profits.

(*o*) *Doe* d. *Morris* v. *Williams*, 6 B. & C. 41; *Doe* d. *Hindley* v. *Rickarby*, 5 Esp. 4; *Rees* d. *Mears* v. *Perrott*, 4 C. & P. 230.

(*p*) See ante, 225; and *Cooke* v. *Loxley*, 5 T. R. 4; 2 R. R. 521.

(*q*) See in *Hunt* v. *Bishop*, 8 Exch. 675, 680; 9 Id. 635.

(*r*) Cole Ejec. 404, 405.

(*s*) Co. Litt. 215 b, n. (1).

(*t*) See s. 10 of the act, p. 267.

(*u*) Ante, Chap. VIII.

(*x*) *Smith* v. *Tett*, 9 Exch. 307.

(*y*) See R. S. C., App. A., Part III., Sect. iv.

It is generally advisable for a landlord to take a verdict for the mesne profits where the defendant appears at the trial, and has previously given bail "to pay the costs *and damages* which shall be recovered by the claimants in the action," pursuant to 15 & 16 Vict. c. 76, s. 213 (*z*). But where the defendant does not appear at the trial, the claimant seldom offers proof of his title, &c. for the mere purpose of recovering mesne profits. He may, however, do so, and sometimes with advantage, especially where bail has been given as above mentioned.

Evidence for Defendant.

The defendant may prove that his tenancy has not expired, or been duly determined by notice to quit or otherwise; or that a new tenancy has since been created, either expressly or impliedly by the payment and acceptance of rent due at a later period (*a*). If a forfeiture be relied on, the defendant may not only dispute the sufficiency of the claimant's evidence on that point, and also produce contradictory evidence, but he may also (if he can) prove a waiver of such forfeiture, with full knowledge thereof (*b*). But this evidence will not avail where there has been a continuing breach after such waiver (*c*). If the ejectment be for non-payment of rent the defendant may prove payment of such rent, or of all the arrears except less than one half-year's rent; or that there was a sufficient distress on the demised premises, or some part thereof, to countervail all the arrears due, and that such distress might have been found with reasonable diligence (*d*). But such proof will not avail if a strict demand of the rent according to the rules of the common law be proved (*e*); or such formal demand be dispensed with by the terms of the proviso for re-entry contained in the lease (*f*).

When Tenant can deny Landlord's Title.

Generally speaking, as we have seen in discussing the modes of estoppel (*g*), a tenant and any person claiming through or under him is estopped from disputing the landlord's title to demise; but he may show by evidence that it has since expired or been legally determined, or parted with by way of mortgage, sale or otherwise (*h*). When the lessor himself does not sue, the *derivative* title of the claimant may be disputed, so far as that can be done without impugning the lessor's right to demise according to the terms of the lease; unless, indeed, the defendant has admitted the claimant's title by payment of rent or otherwise, and such admission cannot be explained away by evidence

(*z*) Ante, Sect. 2 (a).

(*a*) *Doe* d. *Hollingworth* v. *Stennett*, 2 Esp. 717; 5 R. R. 769; *Bishop* v. *Howard*, 2 B. & C. 100.

(*b*) *Croft* v. *Lumley*, 5 E. & B. 648; 26 L. J., Q. B. 223; 6 H. L. Cas. 672.

(*c*) *Doe* d. *Baker* v. *Jones*, 5 Exch. 498; *Doe* d. *Muston* v. *Gladwin*, 6 Q. B. 953; *Doe* d. *Flower* v. *Peck*, 1 B. & Adol. 428; *Doe* d. *Ambler* v. *Woodbridge*, 9 B. & C. 376.

(*d*) As to when there is a sufficient distress on the premises, see *Doe* d. *Haverson* v. *Franks*, 2 C. & K. 678.

(*e*) *Acocks* v. *Phillips*, 5 H. & N. 183.

(*f*) *Doe* d. *Harris* v. *Masters*, 2 B. & C. 490; 4 D. & R. 45.

(*g*) Ante, 225.

(*h*) *Longford* v. *Selmes*, 3 Kay & J. 220.

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showing fraud or mistake (*i*). Sometimes the defendant may prove a determination or suspension of the right of re-entry by an eviction from part of the demised premises (*k*).

Statute of Limitations.

If there be a term created by deed, and such term has not yet expired, the Statute of Limitations has no application. For however long a time rent may have been omitted to be paid, the landlord's right to re-enter subsists for the whole length of the term, however long. This is the effect of *Grant* v. *Ellis* (*l*), *Doe* d. *Davey* v. *Oxenham* (*m*), and the House of Lords case of *Archbold* v. *Scully* (*n*).

Judgment enforced by Writ of Possession.

A judgment for the plaintiff may be enforced by writ of possession (*o*) in the manner formerly used in actions of ejectment in the superior courts of common law (*p*), and the person prosecuting the judgment is entitled to sue out the writ of possession, without any order for the purpose, upon filing an affidavit showing due service of the judgment, and that the same has not been obeyed (*q*). There may be either one writ for possession and costs, or separate writs, at the election of the claimant (*r*).

Issue of Writ of Possession though Landlord's own Term Expired. *Knight* v. *Clarke.*

A landlord whose own term has expired after judgment recovered may be none the less entitled to a writ of possession, the burden of proof lying upon the defendant to show that the issue of such a writ would be unjust. This was held by the Court of Appeal in *Knight* v. *Clarke* (*s*). In that case the plaintiff was possessed of one day's residue of a term of 98 years, and the defendant's term by underlease had expired two days before the plaintiff sued the defendant in ejectment. The action was tried and judgment recovered nine months after the expiration of the plaintiff's title, but Matthew, J., at the trial allowed a writ of possession to issue, and the Court of Appeal affirmed his decision, it not appearing that the freeholder objected to the possession of the plaintiff.

At what Time Execution may issue.

Under the former practice, the judge had power by the statute 11 Geo. 4 & 1 Will. 4, c. 70, s. 38 (which was, it may be observed, left untouched by the Common Law Procedure Acts), to grant immediate possession. This section is, however, repealed by the Statute Law Revision Act of 1873. There is no provision in the Rules of the Supreme Court as to the time at which a writ of possession may issue, except that there is a general rule, that "As between the original parties to judgment, execution may issue at any time within

(*i*) See Cole Ejec. 219.
(*k*) *Wheeler* v. *Stevenson*, 6 H. & N. 155.
(*l*) *Grant* v. *Ellis*, 9 M. & W. 113.
(*m*) *Doe* v. *Oxenham*, 7 M. & W. 131.
(*n*) *Archbold* v. *Scully*, 9 H. L. C. 360.
(*o*) R. S. C., Ord. XLII., r. 5.
(*p*) R. S. C., Ord. XLVII., r. 1.
(*q*) Id. r. 2. For the mode of enforcing writs of possession, see Chit. Arch. Pr. II. 1045.
(*r*) R. S. C., Ord. XLVII., r. 3.
(*s*) *Knight* v. *Clarke*, 15 Q. B. D. 294; 54 L. J., Q. B. 509—C. A.

six years from recovery of the judgment" (*t*); which would seem to imply, that execution by writ of possession may issue immediately after judgment is entered. Execution for mesne profits, &c., or costs, may always, unless it be specially ordered otherwise, issue immediately on the entry of judgment (*u*).

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## Sect. 3.—*By Proceedings in the County Court.*

Recovery of Premises up to 50*l.*

By the consolidating County Courts Act, 1888, 51 & 52 Vict. c. 43, there are two methods provided for the recovery of real property, which are sometimes distinguished as "recovery of possession" and "ejectment." The limit in both cases is the same where neither annual value nor rental exceeds 50*l.*, but before the Act of 1888 the limit in the latter case was where neither annual value nor rental exceeded 20*l.* The former method of recovering the demised premises is confined to the cases of wrongful holding over, and leaving rent unpaid. For these cases a special procedure is provided, analogous to that of the Common Law Procedure Act, 1852, sects. 213 and 210. The latter method, so far as the statute goes, is of general application; but a County Court rule confines it to the cases to which the former method is not applicable (*x*).

The special procedure was introduced in 1856, but it was not until 1867 that the general jurisdiction in "ejectment," as it was then termed, was given to County Courts.

### (a) *Actions by Landlords for Recovery of Small Tenements after Term expired, or determined by Notice to Quit.*

Recovery of Premises of 50*l.* value, or less, where wrongful holding over.

By the County Courts Act, 1888, 51 & 52 Vict. c. 43, s. 138, replacing, with one alteration only, sects. 50 and 51 of the Act of 1856, 19 & 20 Vict. c. 108:—

C. C. Act, 1888, s. 138.

When the term and interest of the tenant of any corporeal hereditament, *where neither the value of the premises nor the rent* payable in respect thereof shall have *exceeded* 50*l. by the year*, and upon which *no fine or premium* shall have been duly paid, *shall have expired, or shall have been determined* either by the landlord or the tenant *by notice to quit* (*y*), and such tenant, or any person holding or claiming by, through, or under him, *shall neglect or refuse to deliver up possession accordingly*, the landlord may enter a plaint, at his option either against such tenant or against such person so neglecting or refusing, *in the Court of the district in which the*

Holding over premises of 50*l.* value, or less, under s. 138 of County Courts Act, 1888.

(*t*) R. S. C., Ord. XLII., r. 22.
(*u*) Id. r. 17.
(*x*) C. C. Rules, 1889, Ord. V., r. 3.
(*y*) The expression in s. 50 of the Act of 1856 was "*legal* notice to quit." The omission of the word "legal" was suggested by *Friend* v. *Shaw*, 20 Q. B. D. 374, and p. 863 (*g*), post.

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C. C. Act, s. 138—*contd.*

*premises lie*, for the recovery of the same, and thereupon a summons shall issue to such tenant or such person so neglecting or refusing; and if the defendant shall not, at the time named in the summons, show good cause to the contrary, then, *on proof of his still neglecting or refusing* to deliver up possession of the premises, *and of the yearly value and rent* of the premises, *and of the holding, and of the expiration or other determination of the tenancy, with the time and manner thereof, and of the title of the plaintiff*, if such title has accrued since the letting of the premises, *and of the service of the summons*, if the defendant shall not appear thereto,

Order for Possession.

the judge may order that possession of the premises mentioned in the plaint be given by the defendant to the plaintiff, either forthwith or on or before such day as the judge shall think fit to name; and if such order be not obeyed, the registrar, whether such order can be proved to have

Warrant.

been served or not, shall, at the instance of the plaintiff, issue a warrant authorizing and requiring the bailiff of the court to give possession of such premises to the plaintiff.

Claim for Rent or Mesne Profits.

In any such plaint *against a tenant* (*z*), the plaintiff may add a claim *for rent or mesne profits, or both*, down to the day appointed for the hearing, or to any preceding day named in the plaint, *so as the same shall not exceed* 50*l.* (*a*).

Restriction on Value.

Under these words neither the rent paid between the litigant parties (*b*) nor the annual value of the premises to let to a tenant from year to year at a fair rack-rent (without deducting any ground-rent paid to a superior landlord) may exceed 50*l.* per annum (*c*). If any fine or premium was paid the remedy is by ejectment in the High Court; unless, indeed, neither the annual value nor the rent exceed 20*l.* (*d*).

Conclusiveness of Proceedings.

A warrant obtained by a landlord proceeding against a lessee not in possession is not conclusive against the person actually in possession.

C. C. Rules and Forms.

The time and mode of proceeding under the above act are now regulated by certain consolidated rules of practice and forms which came into operation on 1st February, 1889, annulling the previous consolidating rules of 1886 (*e*).

Plaint.

Jury.

The action must be commenced by a plaint (*f*) entered in the County Court of the district wherein the tenements are situate; and thereupon a summons (*g*) shall issue. This must be served pursuant to section 141 (*h*). The decision of the judge as to the sufficiency of the service is conclusive (*i*). Either party can require

(*z*) Not against any other person so neglecting or refusing, &c.

(*a*) This part of the section cannot be made use of when the action is against a sub-tenant; *Campbell* v. *Loader*, 3 H. & C. 520; 34 L. J., Ex. 50.

(*b*) *Brown* v. *Cocking*, L. R., 3 Q. B. 672; 37 L. J., Q. B. 250.

(*c*) *Elston* v. *Rose*, L. R., 4 Q. B. 4; *Re Helstone*, 38 L. J., Q. B. 6.

(*d*) Post, Sect. 3 (c).

(*e*) See the prefix and suffix to the Rules.

(*f*) This is prepared by the Registrar and entered in the book kept for that purpose in his office.

(*g*) See Form, post, Appendix E., Sect. 3 (c).

(*h*) Post, sub-s. (c).

(*i*) *Robinson* v. *Lenaghan*, 2 Exch. 333.

a jury to be summoned (*k*). To maintain the action under the above section it is necessary that the plaintiff should prove:

Proof of Tenancy.

That the ordinary relation of landlord and tenant of the property claimed has existed between the plaintiff and defendant; or between the plaintiff and some other person by, through, or under whom the defendant holds or claims (*l*). It is not necessary to show that the plaintiff was the original lessor; it is sufficient to prove that when the term expired, or was determined, he was the immediate reversioner of the tenements: or if such reversion then belonged to several persons, as joint tenants, coparceners or tenants in common, that the plaintiff was one of the persons so entitled (*m*). But if the title of the plaintiff accrued since the letting of the premises, such title must be deduced from the landlord and proved in the usual manner. Thus under the repealed Act of 1846, where the plaintiff claimed as a mortgagee, and the defendant under a demise from the mortgagor *subsequent* to the mortgage, and the defendant had never attorned to the plaintiff or consented to hold under him: it was held, that the statute did not apply and consequently that the County Court had no jurisdiction (*n*). Again, where the defendant had been let into possession under an agreement to purchase, one of the terms of which was that he should pay 8*s*. a week rent, to be afterwards deducted from the purchase-money, and it appeared that he had paid sums which, together with the set-off, equalled the amount of the purchase-money: it was held, that the ordinary relation of landlord and tenant did not exist between the parties, and therefore that the County Court had no jurisdiction (*o*).

Proof of Tenancy of Defendant.

The defendant must be proved to have been either the tenant to whom the demise was made, or a person "holding or claiming by, through, or under him." Any person who obtains the possession from the tenant by the tenant's voluntary act directly or indirectly, either as an assignee or a sub-tenant, or by fraud and collusion with the tenant, is within the statute, and estopped from denying the landlord's title (*p*). Proof that the defendant came into possession after the original tenant entered and during the continuance of the demise is prima facie evidence that he obtained possession as assignee of the term (*q*), or in some way claims by, through, or under the tenant within the meaning of the statute.

No Real Dispute as to the Title.

There must be no real dispute or question between the parties as to the right and title of the plaintiff, or of the defendant, to the

(*k*) C. C. Rules, Ord. XXII., r. 3.
(*l*) *Jones* v. *Owen*, 5 D. & L. 669; *Banks* v. *Rebbeck*, 2 L., M. & P. 542.
(*m*) See definition of "landlord" in s. 186 of the County Courts Act, 1888.
(*n*) *Jones* v. *Owen*, 5 D. & L. 669.
(*o*) *Banks* v. *Rebbeck*, 2 L., M. & P. 452.
(*p*) *In re Emery* v. *Barnett*, 4 C. B., N. S. 423; 27 L. J., C. P. 216.
(*q*) See Cole Ejec. 224.

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tenements; otherwise the County Court will have no jurisdiction under this act (*r*), unless by the written consent of both parties, signed by them or their solicitors (*s*). Generally speaking, as we have seen, a tenant cannot dispute a landlord's title (*t*). And where and so far as that rule is applicable, no such dispute or question can legally arise between the parties (*u*). In some cases, however, a tenant may prove that since the demise his landlord's title has ceased, or been duly determined, or assigned over to some third person, who has made a fresh demise or conveyance to the defendant; or, if the plaintiff be not the original lessor, or the person from whom the defendant obtained possession of the demised premises, the latter may prove that he paid rent to the plaintiff, or submitted to a distress made by him for rent, by mistake and in ignorance of the real facts; and that the plaintiff really has no title. In such cases, upon proof of facts of the above nature, the County Court would have no jurisdiction to proceed further (*x*). But it is the duty of the judge to inquire into the facts and to hear the evidence, so far as is necessary to ascertain that a real question as to the title legally may and actually does exist between the parties; and that it is not a mere pretence raised by the defendant for the sole purpose of ousting the jurisdiction of the County Court. If it appear to him that a bonâ fide question as to title does exist, he should decline to proceed further, or strike out the cause for want of jurisdiction (*y*), in which case he may (if he thinks fit) award costs against the plaintiff (*z*). If it appear that no question can legally be raised by the defendant, or that no such question does actually exist, and that the objection is a mere pretence of the defendant for the purpose above mentioned, the judge should overrule the objection and proceed to hear and determine the action (*a*). If he decide erroneously upon the question whether certain facts do raise a question of title, the defendant may appeal to the High Court of Justice (*b*); or a rule or order (in lieu of a mandamus) may be applied for to the court pursuant to s. 131 of the County Courts Act, 1888 (*c*); or a prohibition may be applied for under ss. 127, 128 of that Act (*d*).

Duty of the Judge to ascertain whether there really is a Question as to the Title.

(*r*) *Pearson* v. *Glazebrook*, L. R., 3 Ex. 27; 37 L. J., Ex. 15. In this case the defendant claimed the freehold, subject only to the payment of a quit rent.

(*s*) County Courts Act, 1888, s. 64; see the form of such consent, No. 70, in the Schedule to the C. C. Rules.

(*t*) Ante, 225.

(*u*) *Re Emery* v. *Barnett*, 4 C. B., N. S. 423; 27 L. J., C. P. 216; *Lloyd* v. *Jones*, 6 C. B. 81; *Barbour* v. *Barlow*, 8th July, 1856, per Bramwell, B., at chambers.

(*x*) County Courts Act, 1888, s. 56; *Marwood* v. *Waters*, 13 C. B. 820.

(*y*) *Pearson* v. *Glazebrook*, L. R., 3 Ex. 27; 37 L. J., Ex. 15; *Sewell* v. *Jones*, 1 L., M. & P. 525.

(*z*) County Courts Act, 1888, s. 114.

(*a*) *Fearon* v. *Norvall*, 5 D. & L. 439; *Lilley* v. *Harvey*, Id. 648; *Owen* v. *Pearce*, Id. 654, n.; *Re Emery* v. *Barnett*, supra; *Lotham* v. *Spedding*, 17 Q. B. 440; *Lloyd* v. *Jones*, supra.

(*b*) *Mountney* v. *Collier*, 1 E. & B. 630.

(*c*) *In re Emery* v. *Barnett*, supra.

(*d*) *Jones* v. *Owen*, 5 D. & L. 669; *Banks* v. *Rebbeck*, 2 L., M. & P. 452;

The plaintiff must prove that "neither the value of the premises nor the rent payable in respect thereof," has exceeded 50*l.* by the year (ante, p. 860). Under the Act of 1846, 9 & 10 Vict. c. 95, s. 122, if the rent reserved were under 50*l.* per annum, and no fine paid, the court had jurisdiction, notwithstanding the annual value of the premises had increased, by buildings or otherwise, to a much greater amount than 50*l.* (*e*). But under the Act of 1888, re-enacting the Act of 1856, neither the rent nor the annual value may exceed 50*l.*, and this must be proved at the trial, whether the defendant appear there or not.

Neither Annual Value nor Rent must exceed 50*l.*

He must show that "no fine or premium" was paid for the lease. This will sufficiently appear by the lease, in the absence of express proof to the contrary.

There must have been no Fine or Premium.

He must show that the term or tenancy has *expired or been determined* either by the landlord or the tenant by a sufficient notice to quit. The statute expressly requires proof at the trial of the holding, and of the expiration or other determination of the tenancy, with the time and manner thereof, whether the defendant appear at the trial or not. We have already (ante, p. 357) fully considered the law as to notices to quit. When the landlord seeks to recover the premises by reason of a forfeiture committed by the tenant, and a condition or proviso for re-entry, the action is not maintainable under this section (*f*).

The Term must have expired or been determined by Notice to Quit.

It had been said that the term "*legal* notice to quit," in the repealed sect. 50 of the Act of 1856, meant only the notice to quit, the nature and character of which followed as matter of law from the state of the facts, and that the jurisdiction under the section was confined to tenancies from year to year. This was in a case (*g*) of a tenancy for three years, with a power of re-entry in pursuance of which the landlord had given a notice to quit, so that the action seems to have been in reality for a forfeiture, but whether this was so or not, it is hard to see how the Court construed "legal" notice to quit in any other sense than "*legally* sufficient," and it is submitted that at all events "notice to quit" in the present section includes a notice given in exercise of an option to determine a lease or any other notice expressly stipulated for.

Meaning of "Notice to Quit."

He must show that the defendant has neglected or refused, and still neglects or refuses, to deliver up possession of the premises. For the purpose of showing this, a demand of possession should be

Defendant must neglect or refuse to deliver up Possession.

*Marwood* v. *Waters*, 13 C. B. 820; *Re Chew* v. *Holroyd*, 8 Exch. 249; *Lawford* v. *Partridge*, 1 H. & N. 621; 26 L. J., Ex. 147.

(*e*) *In re Earl of Harrington* v. *Ramsey*, 8 Exch. 879; 2 E. & B. 669.

(*f*) *Doe* d. *Cundy* v. *Sharpley*, 15 M. & W. 558.

(*g*) *Friend* v. *Shaw*, 20 Q. B. D. 374; 36 W. R. 236; 58 L. T. 89.

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made, and, if possible, a refusal obtained in like manner as under the 15 & 16 Vict. c. 76, s. 213 (*h*). The act requires "proof of his still neglecting or refusing to deliver up possession of the premises." But proof that he retains possession of them after demand made, as above mentioned, will be primâ facie evidence that he still refuses, or at all events neglects to deliver up possession (*i*).

Service of Summons.

If the defendant do not appear at the trial, the service of the summons must be proved (*k*). The judge's decision as to the sufficiency of the service is conclusive (*l*).

Mesne Profits.

If the plaintiff seek to recover rent or mesne profits pursuant to sect. 138 (ante, p. 859), he must prove *the amount* in like manner as in an action of ejectment. But the other evidence as to the tenancy, &c. will generally be sufficient to prove the amount or value of the mesne profits.

Defendant may prove that there is no Tenancy between Plaintiff and Defendant.

When the landlord proceeds under this section, the defendant may produce contradictory evidence, so far as he is not estopped from so doing by the relation of landlord and tenant. Thus, he may show that the ordinary relation of landlord and tenant never existed as between him and the plaintiff, or as between any persons under whom they respectively claim (*m*). But, generally speaking, if the defendant's tenancy to the plaintiff be sufficiently proved, or if it appear that the defendant obtained possession through or under the plaintiff or his tenant, the defendant will not be permitted to dispute the plaintiff's title; and where that is the case, no dispute or question as to the title can arise, so as to exclude the jurisdiction of the County Court (*n*). Sometimes, however, he may

Plaintiff's Title ceased.

show that since the demise the plaintiff's title has expired or ceased, or been determined, or assigned to some person from whom the defendant has obtained a fresh demise or conveyance (*o*); or that the defendant has a title to the premises not inconsistent with his tenancy to the plaintiff during the term. When anything of this

Title in Defendant.

sort is proved, and a *bonâ fide* question as to title sufficiently appears, the judge should, as we have seen, abstain from deciding in favour of either party, for want of jurisdiction (*p*). It was once held to be no defence that an action of ejectment was pending in one of the superior courts for the same property upon the same title (*q*); but a County Court Rule (see p. 875, post) now meets this difficulty.

(*h*) Ante, Sect. 2 (a).
(*i*) See Cole Ejec. 656.
(*k*) As to the mode of service, see sect. 141.
(*l*) *Robinson* v. *Lenaghan*, 2 Exch. 333.
(*m*) *Jones* v. *Owen*, 5 D. & L. 699; *Banks* v. *Rebbeck*, 2 L., M. & P. 452.
(*n*) *Barbour* v. *Barlow*, Cole Ejec. 655, n. (*a*).
(*o*) See Cole Ejec. 217, 657.
(*p*) County Courts Act, 1888, s. 56.
(*q*) *Bissill* v. *Williamson*, 7 H. & N. 391; 31 L. J., Ex. 131.

If a verdict and judgment be found for the plaintiff, the judge will order that possession of the premises mentioned be given by the defendant to the plaintiff, either forthwith or on or before such a day as the judge shall think fit to name (*r*).

Judgment for Plaintiff.

An order of a County Court judge under sect. 138 is not analogous to a judgment in ejectment, so as to entitle the landlord to maintain a subsequent action of trespass for mesne profits, &c. It creates no estoppel (*s*). Nor, where the order is obtained by the landlord proceeding against his tenant, but not against a person in possession of a sub-lease, is the order conclusive against the sub-lessee, who may, notwithstanding the order, sue the landlord in trespass, if the landlord had not in fact a right to possession (*t*).

Proceedings not conclusive.

*Campbell* v. *Loader*.

The costs are in the discretion of the court by virtue of s. 113 of the County Courts Act, 1888, under which, however, they abide the event "in default of any special direction." Even where the court decides that it has no jurisdiction, it *may* award costs against the plaintiff (*u*), who ought to have proceeded in the proper court.

Costs of Witnesses, &c.

By County Court Rules, Order L a., Rule 10 (made in February, 1892, and replacing the corresponding and repealed rule 19 of Order L. of the Rules of 1889), it is provided that:—

Taxation of Costs.

> The costs in actions under sections 138 and 139 of the Act (*x*) shall be taxed in the case of a plaintiff, on the scale applicable to the rent or value of the premises upon which the Court Fees are assessed, plus the amount of any rent and mesne profits recovered, and in the case of a defendant on that applicable to the said rent or value, plus the amount of the rent and mesne profits claimed.

Appeal.

If the yearly rent or value of the premises exceeds 20*l*., the unsuccessful party may appeal, as of right, pursuant to sect. 120 of the County Courts Act, 1888, and if they do not exceed that amount, there is an appeal by leave under the same section (*y*).

Warrant for Possession.

If the order for the delivery of possession made at the hearing be not obeyed, the registrar, whether such order can be proved to have been served or not, is bound at the instance of the plaintiff to issue a warrant to the bailiff of the court to give possession to the plaintiff (*z*). For the effect of a warrant, and the protection

(*r*) See Form, post, Appendix E., Sect. 3 (c).

(*s*) *Campbell* v. *Loader*, 3 H. & C. 520; 34 L. J., Ex. 50.

(*t*) *Hodson* v. *Walker*, L. R., 7 Eq. 55; 41 L. J., Ex. 51; 25 L. T. 537; 20 W. R. 489, diss. Martin, B. See, however, *Flitters* v. *Allfrey*, L. R., 10 C. P. 29, where a landlord having evicted his tenant under a warrant as for a weekly tenancy, and having sued in a County Court for arrears of a weekly rent, was held concluded, in an action of trespass for the eviction, by the decision of the County Court judge, that the tenancy was not weekly, but yearly.

(*u*) County Courts Act, 1888, s. 114.

(*x*) I.e. of the Act of 1888, as to recovery of small tenements, see p. 859, ante, and p. 866, post.

(*y*) Post, Sect. 3 (e).

(*z*) Ante, 860; see Form, post, Appendix E., Sect. 3 (c), No. 4.

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thereby afforded to the bailiff, &c., and also the protection of the plaintiff from any action of *trespass*, see sections 142—145 of the County Courts Act, 1888, post, p. 868.

### (b) *Actions by Landlords for Recovery of Small Tenements, for Non-payment of Rent.*

Recovery of Premises of 50*l.* value or less where Half-Year's Rent in Arrear.

C. C. Act, 1888, s. 139.

By sect. 139 of the County Courts Act, 1888, re-enacting with verbal alterations, sect. 52 of the County Courts Act, 1856, in cases where neither rent nor value exceeds 50*l.* a year, where a half-year's rent is in arrear, and where the contract of tenancy contains a proviso for re-entry for non-payment legally applicable to the case, a summary procedure for recovery of the premises by the landlord is provided as follows :—

When the rent of any corporeal hereditament, *where neither the value of the premises nor the rent* payable in respect thereof exceeds 50*l.* by the year [see ante, p. 860], *shall for one half-year be in arrear*, and the landlord shall have *right by law to re-enter* for the non-payment thereof, he may, *without any formal demand or re-entry*, enter a plaint *in the Court of the district in which the premises lie* for the recovery of the premises; and thereupon a summons shall issue to the tenant, *the service whereof shall stand in lieu of a demand and re-entry*, and if the tenant shall, **5** clear days before the return day of such summons, pay into court all the rent in arrear and the costs, the action shall cease; but if he shall not make such payment, and shall not at the time named in the summons show good cause why the premises should not be recovered, *then, on proof of the yearly value and rent* of the premises, *and of the fact that one half-year's rent was in arrear* before the plaint was entered, *and that no sufficient distress was then to be found* on the premises to countervail such arrear, *and of the landlord's power to re-enter, and of the rent being still in arrear, and of the title of the plaintiff*, if such title has accrued since the letting of the premises, *and of the service of the summons*, if the defendant shall not appear thereto, the judge may order possession of the premises mentioned in the plaint to be given by the defendant to the plaintiff on or before such day, not being less than **4** weeks from the day of hearing, as the judge shall think fit to name, unless within that period all the rent in arrear and the costs are paid into court, and if such order be not obeyed, and such rent and costs are not so paid, the registrar shall, whether such order can be proved to have been served or not, at the instance of the plaintiff, issue a warrant authorizing and requiring the bailiff of the court to give possession of such premises to the plaintiff, and the plaintiff *shall, from the time of the execution of such warrant, hold the premises discharged of the tenancy*, and the defendant and all persons claiming by, through, or under him shall, so long as the order of the court remains unreversed, be barred from all relief.

What Landlord must prove.

Order for Possession.

Warrant for Possession.

This section is very similar in substance and effect to sect. 210 of the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76 (ante, p. 837), save that it is restricted and confined to small cases, i.e. where neither the annual value nor the rent exceeds 50*l.* Any fine or

premium paid for the lease will not deprive the County Court of jurisdiction under this section, as it would under section 138 (ante, p. 859).

The mode of proceeding under this section is similar (mutatis mutandis) to that under section 138.

Procedure.

Before entering his plaint the plaintiff should clearly ascertain that he has "*a right by law to re-enter* for the non-payment" of one half-year's rent in arrear. He can have no such right except by virtue of some condition or proviso for re-entry contained in the lease or agreement (whether by deed, writing, or oral agreement, express or implied) under which the defendant holds; nor until the time or period (if any) thereby allowed to save the forfeiture has elapsed (*a*); and he should further ascertain that there is no sufficient distress *to be found* on the premises to countervail *such arrear* (*b*). The distress need not be sufficient to countervail "all the arrears," if more than one half-year's rent be due; but it is otherwise under 15 & 16 Vict. c. 76, s. 210, which is differently worded in this respect.

Preliminary Points—

Right to Re-enter.

No sufficient Distress.

The plaintiff will be put to exactly the same proof as in an action under sect. 138, except that, in place of proving that the tenancy was determined by notice or expired, and that the tenant has refused to give up possession, he must give evidence of the fact that one half-year's rent was in arrear before the plaint was entered; and that before and at the time that the plaint was entered, the landlord *had power to re-enter for non-payment of the said half-year's rent.* This will appear by the lease or agreement under which the defendant holds, or by the parol evidence of the tenancy, including the express condition or proviso for re-entry on non-payment of rent. It must appear that the number of days (if any) allowed by such condition or proviso for payment of the rent to save the forfeiture elapsed before the plaint was entered (*c*).

Half-a-Year's Rent in Advance. Legal Right to Re-enter.

The procedure in case of the order for possession being disobeyed will be the same as in cases under sect. 138 (ante, p. 859).

Warrant for Possession.

(c) *Provisions applicable both to "Holding over" and "Rent Unpaid."*

There are certain provisions in the County Courts Act which, as they apply equally to both the above forms of action for recovery of possession by landlords from their tenants, may be best noticed at one time in this place. They relate to the following matters:—

Provisions of County Courts Acts as to Recovery of Tenements.

(i.) *Service of Summons.*

By sect. 141 of the County Courts Act, 1888, re-enacting s. 54 of the County Courts Act, 1856, 19 & 20 Vict. c. 108, "a summons for

How Summons served.

(*a*) *Doe* d. *Dixon* v. *Roe*, 7 C. B. 134.
(*b*) As to the mode of proving this, see ante, 338.
(*c*) *Doe* d. *Dixon* v. *Roe*, 7 C. B. 134.

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the recovery of a tenement may be served like ordinary summonses to appear to plaints in the Court; and if the defendant cannot be found, and his place of dwelling shall either not be known, or admission thereto cannot be obtained for serving any such summons, a copy of the summons shall be posted on some conspicuous part of the premises sought to be recovered, and such posting shall be deemed good service on the defendant."

(ii.) *Notice by Sub-tenant to his immediate Lessor of Summons for Recovery of Possession.*

19 & 20 Vict. c. 108, s. 53.

Notice of Summons by Tenant to his immediate Landlord.

Penalty.

By sect. 140 of the County Courts Act, 1888, 51 & 52 Vict. c. 43, exactly re-enacting 19 & 20 Vict. c. 108, s. 53, "where any summons for the recovery of a tenement as is hereinbefore specified shall be served on or come to the knowledge of any sub-tenant of the plaintiff's immediate tenant, such sub-tenant being an occupier of the whole or of a part of the premises sought to be recovered, he shall *forthwith give notice thereof to his immediate landlord, under penalty of forfeiting three years' rack-rent* of the premises held by such sub-tenant to such landlord, to be recovered, whatever the amount thereof, by such landlord, by action *in the court from which such summons shall have issued;* and such landlord on the receipt of such notice, if not originally a defendant, may be added or substituted as a defendant to defend possession of the premises in question."

This section is similar in substance and effect to sect. 209 of the Common Law Procedure Act, 1852.

(iii.) *Warrant of Possession.*

Warrant for Possession—how executed.

By sect. 142 of the County Courts Act, 1888, exactly re-enacting 19 & 20 Vict. c. 108, s. 55, "any warrant to a bailiff to give possession of a tenement shall justify the bailiff named therein in entering upon the premises named therein, with such assistance as he shall deem necessary, and in giving possession accordingly, but no entry upon any such warrant shall be made except between the hours of nine in the morning and four in the afternoon."

Date and Duration of Warrant.

By sect. 143, exactly re-enacting sect. 56, "every such warrant shall, on whatever day it may be issued, bear date on the day next after the last day named by the judge in his order for the delivery of possession of the premises in question, and shall continue in force from three months from such date and no longer, but no order for delivery of possession need be drawn up or served."

Protection of Judge, Registrar, Bailiff, &c.

By sect. 144, the judge or registrar issuing the warrant, and the bailiff executing it, are protected from any action or prosecution brought by reason that the person suing out the warrant had not lawful right to the possession of the premises.

And by sect. 145, re-enacting with amendments sect. 60, a landlord having lawful title is protected as follows:—

Protection of Landlord in case of irregularity. S. 145.

Where the landlord at the time of applying for such warrant as aforesaid had lawful right to the possession of the premises, or of the part thereof, so held over as aforesaid [see sect. 138, p. 859], neither the said landlord nor his agent, nor any other person acting in his behalf, shall be deemed to be a trespasser by reason merely of any irregularity or informality in the mode of proceeding for obtaining possession under the authority of this act, but the party aggrieved may, if he think fit, bring an action for such irregularity or informality, in which the damage alleged to be sustained thereby shall be specially laid, and may recover full satisfaction for such special damage with costs of the action: Provided that if the special damage so laid be not proved, the defendant shall be entitled to a verdict, and that if proved, but assessed at any sum not exceeding five shillings, the plaintiff shall recover no more costs than damages, unless the judge before whom the trial shall have been held shall certify that in his opinion full costs ought to be allowed (*c*).

Costs of Landlord in Action.

(iv.) *Costs, and Taxation of Costs.*

Costs, and Taxation.

Costs are in the discretion of the Court by virtue of s. 113 of the County Courts Act, 1888, and the taxation is on the same scale as that of proceedings for recovery of small tenements after term or notice to quit expired, under Order L a., Rule 10, of the County Court Rules, set out ante, p. 865.

(v.) *Appeal.*

Appeal by Leave up to 20*l.*, and as of right in other cases.

By sect. 120 of the County Courts Act, 1888, 51 & 52 Vict. c. 43, there is an appeal from the County Court on any point of law, by leave of the judge of the County Court (*d*) if the rent or value of the premises does not exceed twenty pounds, and as of right in other cases. This section, which has the same effect in the action under sect. 138, for "recovery of tenements" held over (see ante, p. 859) as it has in the action under sect. 139 for "recovery of tenements" for non-payment of rent (see ante, p. 866), but which gives an appeal as of right in all ordinary actions of "ejectment" (see post, p. 871) is as follows:—

County Courts Act, 1888, 51 & 52 Vict. c. 43, s. 120.

"If any party in any action or matter shall be dissatisfied with the determination or direction of the judge in point of law or equity, or upon the admission or rejection of any evidence, the party aggrieved by the judgment, direction, decision, or order of the judge may appeal from the same to the High Court, in such manner and subject to such conditions as may be for the time being provided by the Rules of the Supreme Court regulating the procedure on appeals from inferior courts to the High Court (*e*); provided always, that

Appeal to High Court under s. 120 of County Courts Act, 1888.

(*c*) Compare s. 6 of Small Tenements Recovery Act, 1838, p. 879, infra.

(*d*) See *Shrewsbury (Earl of)* v. *Garfield*, 60 L. J., Q. B. 765.

(*e*) See R. S. C., Ord. LIX., rr. 10—17, added by R. S. C., Dec., 1885. By Rules 10 and 12 the appeal must be by notice of motion stating the grounds of the appeal,

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there shall be no appeal in any action of contract or tort, other than an action of ejectment or an action in which the title to any corporeal or incorporeal hereditament shall have come in question, where the debt or damage claimed does not exceed twenty pounds . . . . *nor in any action for the recovery of tenements where the yearly rent or value of the premises does not exceed twenty pounds*, nor in proceedings in interpleader where the money claimed or the value of the goods or chattels claimed, or of the proceeds thereof, does not exceed twenty pounds, unless the judge shall think it reasonable and proper that such appeal shall be allowed, and shall grant leave to appeal. At the trial or hearing of any action or matter, in which there is a right of appeal, the judge, at the request of either party, shall make a note of any question of law raised at such trial or hearing, and of the facts in evidence in relation thereto, and of his decision thereon, and of his decision of the action or matter."

Judge's Note.

By sect. 121 the judge is bound to furnish a copy of any note taken by him in pursuance of the above section, for use at the hearing of the appeal. By sect. 122 the High Court may on appeal draw inferences of fact, and may either order a new trial or order judgment to be entered for any party. By sect. 123 no appeal lies if before the decision of the judge is pronounced, the parties agree in writing, signed by themselves or their solicitors or agents, that his decision shall be final. By sect. 124 there is no appeal except as by the act provided; and by sects. 126—132 provisions are made for removing actions by certiorari and for staying them by prohibition, in cases of excess of the County Court jurisdiction.

Judge's Notes.

Jurisdiction of High Court.

(vi.) *Fees.*

By the Treasury Order of 1st January, 1889, the following fees (amongst others) may be taken in the County Courts:

For every plaint or petition, one shilling in the pound.

Where the claim or demand exceeds forty shillings, and an ordinary summons is to be served by bailiff, an additional fee of one shilling.

Where in any case the number of defendants shall exceed three, an additional fee of one shilling for each defendant above three.

For every hearing, two shillings in the pound. To be charged once only in an action, unless a new trial ordered.

In all cases where the defendant shall either personally, or by his solicitor or agent, admit the claim, one half of the fee paid by the plaintiff for the hearing of the plaint shall be

the notice to be an 8 days' notice, and to be served on every party directly affected within 21 days from the date of the judgment complained of.

returned to the plaintiff by the registrar of the court, although the court may have been required to decide upon the terms and conditions upon which the claim is to be paid.

An additional hearing fee shall be taken for every new trial.

No fee shall be payable for hearing any application for a new trial, or to set aside proceedings.

For issuing every warrant, eighteenpence in the pound.

In plaints for the recovery of tenements when the term has expired or been determined by notice, all poundage, except as aforesaid, shall be estimated on the amount of the weekly, monthly, quarterly, half-yearly, or yearly rent of the tenement, as such tenement shall have been let by the week or by the month, or for any longer period; and if no rent shall have been reserved, then on the amount of the half-yearly value of the tenement, to be fixed by the registrar.

Where a claim for rent or mesne profits, or both, is added to a plaint for the recovery of a tenement, an additional poundage shall be taken on the amount or amounts so claimed, but where thereby the total amounts on which poundage would be taken shall exceed twenty pounds, the poundage shall be estimated on twenty pounds only.

In plaints for the recovery of tenements for non-payment of rent, all poundage, except as aforesaid, shall be estimated on the amount of the half-yearly rent of the tenement.

In every case where the poundage cannot be estimated by any rule in this schedule, it shall be estimated on twenty pounds.

All fractions of a pound, for the purpose of calculating poundage, shall be treated as an entire pound.

No increase of fees shall be made by reason of there being more than one plaintiff or defendant, except as before directed, where the number of defendants exceeds three.

### (d) *Ordinary Action of "Ejectment" in County Courts.*

Ejectment in County Court where neither Annual Value nor Rent exceeds 50*l.*

The right to bring an ordinary action of ejectment in a county court as distinguished from the action for recovery of tenements (1) where held over or (2) where rent unpaid was first given by the County Courts Act, 1867, s. 11, where neither the value of the lands sought to be recovered nor the rent payable in respect thereof exceeded 20*l.* a year. The 59th section of the County Courts Act, 1888, 51 & 52 Vict. c. 43, raises the limit from 20*l.* to 50*l.* and enacts that—

County Courts Act, 1888, s. 59.

All actions of ejectment, where neither the value of the lands, tenements, or hereditaments, nor the rent payable in respect thereof, shall

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exceed the sum of 50*l.* by the year (*f*), may be brought and prosecuted in the court of the district in which the lands, tenements, or hereditaments are situate; provided that the defendant in any such action of ejectment, or his landlord, may within one month from the day of service of the summons, apply to a judge of the High Court at Chambers for a summons to the plaintiff to show cause why such action should not be tried in the High Court on the ground that the title to lands or hereditaments of greater annual value than 50*l.* would be affected by the decision in such action; and on the hearing of such summons, the judge of the High Court, if satisfied that the title to other lands would be so affected, may order such action to be tried in the High Court, and thereupon all proceedings in the court in such action shall be discontinued.

50*l.* limit—Remitter to High Court for excess of limit, or title in dispute.

Notice, under Conveyancing Act, before proceeding for Forfeiture.

If the action be for a forfeiture caused otherwise than by non-payment of rent, or certain other causes, it must be preceded by the notice under sect. 14 of the Conveyancing Act already set out with the excepted cases (ante, p. 349), but the County Court has no power to grant relief against forfeiture under that act, and if the parties do not come to terms the tenant will not be able to obtain relief in the landlord's action in the County Court, but must bring an independent action of his own in the High Court.

Appeal in Ejectment.

By sect. 120 of the County Courts Act, 1888 (ante, p. 869), there appears to be an appeal by right in all actions of ejectment.

Meaning of "Rent Payable" and "Annual Value."

The "rent payable" means as between the litigant parties, and not any rent that may be paid by a sub-lessee (*g*), though, if the latter rent exceeds 50*l.*, that would be strong primâ facie evidence that the annual value exceeds 50*l.* The "annual value" means the actual marketable value per annum; and of this the rent at which the property would let from year to year to a suitable tenant is a fair criterion (*h*). The annual value means the annual value of the property itself, and not of the interest therein of either of the parties; so that if a ground-rent be payable thereout to a superior landlord, such ground-rent must not be taken into consideration, or deducted in estimating the annual value of the property (*h*). It is to be observed, that neither the annual value nor the annual rent may exceed 50*l.*, otherwise the County Court will have no jurisdiction under this act.

County Court Rules.

The RULES, ORDERS, and FORMS, of proceedings in the County Courts which are now (1898) in force came into operation on the 1st of February, 1889.

County Court Rules, Ord. XXXVII. r. 25.

By C. C. Rules, Ord. V. r. 3, "Where an action can be brought to recover possession of a tenement under the provisions of sections 138 and 139 of the act [i.e. the County Courts Act, 1888,

(*f*) Whether any fine or premium shall have been paid or not; but any such fine or premium may tend to show that the annual value for the time being exceeds 20*l.*

(*g*) *Brown* v. *Cocking*, L. R., 3 Q. B. 672; 37 L. J., Q. B. 250.

(*h*) *Elston* v. *Rose*, L. R., 4 Q. B. 4; *Re Helstone*, 38 L. J., Q. B. 6.

ante, p. 859 and p. 866], no action shall be brought under sect. 59 of the same act. Actions brought under the former sections shall be distinguished as actions for the recovery of possession, and actions under the last section shall be distinguished as actions for the recovery of land." This rule re-enacts Ord. XXXVII. r. 25 of the former County Court Rules.

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In what excepted Cases ordinary Action of Ejectment may be brought in County Court.

The effect of the above rule seems to be, that the *ordinary action of* ejectment cannot be maintained in the County Court *by a landlord against a tenant*, except when the following circumstances concur, viz.:—1. Neither the value of the property nor the rent payable in respect thereof exceed 50*l.* by the year (ante, p. 872). 2. It must not be a case of "holding over" after the term has expired, or been determined by a legal notice to quit, given by either party; unless, indeed, there was a fine or premium paid for the lease (ante, p. 859). 3. It must not be for non-payment of rent (ante, p. 866), whether a fine or premium was paid for the lease or not.

In these excepted cases, the landlord must follow the special procedure marked out by sections 138 and 139 of the Act of 1888 (ante, pp. 859, 866).

Joinder of Parties.

To return to the ordinary action under s. 59 of the Act of 1888.—By Ord. V. r. 10 of the C. C. Rules, it is provided that "all persons in whom title is alleged must be joined as plaintiffs, and the person or persons alleged to be in possession or apparent possession must be defendants." Misjoinder of parties will not, however, defeat the action (Ord. XVII. r. 12).

Of Causes of Action.

By Ord. IV. r. 1, "No cause of action shall, unless by leave of the judge or registrar, be joined with an action for the recovery of land, except claims in respect of mesne profits, or arrears of rent or double value in respect of the premises claimed or any part thereof, or damages for breach of any contract under which the same or any part thereof are held, or for any wrong or injury to the premises claimed." And by Rule 7 of the same Order, "If at any time it appears, or is made to appear, to the judge that any causes of action united or claims joined in any action cannot be conveniently tried and disposed of together, he may order separate trials, or may exclude any such cause of action or claim, and may order the proceedings to be amended accordingly, and may make such order as to costs as may be just."

Joinder of other Causes of Action.

Description of Property.

By Ord. VI. r. 4, "In all actions for the recovery of land, the particulars shall contain a full description of the property sought to be recovered and of the annual value thereof, and of the rent, if there be any, fixed or paid in respect thereof."

Delivery of Summons to Bailiff.

By Ord. VII. r. 7, "The summons in an action brought under sect. 59 of the Act to recover lands, shall be delivered to the bailiff

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forty (*i*) clear days at least before the return-day, and shall be served thirty-five clear days before the return-day thereof."

This provision as to time is obligatory (*i*).

Service in case of Vacant Possession.

By Rule 21 of the same Order, "Service of a summons in an action to recover land may, in case of vacant possession, be made by posting a copy of the summons upon the door of the dwelling-house or other conspicuous part of the property."

Appearance by Person not Summoned.

By Ord. X. r. 4, "In actions for the recovery of land, any person not named as a defendant in the summons may, by leave of the judge or registrar, be allowed to appear and defend on filing twelve clear days before the return-day an affidavit, together with as many copies thereof as there are plaintiffs and defendants, showing that he is in possession either by himself or his tenant of the property or some part thereof mentioned in the particulars (such part being described in the affidavit with reasonable certainty), and upon such affidavit being filed, the registrar shall enter the name, address, and description of the person filing the same in the plaint book as a defendant in addition to the name of every person originally made defendant; and shall ten clear days before the return-day give notice, according to the form in the Appendix, by post or otherwise, to the plaintiffs and the original defendants, that the person filing the affidavit has filed the same, and will appear and defend at the trial of the action, annexing to each notice a copy of the affidavit. In all subsequent proceedings in the action, the person filing the affidavit shall be named as a defendant."

Limit of Defence to part of the Property.

Form 218.

By Rule 5 of the same Order, "In actions for the recovery of land, any defendant may twelve clear days before the return-day file with the registrar a notice in writing, according to the form in the Appendix, signed by himself or his solicitor, that he intends to limit his defence to a part only of the property mentioned in the particulars, describing that part in such notice with reasonable certainty, and the registrar shall ten clear days before the return-day send the same by post to the plaintiff."

Equitable Defence. Counter-claim.

A defendant may rely on any equitable ground of defence against the plaintiff's claim, in which case he must, five clear days before the return-day, file a statement of the grounds he so relies on setting forth each of the grounds of equitable defence separately (*j*); or he may make any counterclaim against the plaintiff, in which case also he must file a concise statement of the counterclaim five clear days before the return-day (*k*).

Discontinuance of Action by Plaintiff.

The discontinuance of the action by the plaintiff is provided for by Ord. IX. r. 1.

(*i*) *Barker* v. *Palmer*, L. R., 8 Q. B. D. 9.

(*j*) Ord. X., rr. 10, 19.

(*k*) Ord. X., r. 10.

It was held, in *Bissill* v. *Williamson* (*l*), that the pendency of an ejectment in one of the superior courts was not a bar to the plaintiff's proceeding in the County Court, under 19 & 20 Vict. c. 108, for recovery of possession. But now, by Ord. XXII. r. 9, "where at the trial it shall appear that an action for the same cause, at the suit of the same plaintiff, is pending in any other court of record, the court shall order the trial to stand adjourned to a certain day, and unless before such day the action in such other court shall have been discontinued, the action shall be struck out."

Discontinuance of Action for same Cause in other Court.

By Rule 6 of Ord. IX., "Any defendant in an action to recover lands may, at any time before the return-day, confess the action, as to the whole or any part of the lands, by signing, in the presence of any registrar or of one of his clerks or of a solicitor, and attested by the person in whose presence it is signed, an admission of the title of the plaintiff to the lands or to the said part thereof, and of his right to the possession thereof; and the registrar shall, upon the receipt of such admission, forthwith give notice thereof by post to the plaintiff, and the judge may, on the return-day, upon proof of the signature of the defendant to such admission by affidavit or otherwise, in case the same is not attested by the registrar or clerk, and without any further proof of the plaintiff's title (if no defendant other than the defendant signing such admission defends for the said lands or the said part thereof) give judgment for the plaintiff for the recovery of possession and for costs. Provided, that if the plaintiff receive notice of such admission before the return-day, he shall not be entitled as against any defendant signing to any costs incurred subsequently to the receipt of such notice, except the costs of attending the court on the return-day, unless the court shall otherwise order. Provided also, that where the admission is not signed by all the defendants defending for the said lands or the said part thereof the trial shall proceed against all the defendants who shall not have signed as if no admission had been signed."

Confession of Action by Defendant.

By Ord. XXII. r. 3, "Actions for the recovery of land or tenements . . . . . may, at the instance of either party, be tried by a jury."

Jury.

By Ord. XXIII. r. 10, "Where in an action to recover land or damages in respect of any right relating to land, the title of the plaintiff shall appear to have existed, as alleged in the summons, at the time of entry of the plaint, but to have expired before the return-day, the plaintiff shall be entitled to judgment according to the fact that he was so entitled, and for his costs of the action, unless

Judgment.

(*l*) *Bissill* v. *Williamson*, 31 L. J., Ex. 131; 7 H. & N. 391. The power to make rules "for regulating the practice" of the County Courts is derived from the County Courts Act, 1888, s. 164.

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the judge shall otherwise order." By Rule 46 of Order XXV., where in a similar action "judgment is given for the plaintiff, execution may issue upon a day to be named in the judgment, and if no day be named then it may issue after the expiration of fourteen clear days from the day on which judgment shall have been given."

Execution.

By Rule 47, where "judgment has been obtained for the recovery of possession and costs, there may be either one warrant or separate warrants of execution for the recovery of possession, and for the costs, at the election of the plaintiff." And by Rule 48, where "judgment is given for the defendants or any of them with costs, executions may issue for the costs upon a day to be named in the judgment, and if no day be named then it may issue after the expiration of fourteen clear days from the day on which judgment shall have been given."

Execution for Costs of Defendant.

Warrant of Possession.

By Ord. XXV. r. 25, a judgment or order for the recovery of land or for the delivery of possession, whether made in an action of ejectment or in any other action or matter, may be enforced by warrant of possession, and by Rule 49 of the same Order, "when an order is made for the recovery or for the delivery of possession of land to any person, the warrant of possession shall not be issued by the registrar without evidence by affidavit of service of the order and disobedience thereto."

Costs.

Costs are in the discretion of the court, but abide the event in default of any special direction, by virtue of s. 113 of the County Courts Act, 1888.

Taxation of Costs.

Costs are taxed as in other actions where title comes in question. On this point reference should be made to Heywood's Annual County Court Practice, but it may be mentioned here that the judge may make special allowances in addition to or in substitution for those to which the party would be otherwise entitled for preparation of minutes of fact or argument when a solicitor conducts a case without counsel, for counsel's fees where there is no local bar in or within twenty miles of the court town (if the court be not within a radius of twenty-five miles from Charing Cross), and for counsel's fee for interrogatories, &c. (*m*).

Special Allowances.

Counsel's Fees.

Except in so far as is specially directed by the above rules, actions of ejectment in the County Courts will follow the ordinary rules in other actions in these courts.

(*m*) Heywood's Annual County Court Practice.

## Sect. 4.—*Proceedings before Justices.*



### (a) *Recovery of Small Tenements wrongfully held over.*

1 & 2 Vict. c. 74, s. 1.

The Small Tenements Recovery Act, 1838, 1 & 2 Vict. c. 74, sect. 1, enacts, that if the term be for not more than seven years and the rent be not more than 20*l.*, the tenant may be summoned before justices of the district in which the premises are situate, and if he fail to appear before them and show to their satisfaction why possession should not be given, he may be turned out of possession by their warrant issued to the constables of the district and executed within a period named therein, not being less than twenty-one nor more than thirty days from its date. The section is as follows:—

Where Term not more than 7 Years at no Rent, or at Rent not more than 20*l.*, Tenant holding over may be served with Notice.

[Whereas it is expedient to provide for the more speedy and effectual recovery of the possession of premises unlawfully held over after the termination of the tenancy: Be it therefore enacted that from and after the passing of this act (*mm*),] when and as soon as the term or interest of the tenant of any house, land, or other corporeal hereditaments held by him at will, or for *any term not exceeding seven years*, either without being liable to the payment of any rent, or at a *rent not exceeding the rate of twenty pounds a year*, and upon which *no fine* shall have been reserved or made payable, shall have ended, or shall have been duly determined by a legal notice to quit or otherwise, and such tenant, or (if such tenant do not actually occupy the premises, or only occupy a part thereof) any person by whom the same, or any part thereof, shall be then actually occupied, shall neglect or refuse to quit and deliver up possession of the premises, or of such part thereof respectively, it shall be lawful for the landlord (*n*) of the said premises, or his agent (*o*), to cause the person so neglecting or refusing to quit and deliver up possession to be served (in the manner hereinafter mentioned) with a written notice, in the form set forth in the schedule to this act (*p*), signed by the said landlord or his agent, of his intention to proceed to recover possession under the authority and according to the mode prescribed in this act; and if the tenant or occupier shall not thereupon appear at the time and place appointed, and show to the satisfaction of the justices hereinafter mentioned, reasonable cause why possession should not be given under the provisions of this act, and shall still neglect or refuse to deliver up possession of the premises, or of such part thereof of which he is then in possession, to the said landlord or his agent, it shall be lawful for such landlord or his agent to give to such justice (*pp*) proof of the holding and of the end or other determination of the tenancy, with the time or manner thereof, and where the title of the landlord has accrued since the letting of the premises, the right by which he claims the possession; and upon

Proof of Landlord's Claim before Justices.

(*mm*) Words in brackets repealed, and omitted from the Statutes Revised.

(*n*) I.e. by sect. 7, the person entitled to the immediate reversion of the premises, or in the case of joint tenants, tenants in common or coparceners, any one of them.

(*o*) I.e. by sect. 7, "any person usually employed by the landlord in the letting of the premises or in the collection of the rents thereof or specially authorized to act in the particular matter by writing under the hand of" the landlord.

(*p*) See Form, Appendix C., Sect. 12; and note that by the form of complaint (Appendix E., Sect. 4) a duplicate of the notice is to be annexed to the complaint. And see *Delaney* v. *Fox*, 1 C. B., N. S. 166; 2 Id. 768; 26 L. J., C. P. 5, 248.

(*pp*) "Justices" is printed "justice" in the Statutes Revised, apparently by a clerical error.

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Proof of Service of Notice, &c.

Warrant of Justices.

No entry on Sunday, &c.

proof of service of the notice, and of the neglect or refusal of the tenant or occupier, as the case may be, it shall be lawful for the justices acting for the district, division or place within which the said premises, or any part thereof, shall be situate, in petty sessions assembled, or any two of them, to issue a warrant under their hands and seals to the constables and peace officers of the district (*q*), division, or place within which the said premises, or any part thereof, shall be situate, commanding them, within a period to be therein named, not less than **21** nor more than **30** clear days from the date of such warrant, to enter (by force if needful) into the premises, and give possession of the same to such landlord or agent: provided always, that entry upon any such warrant shall not be made on a Sunday, Good Friday, or Christmas day, or at any time except between the hours of nine in the morning and four in the afternoon: provided also, that nothing herein contained shall be deemed to protect any person, on whose application and to whom any such warrant shall be granted, from any action which may be brought against him by any such tenant or occupier, for or in respect of such entry and taking possession, where such person had not, at the time of granting the same, lawful right to the possession of the said premises; provided also, that nothing herein contained shall affect any rights to which any person may be entitled as outgoing tenant, by the custom of the country or otherwise.

Rent, contract to pay Rates and Taxes is not equivalent to.

A mere contract to pay rates and taxes in consideration of the occupation is not a contract for rent, so that where the tenant paid more than 20*l.* in pursuance of such a contract, it was held that he was within the act (*r*).

Landlord's common law right to re-enter unaffected. *Jones* v. *Foley.*

The issue of the warrant does not cause the possession of the party holding over to be protected during the twenty-one days or other period of its currency, and the landlord's right at common law to resume possession at the end of the tenancy (provided that no forcible entry is effected) is unaffected by the statute (*s*).

Service on Tenant of Notice of Application to Justices.

Sect. 2.

The service on the tenant of the notice of application to the justices is regulated by sect. 2 as follows:—

Such notice of application intended to be made under this act may be served either personally or by leaving the same with some person being in and apparently residing at the place of abode of the persons so holding over as aforesaid; and the person serving the same shall read over the same to the person served, or with whom the same shall be left as aforesaid, and explain the purport and intent thereof: provided, that if the person so holding over cannot be found, and the place of abode of such person shall either not be known, or admission thereto cannot be obtained for serving such summons, the posting up of the said summons on some conspicuous part of the premises so held over shall be deemed to be good service upon such person.

By sect. 3, any person obtaining a warrant under the act without having, at the time of granting the same, lawful right to the possession of the premises, is to be deemed a trespasser, though no entry be

(*q*) *Jones* v. *Chapman*, 14 M. & W. 124; 2 D. & L. 907.

(*r*) *Richmond Borough Justices, In re*, 10 T. L. R. 68.

(*s*) *Jones* v. *Foley*, [1891] 1 Q. B. 730; 60 L. J., Q. B. 464; 64 L. T. 538; 39 W. R. 510.

made, and execution of the warrant may be stayed upon the tenant becoming bound with two sureties to sue for trespass the person to whom the warrant was granted until judgment shall have been given in such action of trespass.

Protection of Justices, Constables, and Landlord.

The protection of the justices issuing the warrant, and of the constables executing it, in cases where the landlord had right to possession, and the protection of a landlord having right to possession but committing some irregularity in the course of the proceeding is provided for as follows, by sects. 5 and 6 :—

Action against Justices or Constables barred.

**5.** It shall not be lawful to bring any action or prosecution against the said justices by whom such warrant as aforesaid shall have been issued, or against any constable or peace officer by whom such warrant may be executed, for issuing such warrant or executing the same respectively, by reason that the person on whose application the same shall be granted had not lawful right to the possession of the premises.

Action against Landlord having Right, for Irregularity.

**6.** Where the landlord at the time of applying for such warrant as aforesaid had lawful right to the possession of the premises, or of the part thereof so held over as aforesaid, neither the said landlord nor his agent, nor any other person acting in his behalf, shall be deemed to be a trespasser by reason merely of any irregularity or informality in the mode of proceeding for obtaining possession under the authority of this act; but the party aggrieved may, if he think fit, bring an action on the case for such irregularity or informality, in which the damage alleged to be sustained thereby shall be specially laid, and may recover full satisfaction for such special damage, with costs of suit: provided, that if the special damage so laid be not proved, the defendant shall be entitled to a verdict, and that, if proved, but assessed by the jury at any sum not exceeding five shillings, the plaintiff shall recover no more costs than damages, unless the judge before whom the trial shall have been held shall certify upon the back of the record that in his opinion full costs ought to be allowed (*ss*).

Costs of Landlord.

Duplicate of Notice to be annexed to Complaint.

For the notice under the act, see Appendix C., Sect. 12, post, and for the complaint before justices—*to which a duplicate of the notice is directed, by the form of complaint, to be annexed*—and the Warrant of Possession, see Appendix E., Sect. 4, post.

The jurisdiction of justices under this act is not ousted by the defendant bonâ fide setting up the title of a third person (*t*). The justices should hear and determine any such question.

Summary Remedy against Schoolmasters, &c.

A similar summary remedy is given to the guardians of the poor of any union or parish with respect to lands vested in them or under their management or control (*u*), and to the valuer under inclosure acts, in respect of encroachments and recent inclosures of land subject to the provisions of those acts (*v*). Also against schoolmasters, &c., who wrongfully hold over, after removal from their office (*x*); also, to the secretary of state for war (*y*).

(*ss*) Compare s. 145 of County Courts Act, 1838, p. 869, supra.
(*t*) *Rees* v. *Davies*, 4 C. B., N. S. 56.
(*u*) 5 & 6 Will. 4, c. 69, s. 5.
(*v*) 15 & 16 Vict. c. 79, s. 13; see *Chitcote* v. *Youldon*, 29 L. J., M. C. 197.
(*x*) 23 & 24 Vict. c. 136, s. 13.
(*y*) 22 Vict. c. 12, s. 5.

CH. XXII. s. 4.
*Recovery of Premises before Justices (Parish Property).*

### (b) *Recovery of Parish Property.*

59 Geo. 3, c. 12, s. 24.
Summons before Justices of permitted Occupier refusing to Quit Parish Property within One Month after Notice in Writing.

The Poor Relief Act, 1819 (*z*), 59 Geo. 3, c. 12, s. 24, enacts that if any person, who shall have been permitted to occupy any dwelling belonging to or provided by or at the charge of any parish for the habitation of the poor thereof, or who shall have unlawfully intruded himself into any such dwelling, or in any house, tenement, or hereditament belonging to such parish, shall not deliver up the possession thereof to the churchwardens and overseers of the poor of any such parish, within one month after demand in writing, delivered to him, or in his absence affixed on some notorious part of the premises, any two justices of the peace, upon complaint to them by one or more of the churchwardens and overseers, may summon him to appear before them, at a time and place to be appointed by them, and cause the summons to be delivered to him, or in his absence to be affixed on the premises, seven days at the least before the time appointed for hearing the complaint; and such justices are required, upon appearance of the defendant, or proof that such summons has been delivered or affixed as is thereby directed, to hear the complaint, and if they shall find it to be true, then by warrant to cause possession of the premises to be delivered to the churchwardens and overseers or some of them.

Warrant for Possession.

59 Geo. 3, c. 12, s. 25.
Summons of Termor Holding over.

The recovery of parish land let and held over is provided for by sect. 25 of the same act as follows:—

If any person, to whom any land appropriated, purchased, or taken under the authority of this act, for the employment of the poor of any parish, or to whom any other lands belonging to such parish, or to the churchwardens and overseers thereof, or to either of them, shall have been let for his or her own occupation, shall refuse to quit and deliver up the possession thereof to the churchwardens and overseers of the poor of such parish, at the expiration of the term for which the same shall have been demised or let to him or her; or if any person or persons shall unlawfully enter upon, or take or hold possession of any such land, or any other land or hereditaments belonging to such parish, or to the churchwardens or overseers, or to either of them; it shall be lawful for such churchwardens and overseers of the poor, or any of them, after such notice and demand of possession as is by this act directed in the case of parish houses, to exhibit a complaint against the person or persons in possession of such land before two of his Majesty's justices of the peace, who are hereby authorized and required to proceed thereon, and to hear and determine the matter thereof, and if they shall find and adjudge the same to be true, to cause possession of such land to be delivered to the churchwardens and overseers of the poor, or some of them, in such and the like course and manner as are by this act directed with regard to parish houses.

Jurisdiction not ousted by claim of Title.

Upon an information and complaint, under sect. 24, by parish officers, the justices are not precluded from inquiring into the matter and determining thereon, by reason of the defendant claiming title

(*z*) See this Act, Chitty's Statutes, tit. "*Poor.*"

to the property on behalf of himself or the person by whom he was put into possession (*a*).

If a person "permitted to occupy" within the terms of the statute desert the premises, the parish officers may resume possession, as at common law, without any notice to quit, or resort to procedure under the statute (*b*); but where a person has been let into possession of a house belonging to the parish, by the parish officers, as an ordinary tenant, they cannot proceed against him to recover possession under the 24th section of this statute (*c*).

Character of Occupation.

Waste land of a parish, into the occupation of which a person has been let under licence of the majority of the parish freeholders, under an agreement to pay rent to churchwardens and overseers in aid of the poor rates, is parish land, which they may recover, under sect. 24 of the above act, after notice and demand of possession; and indeed it appears possible that they might in such a case expel the tenant without resorting to the statutory procedure (*d*).

Waste Land.

### (c) *Recovery of Cottage Allotments* (*e*).

By the Allotments Act, 1832, 2 & 3 Will. 4, c. 42, power is given in parishes inclosed under acts of parliament, in which allotments have been made for the benefit of the poor, for the trustees of the allotments and parish officers in vestry assembled, to let them in small portions to industrious cottagers.

2 & 3 Will. 4, c. 42.

By sect. 5, "if the rent is in arrear for four weeks, or, if, at the end of any year of occupation, it is the opinion of the vestry that the land has not been duly cultivated, the churchwardens or overseers, or any or either of them, with the consent of the vestry, may serve a notice to quit upon the occupier, who shall deliver up possession within one week after notice."

Notice to Quit where Rent in Arrear for 4 Weeks.

Recovery of possession is provided for by sect. 6 as follows:—

Summons of Tenant in default, and delivery of posesssion by Warrant of Justices.

If any person to whom such portion of land as aforesaid shall have been let, for his or her own occupation, shall refuse to quit and deliver up possession thereof when thereto required, according to the terms of this act, or if any other person or persons shall unlawfully enter upon, or take or hold possession of any such land, it shall be lawful for the churchwardens and overseers of the poor, or any or either of them, to exhibit a complaint against the person so in possession of such land before two of his Majesty's justices of the peace, who are hereby authorized and required to issue a summons, under their hands and seals, to the person against whom such complaint shall be made, to appear before them at a time and place appointed therein; and such justices are hereby required and empowered,

(*a*) *Ex parte Vaughan*, L. R., 2 Q. B. 114; 36 L. J., M. C. 17; 7 B. & S. 902.
(*b*) *Wildbor* v. *Rainforth*, 8 B. & C. 4.
(*c*) *Reg.* v. *Middlesex JJ.*, 7 Dowl. 767; *Reg.* v. *Bolton*, 1 Q. B. 66.
(*d*) See, per Byles, J., *Appleton* v. *Morrey*, 2 F. & F. 167.
(*e*) See Chitty's Statutes, tit. "Allotments."

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upon the appearance of the defendant before them, or upon proof on oath that such summons has been duly served upon him, or left at his usual place of residence, or if there should have been any difficulty in finding such usual place of residence, then upon proof on oath of such difficulty, and that such summons has been affixed on the door of the parish church of the said parish in which such land is situated, and in any extra-parochial place on some public building or other conspicuous place therein, to proceed to hear and determine the matter of such complaint; and if they shall find and adjudge the same to be true, then, by warrant under their hands and seals, to cause possession of the land in question to be delivered to the churchwardens and overseers of the poor, or to some of them.

By sect. 11, the powers and provisions of the act, so far as applicable, may be applied where inclosures are made under the Allotments Act, 1832, 1 & 2 Will. 4, c. 42, by which the powers of the Poor Relief Act, 1819, 59 Geo. 3, c. 12, for taking land for the benefit of the poor are extended, or where land shall in any other manner be found appropriated for the general benefit of the poor of any parish.

8 & 9 Vict. c. 118.

By the Inclosure Act, 1845 (8 & 9 Vict. c. 118), power is given to the inclosure commissioners to appropriate a portion of lands inclosed for the purpose of letting it in gardens, not exceeding one quarter of an acre each, to the poor: and by sect. 110:—

Allotment Gardens under Inclosure Acts. Notice to Tenant where Rent in Arrear.

If the rent reserved upon the letting of any garden by the allotment wardens shall at any time be in arrear for forty days, or if at any time during the tenancy, being not less than three calendar months after the commencement thereof, it shall appear to the allotment wardens that the occupier of such garden shall not have duly observed the terms and conditions of his tenancy, or shall have gone to reside more than one mile out of the parish, then and in every such case the allotment wardens shall serve a notice upon such occupier, or, in case he shall have gone to reside out of the parish, shall affix the same to the door of the church of the parish, determining the tenancy at the expiration of one month after such notice shall have been so served or affixed; and thereupon such tenancy shall be determined accordingly: provided always, that in every such case the allotment wardens or their incoming tenant shall pay to the occupier, whose tenancy shall have been so determined, a fair recompense in money for any crops (not being crops prohibited by the terms of such tenancy) which may be growing on such garden at the time of such determination, and for any manure left on such garden, or any benefit accruing from the manuring of such garden to the wardens or their incoming tenant: and the justices, to whom application may be made for a warrant to give possession of such garden, shall settle the amount of such recompense, in case the parties differ about the same, and stay the execution of such warrant until the same shall have been paid or tendered, or (in case such occupier be absent) until the payment thereof shall have been secured to the satisfaction of such justices.

Recovery of Allotment Garden.

By sect. 111, in case, upon the determination of any such tenancy, the occupier of any such garden shall not deliver up possession thereof, or if any other person shall unlawfully hold possession of

any such garden, or of any part of such allotment, the allotment wardens may recover possession according to the mode prescribed by the Small Tenements Recovery Act, 1838, 1 & 2 Vict. c. 74 (ante, p. 877), in the same manner as if the said wardens were landlords, and the overholding occupier or other person a tenant refusing to deliver up possession within the meaning of that act.

Poor Allotments Management Act, 1873.

Both the Allotments Act, 1832, and the Inclosure Act, 1845, were amended by the Poor Allotments Management Act, 1873 (36 & 37 Vict. c. 19), which provides that the allotment trustees and the vestry may appoint a committee for the purpose of exercising their powers; and sect. 110 of the Inclosure Act, 1845, is incorporated with the Allotments Extension Act, 1882, 44 & 45 Vict. c. 80, by sect. 12 of that Act (*e*).

### (d) *Recovery of Deserted Premises.*

The recovery of deserted premises, where a half-year's rent is in arrear and there is no sufficient distress, is provided for by s. 16 of the Distress for Rent Act, 1737, 11 Geo. 2, c. 19, as amended by the Deserted Tenements Act, 1817, 57 Geo. 3, c. 52, as follows:—

11 Geo. 2, c. 19, s. 16.
Where Half-Year's Rent in Arrear and no sufficient Distress, Justices may enter Deserted Premises.

Whereas landlords are often great sufferers by tenants running away in arrear, and not only suffering the demised premises to be uncultivated without any distress thereon, whereby their landlords or lessors might be satisfied for the rent-arrear, but also refusing to deliver up the possession of the demised premises, whereby landlords are put to the expense and delay of recovering in ejectment: Be it enacted, that if any tenant holding any lands, tenements, or hereditaments, *at a rack-rent*, or, where the rent reserved shall be *full three-fourths of the yearly value* of the demised premises, who shall be in arrear for one year's rent [extended by Deserted Tenements Act, 1817, to one half-year's rent], shall *desert* the demised premises, and leave the same *uncultivated or unoccupied* (*f*), *so as no sufficient distress can be had to countervail the arrears of rent*, it shall and may be lawful to and for two or more justices of the peace of the county, riding, division, or place (having no interest in the demised premises), at the request of the lessor or landlord, lessors or landlords, or his, her, or their bailiff or receiver, to go upon and view the same, and to affix or cause to be affixed on the most notorious part of the premises, notice in writing what day (at the distance of **14** days at least (*g*)) they will return to take a second view thereof; and if upon such second view the tenant, or some person on his or her behalf, shall *not appear and pay the rent in arrear*, or there shall not be sufficient distress upon the premises, then the said justices may put the landlord or landlords, lessor or lessors, into the possession of the said demised premises; and the lease thereof to such tenant, *as to any demise therein contained only, shall from thenceforward become void.*

Second View.

(*e*) See also Allotments Act, 1887, 50 & 51 Vict. c. 48, s. 8 (2), and the whole series of Allotment Acts, in Chitty's Statutes, tit. "Allotments."

(*f*) See *Ex parte Pillon*, 1 B. & A. 369; 11 R. R. 342; and 886 (*r*), *post*.

(*g*) *I.e.*, fourteen clear days; *Creak* v. *The Justices of Brighton*, 1 F. & F. 110.

CH. XXII. s. 4.
*Recovery before Justices (Deserted Premises).*

This statute, which gives a summary remedy to landlords, does not require the request or complaint to be made *upon oath*: therefore, where in trespass against two magistrates for turning a tenant out of possession under this act, a record of the proceedings, drawn up conformably to the statute, was given in evidence, it was held, that it was a complete defence to the action, though they did not appear to have acted on the oath of the landlord (*h*). In this and all other like cases the justices ought to make a record of the whole proceedings (*i*).

Complaint need not be on Oath.

Sect. 17.
Appeal to Judges of Assize, &c.

Sect. 17 provides, that such proceedings of the said justices shall be examinable in a summary way by the next justice or justices of assize (*k*) of the respective counties in which such lands or premises lie; and if they lie in the city of London or county of Middlesex, by the judges of the Courts of Queen's Bench or Common Pleas, who are thereby *empowered to order restitution to be made to any such dispossessed tenant, together with his costs*, to be paid by the landlord; and, in case they affirm the act of the justices, to award costs not exceeding five pounds for the frivolous appeal. This section will still apply, but with such alterations as are required by the altered state of the courts, and the appeal in London or Middlesex will therefore lie to any judge of the Queen's Bench Division of the High Court of Justice (*l*).

57 Geo. 3, c. 52.
Right of Re-entry unnecessary.

It having been decided that the Distress for Rent Act, 1737, 11 Geo. 2, c. 19, s. 16, did not apply to cases where the landlord had not, by the terms of the lease, a right of entry (*m*), the Deserted Tenements Act, 1817, 57 Geo. 3, c. 52, extended the powers thereby given to the case of tenants "who shall hold such lands and tenements or hereditaments under any demise or agreement either written or verbal, and although no right or power of re-entry be reserved or given to the landlord in case of non-payment of rent." Since this enactment a right of re-entry is clearly unnecessary (*n*).

3 & 4 Vict. c. 84, s. 13.
Within the Metropolitan Police District.

Where the premises are within the metropolitan police district, the Metropolitan Police Act, 3 & 4 Vict. c. 84, enacts (sect. 13), that, after the passing of that act, "none of the police magistrates within the metropolitan police district shall be required to go upon any deserted lands, tenements or hereditaments, for the purpose of viewing the same, or affixing any notices thereon, or of putting the landlord or landlords, lessor or lessors, into the possession thereof,"

(*h*) *Basten* v. *Carew*, 3 B. & C. 649.
(*i*) *Ashcroft* v. *Bourne*, 3 B. & Adol. 684; *Haylock* v. *Sparke*, 1 E. & B. 471; *Creak* v. *The Justices of Brighton*, 1 F. & F. 110; Cole Ejec. 678, 844.
(*k*) This appeal must be made to the judge or judges going the circuit, in their individual capacity; not as justices of assize: *Reg.* v. *Sewell*, 8 Q. B. 161.
(*l*) By virtue of an Order in Council of 16th December, 1880, under sect. 32 of the Judicature Act, 1873.
(*m*) Easter T. 41 Geo. 3, MS.: *Ex parte Pilton*, 1 B. & A. 369
(*n*) *Edwards* v. *Hodges*, 15 C. B. 477.

under the provisions of 11 Geo. 2, c. 19, and 57 Geo. 3, c. 52, "but that in every case within the metropolitan police district in which by the said acts, or either of them, two justices are authorized to put the landlord or lessor into the possession of such deserted premises, it shall be lawful for one of the police magistrates, upon the request of the lessor or landlord, or his or her bailiff or receiver, made in open court, and upon proof given to the satisfaction of such magistrate of the arrear of rent and desertion of the premises by the tenant as aforesaid, to issue his warrant, directed to one of the constables of the metropolitan police force, requiring him to go upon and view the premises, and to affix thereon the like notices as under the said acts, or either of them, are required to be affixed by two justices of the peace; and upon the return of the warrant, and upon proof being given to the satisfaction of the magistrate before whom the warrant shall be returned that it has been duly executed, and that neither the tenant, nor any person on his or her behalf, has appeared and paid the rent in arrear, and that there is not sufficient distress upon the premises, it shall be lawful for such magistrate to issue his warrant to a constable of the metropolitan police force, requiring him to put the landlord or lessor into the possession of the premises; and every constable to whom any such warrant shall be directed shall duly execute and return the same subject to the provisions contained" in 2 & 3 Vict. c. 47, "as to the execution of warrants directed to constables of the metropolitan police force; and upon the execution of such second warrant, the lease of the premises to such tenant, as to any demise therein contained only, shall thenceforth be void."

Warrant to Constable.

By the Summary Jurisdiction Act, 1848, 11 & 12 Vict. c. 43, s. 34, "it shall be lawful for the Lord Mayor of the city of London, or for any alderman of the said city, for the time being, sitting at the Mansion House or Guildhall Justice Rooms in the said city, to do alone any act, at either of the said justice rooms, which by any law now in force, or by any law not containing an express enactment to the contrary hereafter to be made, is or shall be directed to be done by one or more justice." This applies to proceedings in the city of London under the before-mentioned acts (*o*). But although such mayor or alderman sitting as aforesaid has all the power of two justices, yet he has not the power of a metropolitan police magistrate acting under Metropolitan Police Act, 3 & 4 Vict. c. 84, s. 13 (*o*), and therefore he cannot send a constable to view the premises, and to affix notices, &c., but he must proceed in like manner as two or more justices.

11 & 12 Vict. c. 43, s. 34.

City of London.

(*o*) *Edwards* v. *Hodges*, 15 C. B. 477.

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*Recovery before Justices (Deserted Premises).*

A stipendiary magistrate in any city, town, liberty, borough or place (other than the city of London, or the metropolitan police district) should proceed in like manner as two or more justices (*p*).

Stipendiary Magistrates.

Jurisdiction of Justices.

The foregoing statutes do not contain any exception with respect to leases made in consideration of any fine or premium. Therefore, any such fine or premium is immaterial except so far as it tends to show that the rent reserved is not a rack-rent, or not full three-fourths of the yearly value of the demised premises (*q*). The statutes apply to all demises, whether written or oral, however long may be the term and however large may be the amount of rent reserved (*r*). It is no longer of any consequence that the lease or agreement contains no condition or proviso for re-entry for non-payment of rent (*s*); and therefore this mode of proceeding may sometimes be adopted where no action for recovery of land could be supported, either in the High Court or in the County Court. But the following circumstances must concur, viz.:—1. The rent reserved must be a rack-rent, or full three-fourths of the yearly value of the demised premises. 2. One-half a year's rent at the least must be in arrear. 3. The premises must have been deserted and left uncultivated or unoccupied, so as no sufficient distress can be had to countervail the arrears of rent. No information or complaint on oath need be made before the justices; a mere request is sufficient (*t*). But upon an application to a *metropolitan* police magistrate, proof must be made to his satisfaction of the rent in arrear and desertion of the premises by the tenant (*u*).

Determination of question, whether Premises deserted or not.

The justices are upon their own view to determine whether the premises are deserted or not (*x*); also, whether they have been left uncultivated or unoccupied so as no sufficient distress can be had to countervail the arrears of rent: also, whether the rent reserved is a rack-rent or full three-fourths of the yearly value of the demised premises. Upon these points they may, if they think fit, receive the evidence or statement of any broker, surveyor, or other competent person, or of the landlord or his bailiff or receiver; but they ought to form their own judgment or conclusion (*y*). It has been decided, where a tenant ceased to reside on the premises for several months, and left them without any furniture or sufficient other property to answer the arrears of rent, that the landlord might properly proceed under the statute to recover the possession, although he knew where the tenant then was, and although the justices found a servant of the tenant on

(*p*) 21 & 22 Vict. c. 73; Chit. Stat., tit. "*Justices.*"

(*q*) See Cole Ejec. 676.

(*r*) *Ex parte Pilton*, 1 B. & A. 369; 11 R. R. 342.

(*s*) 57 Geo. 3, c. 52; ante, 884; *Edwards* v. *Hodges*, 15 C. B. 477.

(*t*) *Basten* v. *Carew*, 3 B. & C. 649. See also *Re Perham*, 5 H. & N. 30; 11 & 12 Vict. c. 43, s. 10.

(*u*) 3 & 4 Vict. c. 84, s. 13; ante, 884.

(*x*) *Basten* v. *Carew*, supra.

(*y*) See Cole Ejec. 677.

the premises when they first went to view the same (*z*). On the other hand, in a case where the wife and children of the tenant remained on the premises, but there was no furniture in the house, except three or four chairs, which were stated by the wife to belong to a neighbour: held, by the justices of assize on appeal (reversing the decision of the justices), that the premises had not been *deserted* within the meaning of the act (*a*). Where magistrates had given possession of a dwelling-house as *deserted* and unoccupied, and the judges of assize, on appeal, made an order for restitution with costs, and the tenant brought an action of trespass for the eviction against the magistrates, the constable, and the landlord: it was held, that the record of the proceedings before the magistrate was an answer to the action on behalf of all the defendants (*b*). The proper remedy is to appeal against the decision of the justices pursuant to the Distress for Rent Act, 1737, 11 Geo. 2, c. 19, s. 17 (*c*).

Order on Appeal.

The order of the judges of assize on appeal should be directed to the justices from whom the appeal comes, as the court have refused a mandamus to compel the justices of the peace to cause restitution to be made, in conformity with an order of the justices of assize on appeal, where the order was not directed to any one (*d*). Formerly the court would not compel justices to act, who doubted their jurisdiction, though incorrectly (*e*).

If the magistrates have a record of their proceedings under this act drawn up, it will be an answer to any action of trespass brought against them or the landlord or constable who took possession, notwithstanding there may have been a successful appeal against the order (*f*).

(*z*) *Ex parte Pilton*, 1 B. & A. 369. See also *Taylerson* v. *Peters*. 7 A. & E. 110; decided under 8 Anne, c. 14, ss. 6, 7.

(*a*) *Ashcroft* v. *Bourne*, 3 B. & Adol. 684.

(*b*) *Ashcroft* v. *Bourne*, supra: *Basten* v. *Carew*, 3 B. & C. 649; 3 L. J., K. B. 111; 5 D. & R. 558; 27 R. R. 453.

(*c*) Ante, 884; *Reg.* v. *Sewell*, 8 Q. B. 161.

(*d*) *Reg.* v. *Traill*, 12 A. & E. 761.

(*e*) *Ex parte Fulder*, 8 Dowl. 535; *Ex parte William Davy*, 2 Dowl., N. S. 24. But now see Justices Protection Act, 1848, 11 & 12 Vict. c. 44, s. 5; *Reg.* v. *Cotton*, 15 Q. B. 574, Coleridge, J.; *Reg.* v. *Ingham*, 17 Q. B. 884.

(*f*) See *Ashcroft* v. *Bourne*, supra: *Reg.* v. *Sewell*, supra: per Abbott, C.J., in *Basten* v. *Carew*, supra.

# CHAPTER XXIII.

## CRIMINAL LAW AFFECTING LANDLORD OR TENANT.


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### Sect. 1.—*Letting Infected Houses or Lodgings.*

Public Health Act, 1875.

Penalty for letting House in which infected Persons have been Lodging.

The 128th and 129th sections of the Public Health Act, 1875 (38 & 39 Vict. c. 55), impose penalties on persons letting houses or lodgings or rooms in an inn in which persons have been suffering from "any dangerous infectious disorder," and on persons making false answers to inquiries by intending tenants, as follows:—

Inn.

**128.** Any person who knowingly lets for hire any house, room or part of a house in which any person has been suffering from any dangerous infectious disorder, without having such house, room, or part of a house, and all articles therein liable to retain infection, disinfected to the satisfaction of a legally-qualified medical practitioner, as testified by a certificate signed by him, such person shall be liable to a penalty not exceeding twenty pounds. For the purpose of this section the keeper of an inn shall be deemed to let for hire part of a house to any person admitted as a guest into such inn.

Penalty for making False Statements.

**129.** Any person letting for hire or showing for the purpose of letting for hire any house or part of a house, who, on being questioned by any person negotiating for the hire of such house or part of a house as to the fact of there being, or within six weeks previously having been therein any person suffering from any dangerous infectious disorder, knowingly makes a false answer to such question, shall be liable, at the discretion of the court, to a penalty not exceeding twenty pounds, or to imprisonment, with or without hard labour, for a period not exceeding one month.

London.

The Public Health (London) Act, 1891, 54 & 55 Vict. c. 76 (ss. 63, 64), contains provisions, very similar to the above, which apply (ss. 132, 141) only in the administrative county of London, and are supplemented (s. 55, sub-s. 8, and s. 58) by definitions of "infectious disease" similar to that of the Act of 1890 mentioned in Sect. 2, *infra*.

### Sect. 2.—*Ceasing to occupy Infected House without having it disinfected, &c.*

Ch. XXIII. s. 2.
*Ceasing to Occupy Infected House, &c.*

By s. 7 of the Infectious Diseases Prevention Act, 1890, 53 & 54 Vict. c. 34—an *adoptive* act which may be adopted wholly or in part by an urban or rural sanitary authority, but which does not come into force unless and except so far as adopted—it is enacted that:—

*Adoptive* Infectious Diseases Prevention Act.

Every person who shall cease to occupy any house, room, or part of a house in which any person has within six weeks previously been suffering from *any infectious disease* without having such house, room, or part of a house, and all articles therein liable to retain infection, disinfected to the satisfaction of a registered medical practitioner, as testified by a certificate signed by him, or without first giving to the owner of such house, room, or part of a house, notice of the previous existence of such disease, and every person ceasing to occupy any house, room, or part of a house, and who on being questioned by the owner thereof, or by any person negotiating for the hire of such house, room, or part of a house as to the fact of there having within six weeks previously been therein any person suffering from any infectious disease knowingly makes a false answer to such question shall be liable to a penalty not exceeding ten pounds.

Obligation to Disinfect, and to disclose fact of Infection.

Penalty.

The term "infectious disease" in the above act has by s. 2 the same meaning as in the Infectious Diseases Act, 1889, 52 & 53 Vict. c. 72, i.e. by s. 6 of the latter act, it "means small pox, cholera, diphtheria, membranous croup, erysipelas, the disease known as scarlatina or scarlet fever, and the fevers known by any of the following names, typhus, typhoid, enteric, relapsing, continued, or puerperal," and includes as respects any particular district, any other infectious disease to which the act has been extended by the authorities.

Meaning of Infectious Disease in Act of 1890.

The Act of 1890 has been very widely adopted.

The Public Health (London) Act, 1891, 54 & 55 Vict. c. 76 (s. 65), contains provisions similar to the above, applicable to *dangerous* infectious diseases.

London.

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### Sect. 3.—*Letting House as a Brothel.*

The Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), contains very stringent provisions against the user of a house as a brothel. By sect. 13, any person "who being the lessor or landlord of any premises, or the agent of such lessor or landlord, lets the same or any part thereof with the knowledge that such premises or some part thereof are or is to be used as a brothel, or is wilfully a party to the continued use of such premises or any part thereof as a brothel," is liable on summary conviction to a fine not exceeding twenty pounds, or to imprisonment for not more than three months with or without hard labour. The words "is wilfully a party to the continued use," &c., seem to render any landlord liable under the section who,

Criminal Law Amendment Act, 1885.

Fine or Imprisonment for letting House as Brothel.

CH. XXIII. s. 3.

*Letting House as a Brothel.*

having the knowledge therein described, and having the power to give notice to quit, should abstain from giving such notice immediately on becoming possessed with reasonable certainty of such knowledge.

Solicitor.

A solicitor, convicted as a landlord under this enactment, may be struck off the rolls in respect of the conviction, although the offence has no relation to his character as solicitor (*z*).

## SECT. 4.—*Larceny by Tenants or Lodgers.*

24 & 25 Vict. c. 96, s. 74.

By the Larceny Act, 1861, 24 & 25 Vict. c. 96, s. 74, as printed in the 2nd edition of the Statutes Revised :—

Stealing Chattels or Fixtures.

Whosoever shall *steal any chattel or fixture* let to be used by him or her in or with any house or lodging, whether the contract shall have been entered into by him or her or by her husband, or by any person on behalf of him or her or her husband, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour . . . . and, if a male under the age of sixteen years, with or without whipping; *and in case the value of such chattel or fixture shall exceed the sum of 5l.*, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years . . . . or to be imprisoned . . . . and, if a male under the age of sixteen years, with or without whipping; and in every case of stealing any chattel in this section mentioned it shall be lawful to prefer an indictment in the common form as for larceny; and in every case of stealing any fixture in this section mentioned, to prefer an indictment in the same form as if the offender were not a tenant or lodger, and in either case to lay the property in the owner or person letting to hire.

If above 5*l.* Value.

Form of Indictment.

Lodging-house Keeper not responsible for Goods of Lodger Stolen.

The law implies no obligation upon a lodging-house keeper to take care of the goods of his lodger. Where property of lodger about to quit had been stolen by a stranger in his absence permitted by the occupier to enter the rooms to view them: it was held that the lodging-house keeper was not responsible for the loss (*a*).

## SECT. 5.—*Injuries to Buildings by Tenants.*

24 & 25 Vict. c. 97, s. 13.

By the Malicious Damage Act, 1861, 24 & 25 Vict. c. 97, s. 13 :—

Pulling down or demolishing all or Part of any Building or Fixture.

Whosoever, being possessed of any dwelling house or other building, or part of any dwelling-house or other building, held for any term of years, or other less term, or at will, or held over after the determination of any tenancy, shall unlawfully and maliciously pull down or demolish, or begin to pull down or demolish, the same or any part thereof, or shall unlawfully and maliciously pull down or sever from the freehold any fixture being fixed in or to such dwelling-house or building, or part of such dwelling-house or building, shall be guilty of a misdemeanor (*b*).

(*z*) *Weare, In re*, [1892] 2 Q. B. 439; 62 L. J., Q. B. 596; 69 L. T. 522—C. A.

(*a*) *Holder* v. *Soulby*, 8 C. B., N. S. 254; 29 L. J., C. P. 246.

(*b*) No punishment is specially provided by the Malicious Damage Act, 1861, or any other act, for this offence, which is therefore punishable on conviction, on indictment, as a misdemeanour at common law, *i.e.*, by fine or imprisonment (without hard labour) or both, and to be put under recognizances at the discretion of the Court. See Steph. Dig. of Crim. Law, arts. 22, 383, citing *R.* v. *Dunn*, 12 Q. B. 1041.

## Sect. 6.—*Forcible Entry and Detainer* (*b*).



Nature and Punishment of the Offence by Indictment.

The offence of forcible entry and detainer is defined to be the violent taking or keeping possession of land or tenements, with menaces, force and arms, and without the authority of the law (*c*). This was permitted at common law under certain circumstances, where a person had been disseised or put out of possession (*d*); but being found very prejudicial to the public peace, it was thought necessary, by various statutes (*e*), to restrain all persons whatever from the use of such violent methods to do themselves justice. The indictment for forcible entry into *leasehold* premises is founded on 21 Jac. 1, c. 15; for a forcible detainer, on 8 Hen. 6, c. 9, or 21 Jac. 1, c. 15. An indictment lies also at common law for a forcible entry, although it is generally brought on the acts of parliament (*f*). No expulsion or detainer in this case need be proved, because no restitution can be awarded (*g*). The tenement in which the force was made must be described with convenient certainty; and the indictment must set forth, that the defendant actually entered, and ousted the party grieved, and continued his possession at the time of finding the indictment, otherwise he cannot have restitution, because it does not appear that he needs it (*h*). If, however, a man's wife, children or servants continue in the house, or upon the land, he is not ousted of his possession; but his cattle being upon the ground do not preserve his possession (*i*). A repugnancy in setting forth the offence in an indictment upon any of the statutes is an incurable fault (*k*): an indictment for forcible entry was quashed, therefore, for not setting forth that the party was seised or disseised: or what estate he had in the tenement; for if he had only a term for years, then the entry must be laid into the freehold of A., in the possession of B. (*l*). Upon the finding by the grand jury of the indictment, the judge of assize has a discretion to refuse to award restitution (*m*).

Punishment of the Offence by Justices.

By 8 Hen. 6, c. 9, for a more speedy remedy, the party grieved may complain to any one justice, or to a mayor, sheriff, or bailiff

(*b*) See *Beddall* v. *Maitland*, 17 Ch. D. 174; ante, Chap. XX., Sect. 1.

(*c*) 4 Blac. Com. 148.

(*d*) 1 Hawk. P. C. c. 64, s. 1; 1 Russ. on Crimes, 404 (5th ed.). The common law of this subject seems to be very obscure. See Russell at p. 404, citing *R.* v. *Blake*, 3 Burr. 1731; *R.* v. *Wilson*, 8 T. R. 361; 4 R. R. 694, and expressing the opinion "that it is the more usual and effectual way to proceed upon the statutes, which give restitution and damages to the party grieved."

(*e*) 5 Ric. 2, st. 1, c. 8; 15 Ric. 2, c. 2; 8 Hen. 6, c. 9; 31 Eliz. c. 11; 21 Jac. 1, c. 15; Chit. Stat. tit. "Criminal Law" (Offences against Peace, &c.); 1 Russ. on Crimes, Ch. XXVII., p. 404 (5th ed.); 2 Burn's J. 592—595 (30th ed.).

(*f*) *Rex* v. *Baker*, 3 Burr. 1731.

(*g*) *Rex* v. *Wilson*, 8 T. R. 357; 4 R. R. 694.

(*h*) Hawk. P. C. c. 64, ss. 37, 41.

(*i*) Dalt. c. 132.

(*k*) 1 Hawk. P. C. c. 64, s. 39.

(*l*) 3 Salk. 169; 3 Burr. 1732; *Reg.* v. *Bowser*, 8 Dowl. 128.

(*m*) *Reg.* v. *Harland*, 8 A. & E. 826; 2 Moo. & R. 141.

CH. XXIII. s. 6. *Forcible Entry and Detainer.*

within their liberties. Concerning which power of the justice, it is enacted as follows:—After complaint made to such justice, by the party grieved, of a forcible entry made into lands, tenements or other possessions, or forcibly holding thereof, he shall, within a convenient time, at the costs of the party grieved (without any examining or standing upon the right or title of either party), take sufficient power of the county, and go to the place where the force is made (*n*). All people of the county, as well the sheriff as others, shall be attendant on the justices, to arrest the offenders, on pain of imprisonment and fine to the Queen; and if the doors be shut, and they within the house shall deny the justice to enter, it seems he may break open the house to remove the force (*o*): if, after the entry made, the justice "shall find such force, he shall cause the offenders to be arrested:" and the offenders being arrested, they shall be put in the next gaol, there to abide convict by the record of the same justice, until they have made fine and ransom to the Queen (*p*). The justice ought to "make a record of such force by him viewed:" which record shall be sufficient conviction of the offenders, and the parties shall not be allowed to traverse it. This record, being made out of the sessions, by a particular justice, may be kept by him; or he may make it indented, and certify the one part into the Queen's Bench, or leave it with the clerk of the peace; and the other part he may keep himself. For this view of the force by the justice, being a judge of record, makes his record thereof, in the judgment of the law, as strong and effectual as if the offenders had confessed the force before him; and, as far as regards the restraining of traverse, more effectual than if the force had been found by a jury, upon the evidence of others. A conviction for a forcible detainer must show on the face of it an unlawful entry, as well as a forcible detainer; a conviction on the view merely of the justices, without any evidence of an unlawful entry, is bad, even though information and complaint of an unlawful expulsion be stated (*q*). An inquisition taken under the 8 Hen. 6, c. 9, should set forth the estate possessed by the party in the property (*r*). It is doubtful whether the holding over by a termor after the expiration of his term is constructively an unlawful entry (*s*). The court will not compel magistrates to hear a complaint and act summarily under the statutes (*t*).

Restitution by the Queen's Bench.

Although regularly the justices only who were present at the inquiry, and when the indictment was found, ought to award restitution; yet if the record of the presentment or indictment be

(*n*) Dalt. c. 44; 1 Hawk. P. C. c. 66, s. 8.
(*o*) Dalt. c. 44.
(*p*) 15 Ric. 2, c. 2.
(*q*) *Rex* v. *Wilson*, 1 A. & E. 627; 3 Id. 817.
(*r*) *Reg.* v. *Bowser*, 8 Dowl. 128.
(*s*) *Rex* v. *Oakley*, 4 B. & Adol. 307.
(*t*) *Ex parte Davy*, 2 Dowl., N. S. 24.

certified by the justice or justices into the Queen's Bench, or the same presentment or indictment be removed or certified thither by certiorari, the justices of that court may award a writ of restitution to the sheriff, to restore possession to the party expelled; for the justices of the Queen's Bench have a supreme authority in all cases of the crown (*u*). Also where, upon removal of the proceedings into the Queen's Bench, the conviction shall be quashed, the court will order restitution to the party injured. Where a conviction of forcible entry was quashed for the uncertainty of "messuage *or* tenement," but the restitution was opposed, on an affidavit that the party's title (which was by lease) was expired since the conviction; the court said they had no discretionary power in this case, but were bound to award restitution on quashing the conviction (*x*).

Riot.

If a forcible entry or detainer shall be made by three persons or more, it is also a riot, and may be proceeded against as such, if no inquiry has before been made of the force (*y*).

What is forcible Entry.

In general, it seems clear, that to denominate the entry forcible, it ought to be accompanied with some circumstances of actual *violence or terror;* and therefore that an entry, which has no other force than such as is implied by the law in every trespass whatsoever, is not within these statutes (*z*). With respect to *violence*, it seems to be agreed that an entry may be forcible, not only in respect of a violence actually done to the person of a man,—as by beating him if he refuse to relinquish his possession;—but also in respect of any other kind of violence in the manner of the entry,—as by breaking open the doors of a house, whether any person be in it or not, especially if it be a dwelling-house; and perhaps, also, by an act of outrage after the entry,—as by carrying away the party's goods. It seems, however, that an entry is not forcible, by the bare drawing up of a latch, or pulling back the bolt of the door, there being no appearance therein of being done by a strong hand or multitude of people: and it has been held, that an entry into a house through a window, or by opening a door with a key, is not forcible (*a*). With respect to the circumstances of *terror*, it is to be observed, that wherever a man, either by his behaviour or speech at the time of his entry, gives those who are in possession just cause to fear that he will do them some bodily hurt, if they will not give way to him, his entry is esteemed forcible. This is the case whether he cause such a terror, by carrying with him an unusual number of attendants: or by arming himself in such a manner as plainly intimates a design to

(*u*) Dalt. c. 44.
(*x*) *Rex* v. *Jones*, 1 Stra. 474.
(*y*) Dalt. c. 44; 1 Russ. on Crimes, 380, 428 (4th ed.).
(*z*) *Rex* v. *Smyth*, 5 C. & P. 201; 1 Moo. & R. 155; 2 Burn's J. 597 (30th ed.).
(*a*) 1 Hawk. P. C. c. 64, s. 26; 1 Russ. on Crimes, 427 (4th ed.).

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kill, maim or beat those who shall continue in possession; or threatening to do so, or using such expressions as plainly imply a purpose of using force (*b*). It seems that if a person enter into another man's house or ground with apparent violence, though it be but to cut or take away his corn, grass or other goods, or to fell or chop wood, or do any other like trespass, and though he do not put the party out of his possession, it is a forcible entry. If the entry were peaceable, and after such entry made, parties cut or take away any other man's corn, grass, wood or other goods, without apparent violence or force, such acts are not punishable as forcible entries (*c*); but if he enter peaceably, and then by force or violence cut or take away any corn, grass or wood, or forcibly or wrongfully carry away any other goods there being, it seems to be a forcible entry punishable by the statutes. But no entry is forcible from any threatening to spoil another's goods, or to destroy his cattle, or to do him any other such like damage, which is not personal (*c*). It is a forcible entry, if a man, having an estate in land, by a defeasible title, continue with force in the possession thereof, after a claim made by one who had a right of entry thereto (*d*).

By whom a forcible Entry may be made.

It is clear that a forcible entry may be committed by a single person, as well as by twenty (*e*); but those who accompany a man, when he makes a forcible entry, shall be judged to enter with him, whether they actually come upon the lands or not (*f*). He, however, who barely agrees to a forcible entry made to his own use, without his knowledge or privity, shall not be adjudged to make an entry within these statutes, because he noway concurred in or promoted the force (*g*).

What is a forcible Detainer.

The same circumstances of violence and terror, which will make an entry forcible, will make a detainer forcible also: and a detainer may be forcible, whether the entry were forcible or not (*h*).

(*b*) 1 Hawk. P. C. c. 64, s. 27.
(*c*) Dalt. c. 126.
(*d*) 1 Hawk. P. C. c. 64, s. 23.
(*e*) Id. s. 29.
(*f*) Id. s. 22.
(*g*) 1 Hawk. P. C. c. 64, s. 24.
(*h*) Id. s. 30; 1 Russ. on Crimes, 427 (4th ed.); 2 Burn's J. 598 (30th ed.).

# APPENDIX

OF

# STATUTES, PRECEDENTS AND FORMS.

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# APPENDIX

OF

# *STATUTES, PRECEDENTS AND FORMS.*

## APPENDIX A.

STATUTES AND RULES (*a*).


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### SECT. 1.—2 W. & M. SESS. 1, C. 5.

[See Chap. XI., Sect. 10 (h), p. 509.]

*An Act for enabling the Sale of Goods distrained for Rent in case the Rent be not paid in a reasonable Time.*

APP. A. S. 1. 2 W. & M. SESS. 1, C. 5.

WHEREAS the most ordinary and ready way for recovery of arrears of rent is by distress, yet such distresses not being to be sold, but only detained as pledges for enforcing the payment of such rent, the persons distraining have little benefit thereby: for the remedying whereof be it enacted that where any goods or chattels shall be distrained for any rent reserved and due upon any demise, lease, or contract whatsoever, and the tenant or owner of the goods so distrained shall not within five days next after such distress taken, and notice thereof (with the cause of such taking) left at the chief mansion house or other most notorious place on the premises charged with the rent distrained for,

Where Goods, &c., distrained, and no replevy in 5 Days ater Notice, Person distraining may cause Goods, &c., to be sold, and proceeds applied in satisfaction of Rent and Charges of Distress.

(*a*) The statutes on the subject of landlord and tenant, up to 1894, are collected with notes in Chitty's Statutes (tits. "Landlord and Tenant," and "Landlord and Tenant (Ecclesiastical, College and Hospital Leases)."

App. A. s. 1. 2 W. & M. Sess. 1, c. 5.

replevy the same, with sufficient security to be given to the sheriff according to law, that then in such case, after such distress and notice as aforesaid, and expiration of the said five days, the person distraining shall and may, with the sheriff or under-sheriff of the county, or with the constable of the hundred, parish, or place where such distress shall be taken (who are hereby required to be aiding and assisting therein) cause the goods and chattels so distrained to be appraised by two sworn appraisers (whom such sheriff, under-sheriff, or constable are hereby empowered to swear) to appraise the same truly according to the best of their understandings; and after such appraisement shall and may lawfully sell the goods and chattels so distrained, for the best price can be gotten for the same, towards satisfaction of the rent for which the said goods and chattels shall be distrained, and of the charges of such distress, appraisement, and sale, leaving the overplus (if any) in the hands of the said sheriff, under-sheriff, or constable, for the owner's use (*b*).

Sheaves of Corn or Corn loose or in the Straw, and Hay in the Barn or Stack, or upon the Land, may be secured in the Nature of a Distress (but not removed); and if not replevied in due Time may be appraised and sold.

2. And whereas no sheaves or cocks of corn, loose or in the straw, or hay in any barn or granary, or on any hovel, stack, or rick, can by the law be distrained or otherwise secured for rent, whereby landlords are oftentimes cousened and deceived by their tenants, who sell their corn, grain, and hay to strangers, and remove the same from the premises chargeable with such rent, and thereby avoid the payment of the same: be it further enacted by the authority aforesaid, that for remedying the said practice and deceit it shall and may, from and after the said first day of June, be lawful to and for any person or persons having rent arrear and due upon any such demise, lease, or contract as aforesaid, to seize and secure any sheaves or cocks of corn, or corn loose or in the straw, or hay lying or being in any barn or granary, or upon any hovel, stack, or rick, or otherwise upon any part of the land or pound charged with such rent, and to lock up or detain the same in the place where the same shall be found, for or in the nature of a distress, until the same shall be replevied, upon such security to be given as aforesaid; and in default of replevying the same as aforesaid within the time aforesaid, to sell the same, after such appraisement thereof to be made; so as nevertheless such corn, grain, or hay so distrained as aforesaid be not removed by the person or persons distraining, to the damage of the owner thereof, out of the place where the same shall be found and seized, but be kept there as impounded, until the same shall be replevied, or sold in default of replevying the same within the time aforesaid.

Remedy for Pound Breach or Rescous of Goods, &c., distrained for Rent.

3. And be it further enacted by the authority aforesaid, that upon any pound breach or rescous of goods or chattels distrained for rent, the person or persons grieved thereby shall, in a special action upon the case for the wrong thereby sustained, recover his and their treble damages and costs of suit against the offender or offenders in any such rescous or pound breach, any or either of them, or against the owners of the goods distrained, in case the same be afterwards found to have come to his use or possession.

Remedy for unlawful Distress and Sale of Goods, &c.

4. Provided always, and be it further enacted, that in case any such distress and sale as aforesaid shall be made, by virtue or colour of this present act, for rent pretended to be arrear and due, where in truth no rent is arrear or due to the person or persons distraining, or to him or them in whose name or names or right such distress shall be taken as aforesaid; that then the owner of such goods or chattels distrained and sold aforesaid, his executors or administrators, shall and may, by action of trespass, or upon the case, to be brought against the person or persons so distraining, any or either of them, his or their executors or administrators, recover double of the value of the goods or chattels so distrained and sold, together with full costs of suit.

(*b*) By the Parish Constables Act, 1872, 35 & 36 Vict. c. 92, s. 13, so much of this statute "as requires any sheriff or under-sheriff or constable to be aiding at any distress for rent, or to swear any appraiser thereat, shall be repealed, and no oath shall be required from such appraiser."

Sect. 2.—56 Geo. 3, c. 50.

App. A. s. 2.
56 Geo. 3, c. 50.

*An Act to regulate the Sale of Farming Stock taken in Execution.*
[20*th June*, 1816.]

No Sheriff or other Officer shall sell or carry off from any Lands any Straw, Chaff, or Turnips, in any case, nor any Hay or other Produce contrary to the Covenant.

Whereas it is expedient that the execution of legal process should be so regulated as to be consistent with good husbandry and the effect and intent of covenants and agreements entered into between the owners and occupiers of land let to farm: be it enacted, &c. that no sheriff or other officer in *England* or *Wales* shall, by virtue of any process of any court of law, carry off, or sell, or dispose of, for the purpose of being carried off, from any lands let to farm any straw threshed or unthreshed, or any straw of crops growing, or any chaff, colder, or any turnips, or any manure, compost, ashes, or seaweed, in any case whatsoever; nor any hay, grass, or grasses, whether natural or artificial, nor any tares or vetches, nor any roots or vegetables, being produce of such lands, in any case where, according to any covenant or written agreement entered into and made for the benefit of the owner or landlord of any farm, such hay, grass or grasses, tares and vetches, roots or vegetables, ought not to be taken off or withholden from such lands, or which by the tenor or effect of such covenants or agreements ought to be used or expended thereon, and of which covenants or agreements such sheriff or other officer shall have received a written notice before he shall have proceeded to sale.

Tenant to give Notice of the Existence of Covenants;

**2.** And be it further enacted, that the tenant or occupier of any lands let to farm, against whose goods any process of law shall issue, whereby such goods may be taken and sold, shall, on having knowledge of such process, give a written notice to the sheriff or other officer executing the same of such covenants or agreements whereof he or she shall have knowledge, and which may relate to and regulate, or are intended to regulate, the use and expenditure of the crops or produce grown or growing thereon, and also of the name and residence of the owner or landlord of such lands; and such sheriff or other officer shall forthwith on executing such process, and before any sale shall have been proceeded in, send a notice by the general post to the owner or landlord of such lands, in all cases where such owner or landlord shall be resident in any part of this United Kingdom, and shall have been made known to and ascertained by such sheriff or other officer, and also to the known steward or agent of such landlord or owner, in respect of such lands, stating to such owner, landlord, and agent the fact of possession having been taken of any crops or produce hereinbefore mentioned; and such sheriff or other officer shall, in all cases of the absence or silence of such landlord or owner, or his or her agent, postpone and delay the sale of such crops or produce until the latest day he lawfully can or may appoint for such sale.

and Sheriff to give Notice to the Owner or Landlord.

Sheriff may dispose of Produce, subject to an agreement to expend it on the Land.

**3.** Provided always, and be it further enacted, that such sheriff or other officer executing such process may dispose of any crops or produce hereinbefore mentioned to any person or persons who shall agree in writing with such sheriff or other officer, in cases where no covenant or written agreement shall be shown, to use and expend the same on such lands in such manner as shall accord with the custom of the country, and in cases where any covenant or written agreement shall be shown then according to such covenant or written agreement; and after such sale or disposal so qualified it shall be lawful for such person or persons to use all such necessary barns, stables, buildings, outhouses, yards and fields, for the purpose of consuming such crops or produce, as such sheriff or other officer shall allot or assign to them for that purpose, and which such tenant or occupier would have been entitled to and ought to have used for the like purpose on such lands.

Sheriff to assign Agreement to Landlord.

**4.** And be it further enacted, that such sheriff or other officer shall, on the request of any landlord or owner who shall be aggrieved by any breach of such agreement, permit such landlord or owner to bring any action or actions in the name of such sheriff or other officer for the recovery of damages in respect of such breach; such landlord or owner having nevertheless fully indemnified such sheriff or other officer against all costs whatsoever, and all loss and damage, before any such action shall be commenced.

Sheriff to inquire as to the Name and Residence of the Landlord.

**5.** And be it further enacted, that such sheriff or other officer shall, before any sale of any crops or produce of any lands let to farm shall be proceeded in, make by all ways and means due inquiry within the parish where such

APP. A. s. 2. 56 GEO. 3, c. 50.

lands shall be situate, as to the name and residence of the landlord or owner of such lands.

Landlords not to distrain for Rent on Purchasers of Crops severed from the Soil or other Things sold subject to Agreement.

**6.** And be it further enacted, that in all cases where any purchaser or purchasers of any crop or produce hereinbefore mentioned shall have entered into any agreement with such sheriff or other officer touching the use and expenditure thereof on lands let to farm, it shall not be lawful for the owner or landlord of such lands to distrain for any rent on any corn, hay, straw, or other produce thereof, which at the time of such sale, and the execution of such agreement entered into under the provisions of this act, shall have been severed from the soil and sold, subject to such agreement, by such sheriff or other officer, nor on any turnips whether drawn or growing, if sold according to the provisions of this act, nor on any horses, sheep, or other cattle, nor on any beasts whatsoever, nor on any waggons, carts, or other implements of husbandry which any person or persons shall employ, keep, or use on such lands, for the purpose of threshing out, carrying, or consuming any such corn, hay, straw, turnips, or other produce, under the provisions of the act, and the agreement or agreements directed to be entered into between the sheriff or other officer, and the purchaser or purchasers of such crops and produce as hereinbefore mentioned.

Sheriff not to sell any Clover, &c., growing with Corn.

**7.** And be it further enacted, that no sheriff or other officer shall, by virtue of any process whatsoever, sell or dispose of any clover, rye-grass, or any artificial grass or grasses whatsoever, which shall be newly sown and be growing under any crop of standing corn.

Act not to affect Contracts.

**8.** Provided always, and be it enacted, that this act shall not extend to any straw, turnips, or other articles which the tenant may remove from the farm consistently with some contract in writing.

Sheriff not to be liable for Damages, unless for wilful Omission.

**9.** And be it further enacted, that in every case where any action shall be brought against such sheriff or other officer for any breach of or omission of compliance with the provisions of this act, no plaintiff shall be entitled to recover any damages against such sheriff or other officer unless it shall be proved on the trial of such action that such breach or omission was wilful on the part of such sheriff or other officer.

Indemnity to Sheriff and others acting under the Provisions of this Act.

**10.** And be it further enacted, that no sheriff or under-sheriff, nor any or either of their deputies, agents, bailiffs, or servants, nor any person or persons who shall purchase any hay, straw, chaff, turnips, grass or grasses, or other produce and things hereinbefore mentioned, under the provisions of this act, nor his, her, or their servant or servants, shall be deemed or taken to be a trespasser by reason of his, her, or their coming upon or remaining in possession of any barns or other buildings, yards, or fields, for the purpose of threshing out or consuming any straw, hay, turnips, or other produce hereinbefore mentioned, under the provisions of this act, or for doing any matter or thing whatsoever fit and necessary to be done for the purpose of executing the same, and carrying into effect all stipulations contained in any agreement made under such provisions, though such acts shall have been done by such sheriff or other officer, and by such person or persons, his, her, or their servants, after the return of the process under which such sheriff or other officer shall have acted.

Assignee of Bankrupt, &c., not to take any Crop in any other Way than the Bankrupt would have been entitled to do.

**11.** And be it further enacted, that no assignee of any bankrupt, or of any insolvent debtor's estate, nor any assignee under any bill of sale, nor any purchaser of the goods, chattels, stock, or crop of any person or persons engaged or employed in husbandry on any lands let to farm, shall take, use, or dispose of any hay, straw, grass or grasses, turnips, or other roots, or any other produce of such lands, or any manure, compost, ashes, seaweed, or other dressings intended for such lands, and being thereon, in any other manner and for any other purpose than such bankrupt, insolvent debtor, or other person so employed in husbandry ought to have taken, used, or disposed of the same, if no commission of bankruptcy had issued, or no such assignment or assignments had been executed, or sale made (*c*).

(*c*) This section, so far as it relates to the assignee of any *insolvent* estate, is repealed by the Statute Law Revision Act, 1873.

Sect. 3.—8 & 9 Vict. c. 124.

App. A. s. 3.

8 & 9 Vict. c. 124.

*An Act to facilitate the Granting of certain Leases.* [*8th August*, 1845.]

Whereas it is expedient to facilitate the leasing of lands and tenements: be it enacted, [&c.] that whenever any party to any deed, made according to the forms set forth in the first schedule to this act, or to any other deed which shall be expressed to be made in pursuance of this act, shall employ in such deed respectively any of the forms of words contained in column 1 of the second schedule hereto annexed, and distinguished by any number therein, such deed shall be taken to have the same effect, and be construed, as if such party had inserted in such deed the form of words contained in column 2 of the same schedule, and distinguished by the same number as is annexed to the form of words employed by such party, but it shall not be necessary in such deed to insert any such number.

Where the Words of Column 1 of the Second Schedule employed, the Deed to have the same Effect as if Words of Column 2 were inserted.

**2.** Every such deed, unless any exception be specially made therein, shall be held and construed to include all outhouses, buildings, barns, stables, yards, gardens, cellars, ancient and other lights, paths, passages, ways, waters, watercourses, liberties, privileges, easements, profits, commodities, emoluments, hereditaments, and appurtenances whatsoever to the lands and tenements therein comprised belonging or in anywise appertaining.

Deed to include all Houses, &c.

**3.** In taxing any bill for preparing and executing any deed under this act, it shall be lawful for the taxing officer, and he is hereby required, in estimating the proper sum to be charged for such transaction, to consider not the length of such deed, but only the skill and labour employed, and responsibility incurred in the preparation thereof.

Remuneration for Deed under the Act not to be by Length only.

**4.** Any deed or part of a deed, which shall fail to take effect by virtue of this act, shall nevertheless be as valid and effectual, and shall bind the parties thereto, as far as the rules of law and equity will permit, as if this act had not been made.

Deed failing to take effect by this Act to be valid.

**5.** In the construction, and for the purposes of this act, and the schedules hereto annexed, unless there be something in the subject or context repugnant to such construction, the word "lands" shall extend to all tenements and hereditaments of freehold tenure, and to such customary lands as will pass by deed, or deed and surrender, and not by surrender alone, or any undivided part or share therein respectively; and every word importing the singular number only, shall extend and be applied to several persons or things, as well as one person or thing, and the converse; and every word importing the masculine gender only, shall extend and be applied to a female as well as a male; and the word "party" shall mean and include any body politic or corporate, or collegiate, as well as an individual.

Construction Clause.

**6.** The schedules, and the directions and forms therein contained, shall be deemed and taken to be parts of this act.

Schedules, &c., part of Act.

**7.** This act shall commence and take effect from and after the first day of October [1845].

Commencement of Act.

**8.** That this act shall not extend to Scotland.

Extent of Act.

The First Schedule.

This Indenture, made the day of , one thousand eight hundred and forty [*or other year*], in pursuance of an act to facilitate the granting of certain leases, Between [*here insert the names of the parties, and recitals if any*]: Witnesseth, that the said [*lessor*] *or* [*lessors*] doth, *or* do, demise unto the said [*lessee*] *or* [*lessees*], his [*or* their] executors, administrators and assigns, All, &c. [*parcels*], From the day of for the term of thence ensuing: Yielding therefor during the said term the rent of [*state the rent and mode of payment*] (*d*).

In witness whereof the said parties hereto have hereunto set their hands and seals.

(*d*) Also the covenants—That, &c., as in column 1 (*selecting those intended*).

PP. A. S. 3.
8 & 9 VICT. C. 124.

## THE SECOND SCHEDULE.

*Directions as to the Forms in this Schedule.*

1. Parties who use any of the forms in the first column of this schedule, may substitute for the words "lessee" or "lessor," any name or names; and in every such case corresponding substitutions shall be taken to be made in the corresponding forms in the second column.

2. Such parties may substitute the feminine gender for the masculine, or the plural number for the singular, in the forms in the first column of this schedule: and corresponding changes shall be taken to be made in the corresponding forms in the second column.

3. Such parties may fill up the blank spaces left in the forms 4 and 5 in the first column of this schedule so employed by them, with any words or figures, and the words or figures so introduced shall be taken to be inserted in the corresponding blank spaces left in the forms embodied.

4. Such parties may introduce into or annex to any of the forms in the first column any express exceptions from, or express qualifications thereof respectively; and the like exceptions or qualifications shall be taken to be made from or in the corresponding forms in the second column.

5. Where the premises demised shall be of freehold tenure, the covenants 1 to 10 shall be taken to be made with, and the proviso 11 to apply to, the heirs and assigns of the lessor. And where the premises demised shall be of leasehold tenure, the covenants and proviso shall be taken to be made with and apply to the lessor, his executors, administrators and assigns.

| *Column* 1. | *Column* 2. |
|---|---|
| 1. That the said [*lessee*] covenants with the said [*lessor*] to pay rent. | 1. And the said [*lessee*] doth hereby for himself, his heirs, executors, administrators and assigns, covenant with the said [*lessor*], that he, the said [*lessee*], his executors, administrators and assigns, will during the said term, pay unto the said [*lessor*] the rent hereby reserved, in manner hereinbefore mentioned, without any deduction whatsoever. |
| 2. And to pay taxes; | 2. And also will pay all taxes, rates, duties, and assessments whatsoever, whether parochial, parliamentary or otherwise, now charged or hereafter to be charged upon the said demised premises, or upon the said [*lessor*] on account thereof (excepting land tax, and excepting, in Ireland, tithe rent-charge, and such portion of the poor rate as the [*lessor*] is or may be liable to pay; and excepting also all taxes, rates, duties and assessments whatsoever, or any portion thereof which the [*lessee*] is or may be by law exempted from (*e*)). |
| 3. And to repair; | 3. And also will, during the said term, well and sufficiently repair, maintain, pave, empty, cleanse, amend and keep the said demised premises, with the appurtenances, in good and substantial repair, together with all chimney-pieces, windows, doors, fastenings, water-closets, cisterns, partitions, fixed presses, shelves, pipes, pumps, pales, rails, locks and keys, and all other fixtures and things, which at any time during the said term shall be erected and made, when, where and so often as need shall be. |
| 4. And to paint outside every year; | 4. And also that the said [*lessee*], his executors, administrators and assigns, will in every year in the said term, paint all the outside wood-work and iron- |

(*e*) It is difficult to say from what taxes, rates, &c., a tenant is by law *exempt;* ante Chap. XV.

| *Column* 1. | *Column* 2. |
|---|---|
| | work belonging to the said premises, with two coats of proper oil colours, in a workmanlike manner. |
| 5. And to paint and paper inside every year; | 5. And also that the said [*lessee*], his executors, administrators and assigns, will in every year, paint the inside wood, iron and other works, now or usually painted with two coats of proper oil-colours, in a workmanlike manner; and also re-paper with paper of a quality as at present, such parts of the premises as are now papered; and also wash, stop, whiten or colour such parts of the said premises as are now plastered. |
| 6. And to insure from fire in the joint names of the said [*lessor*] and the said [*lessee*]; | 6. And also that the said [*lessee*], his executors, administrators and assigns, will forthwith insure the said premises hereby demised to the full value thereof, in some respectable insurance office, in the joint names of the said [*lessor*], his executors, administrators and assigns, and the said [*lessee*], his executors, administrators or assigns, and keep the same so insured during the said term: And will upon the request of the said [*lessor*] or his agent, show the receipt for the last premium paid for such insurance for every current year: And as often as the said premises hereby demised shall be burnt down or damaged by fire, all and every the sums or sum of money which shall be recovered or received by the said [*lessee*], his executors, administrators, or assigns, for or in respect of such insurance, shall be laid out and expended by him in building or repairing the said demised premises, or such parts thereof as shall be burnt down or damaged by fire as aforesaid. |
| To show receipts; | |
| And to rebuild in case of fire. | |
| 7. And that the said [*lessor*] may enter and view state of repair, and that the said [*lessee*] will repair according to notice. | 7. And it is hereby agreed that it shall be lawful for the said [*lessor*] and his agents, at all seasonable times during the said term, to enter the said demised premises, to take a schedule of the fixtures and things made and erected thereupon, and to examine the condition of the said premises; and further, that all wants of reparation, which upon such views shall be found, and for the amendment of which notice in writing shall be left at the premises, the said [*lessee*], his executors, administrators and assigns, will, within three calendar months next after every such notice, well and sufficiently repair and make good accordingly. |
| 8. That the said [*lessee*] will not use premises as a shop. | 8. And also, that the said [*lessee*], his executors, administrators and assigns, will not convert, use or occupy the said premises, or any part thereof, into or as a shop, warehouse, or other place, for carrying on any trade or business whatsoever, or suffer the said premises to be used for any such purpose or otherwise than as a private dwelling-house, without the consent in writing of the said [*lessor*]. |
| 9. And will not assign without leave. | 9. And also, that the said [*lessee*] shall not nor will during the said term assign, transfer or set over, or otherwise by any act or deed procure the said premises, or any of them, to be assigned, transferred or set over unto any person or persons whomsoever, without the consent in writing of the said [*lessor*], his executors, administrators or assigns, first had and obtained. |
| 10. And that he will leave premises in good repair. | 10. And further, that the said [*lessee*] will, at the expiration or other sooner determination of the said term, peaceably surrender and yield up unto the said [*lessor*] the said premises hereby demised, with the appurtenances, together with all buildings, erections, and fixtures, |

APP. A. s. 3. 8 & 9 VICT. c. 124.

| *Column* 1. | *Column* 2. |
|---|---|
| | now or hereafter to be built or erected thereon, in good and substantial repair and condition in all respects, reasonable wear and tear, and damage by fire only excepted. |
| 11. Proviso for re-entry by the said lessor on non-payment of rent or non-performance of covenants. | 11. Provided always, and it is expressly agreed, that if the rent hereby reserved, or any part thereof, shall be unpaid for fifteen days after any of the days on which the same ought to have been paid (although no formal demand shall have been made thereof), or in case of the breach or non-performance of any of the covenants and agreements herein contained on the part of the said [*lessee*], his executors, administrators and assigns, then and in either of such cases it shall be lawful for the said [*lessor*] at any time thereafter, into and upon the said demised premises, or any part thereof, in the name of the whole to re-enter, and the same to have again, repossess and enjoy as of his or their former estate, anything *hereinafter* (*f*) contained to the contrary notwithstanding. |
| 12. The said [*lessor*] covenants with the said [*lessee*] for quiet enjoyment. | 12. And the [*lessor*] doth hereby for himself, his heirs, executors, administrators and assigns, covenant with the said [*lessee*], his executors, administrators and assigns, that he and they paying the rent hereby reserved, and performing the covenants hereinbefore on his and their part contained, shall and may peaceably possess and enjoy the said demised premises for the term hereby granted, without any interruption or disturbance from the said [*lessor*], his executors, administrators or assigns, or any other person or persons lawfully claiming by, from or under him, them or any of them. |

SECT. 4.—14 & 15 VICT. c. 25 (THE LANDLORD AND TENANT ACT, 1851 (*g*)).

*An Act to improve the Law of Landlord and Tenant in relation to Emblements, to Growing Crops seized in Execution, and to Agricultural Tenants' Fixtures.*
[24*th July*, 1851.]

WHEREAS it is expedient to amend the law to prevent or lessen the evils of the right to emblements, and the loss and injury arising therefrom, and also the law relating to growing crops seized under executions, and to agricultural fixtures: be it therefore declared and enacted [&c.].

On Determination of Leases or Tenancies under Tenant for Life, &c., instead of Emblements, Tenant to hold until expiration of Current Year, &c.

1. That where the lease or tenancy of any farm or lands held by a tenant at rack-rent shall determine by the death or cesser of the estate of any landlord entitled for his life, or for any other uncertain interest, instead of claims to emblements, the tenant shall continue to hold and occupy such farm or lands until the expiration of the then current year of his tenancy, and shall then quit upon the terms of his lease or holding, in the same manner as if such lease or tenancy were then determined by efluxion of time or other lawful means during the continuance of his landlord's estate; and the succeeding landlord or owner shall be entitled to recover and receive of the tenant in the same manner as his predecessor or such tenant's lessor could have done if he had been living or had continued the landlord or lessor a fair proportion of the rent for the period which may have elapsed from the day of the death or cesser of the estate of such predecessor or lessor to the time of the tenant so quitting, and the succeeding landlord or owner and the tenant respectively shall, as between themselves

(*f*) This is inaccurate; but the mistake does not appear to be so serious as in *Doe* d. *Spencer* v. *Godwin*, 4 M. & S. 265; Cole Ejec. 411.

(*g*) So called by virtue of the Short Titles Act, 1892.

and as against each other, be entitled to all the benefits and advantages, and be subject to the terms, conditions and restrictions to which the preceding landlord or lessor and such tenant respectively would have been entitled and subject in case the lease or tenancy had determined in manner aforesaid at the expiration of such current year: provided always, that no notice to quit shall be necessary or required by or from either party to determine any such holding and occupation as aforesaid.

Growing Crops seized and sold under Execution to be liable for accruing Rent.

**2.** In case all or any part of the growing crops of the tenant of any farm or lands shall be seized and sold by any sheriff or other officer by virtue of any writ of fieri facias or other writ of execution, such crops, so long as the same shall remain on the farms or lands, shall, in default of sufficient distress of the goods and chattels of the tenant, be liable to the rent which may accrue and become due to the landlord after any such seizure and sale, and to the remedies by distress for recovery of such rent, and that notwithstanding any bargain and sale or assignment which may have been made or executed of such growing crops by any such sheriff or other officer.

Tenant may remove Buildings and Fixtures erected by him on Farms, unless Landlord elect to take to them.

**3.** If any tenant of a farm or lands shall, after the passing of this act, *with the consent in writing of the landlord* for the time being, at his own costs and expense, erect any farm-building, either detached or otherwise, or put up any other building, engine or machinery, either for agricultural purposes or for the purposes of trade and agriculture (which shall not have been erected or put up in pursuance of some obligation in that behalf), then all such buildings, engines and machinery shall be the property of the tenant, and shall be removable by him notwithstanding the same may consist of separate buildings, or that the same or any part thereof may be built in or permanently fixed to the soil, so as the tenant making any such removal do not in anywise injure the land or buildings belonging to the landlord, or otherwise do put the same in like plight and condition, or as good plight and condition, as the same were in before the erection of anything so removed: provided, nevertheless, that no tenant shall, under the provision last aforesaid, be entitled to remove any such matter or thing as aforesaid without first giving to the landlord or his agent one month's previous notice in writing of his intention so to do; and thereupon it shall be lawful for the landlord, or his agent on his authority, to elect to purchase the matters and things so proposed to be removed, or any of them, and the right to remove the same shall thereby cease, and the same shall belong to the landlord; and the value thereof shall be ascertained and determined by two referees, one to be chosen by each party, or by an umpire to be named by such referees, and shall be paid or allowed in account by the landlord who shall have so elected to purchase the same.

[See Chap. XVI., Sect. 8, p. 671.]

Tithe Rent-charge.

**4.** (*h*) If any occupying tenant of land shall quit, leaving unpaid any tithe rent-charge for or charged upon such land which he was by the terms of his tenancy or holding legally or equitably liable to pay, and the tithe-owner shall give or have given notice of proceeding by distress upon the land for recovery thereof, it shall be lawful for the landlord, or the succeeding tenant or occupier, to pay such tithe rent-charge, and any expenses incident thereto, and to recover the amount or sum of money which he may so pay over against such first-named tenant or occupier, or his legal representatives, in the same manner as if the same were a debt by simple contract due from such first-named tenant or occupier to the landlord or tenant making such payment.

Act not to extend to Scotland.

**5.** Nothing in this act shall extend to Scotland.

(*h*) As to tithe rent-charge generally, see Chap. XV., Sect. 16, p. 620; the Tithe Act, 1891, 54 & 55 Vict. c. 8, and other Acts, Chitty's Statutes, tit. "Tithe Rent-Charge"; and Leach's Tithe Acts, of which a sixth edition was published in 1896.

App. A. s. 5.
15 & 16 Vict. c. 76.

SECT. 5.—15 & 16 VICT. C. 76 (COMMON LAW PROCEDURE ACT, 1852).

*An Act to amend the Process, Practice, and Mode of Pleading in the Superior Courts, &c.* [30*th June*, 1852.]

Tenant to give Notice of Ejectment to Landlord.

**209.** Every tenant to whom any writ in ejectment shall be delivered, or to whose knowledge it shall come, shall forthwith give notice thereof to his landlord, or his bailiff or receiver, under penalty of forfeiting the value of three years' improved or rack-rent of the premises demised or holden in the possession of such tenant, to the person of whom he holds, to be recovered by action in any court of common law having jurisdiction for the amount.

[*For other sections of this Act, see p.* 837.]

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[See Chap. XV., Sect. 2, p. 597.]

SECT. 6.—32 & 33 VICT. C. 41 (POOR RATE ASSESSMENT AND COLLECTION ACT, 1869) (*i*).

*An Act for amending the Law with respect to the Rating of Occupiers for short Terms, and the making and collecting of the Poor's Rate.* [26*th July*, 1869.]

WHEREAS it is expedient to amend the law relating to the collection of poor rates assessed upon occupiers of hereditaments held for short terms, and to the making and collecting of the poor rate: be it therefore enacted [&c.], as follows:—

Occupiers of Tenements let for short Terms may deduct Poor Rate from Rents.

**1.** The occupier of any rateable hereditament let to him for a term not exceeding three months shall be entitled to deduct the amount paid by him in respect of any poor rate assessed upon such hereditament from the rent due or accruing due to the owner, and every such payment shall be a valid discharge of the rent to the extent of the rate so paid.

Amount of Rate payable by Occupier.

**2.** No such occupier shall be compelled to pay to the overseers at one time or within four weeks a greater amount of the rate than would be due for one quarter of the year.

Owners may agree to pay the Rate, and be allowed a Commission.

**3.** In case the rateable value of any hereditament does not exceed twenty pounds, if the hereditament is situate in the metropolis, or thirteen pounds if situate in any parish wholly or partly within the borough of Liverpool, or ten pounds if situate in any parish wholly or partly within the city of Manchester or the borough of Birmingham, or eight pounds if situate elsewhere, and the owner of such hereditament is willing to enter into an agreement in writing with the overseers to become liable to them for the poor rates assessed in respect of such hereditament, for any term not being less than one year from the date of such agreement, and to pay the poor rates whether the hereditament is occupied or not, the overseers may, subject nevertheless to the control of the vestry, agree with the owner to receive the rates from him, and to allow to him a commission not exceeding twenty-five per cent. on the amount thereof.

Vestries may order the Owner to be rated instead of the Occupier.

**4.** The vestry of any parish may from time to time order that the owners of all rateable hereditaments to which section three of this act extends, situate within such parish, shall be rated to the poor rate in respect of such rateable hereditaments, instead of the occupiers, on all rates made after the date of such order; and thereupon and so long as such order shall be in force the following enactments shall have effect:

1. The overseers shall rate the owners instead of the occupiers, and shall allow to them an abatement or deduction of fifteen per centum from the amount of the rate:
2. If the owner of one or more such rateable hereditaments shall give notice to the overseers in writing that he is willing to be rated for any term not being less than one year in respect of all such rateable hereditaments of which he is the owner, whether the same be occupied or not, the overseers shall rate such owner accordingly, and allow to him a further abatement or deduction not exceeding fifteen per centum from the amount of the rate during the time he is so rated:

(*i*) See ante, Chap. XV.

3. The vestry may by resolution rescind any such order after a day to be fixed by them, such day being not less than six months after the passing of such resolution, but the order shall continue in force with respect to all rates made before the date on which the resolution takes effect:

Provided that this clause shall not be applicable to any rateable hereditament in which a dwelling house shall not be included.

Owners omitting to pay Rates before the fifth day of June to forfeit Commission.

5. When an owner who has become liable to pay the poor rate omits or neglects to pay, before the fifth day of June in any year, any rate or any instalment thereof which has become due previously to the preceding fifth day of January, and has been duly demanded by a demand-note delivered to him or left at his usual or last known place of abode, he shall not be entitled to deduct or receive any commission, abatement, or allowance to which he would, except for such omission or neglect, be entitled under this act, but shall be liable to pay, and shall pay rate or instalment in full.

Repeal of 13 & 14 Vict. c. 99, &c., so far as the same apply to the Poor Rate.

6. The statute thirteenth and fourteenth Victoria, chapter ninety-nine (*j*), with respect to the rating of small tenements, and so much of any local statute as relates to the rating of owners instead of occupiers, are hereby repealed, so far as the same apply to any poor rate made after this act comes into operation.

Constructive payment of the Rate.

7. Every payment of a rate by the occupier, notwithstanding the amount thereof, may be deducted from his rent as herein provided, and every payment of a rate by the owner, whether he is himself rated instead of the occupier, or has agreed with the occupier or with the overseers to pay such rate, and notwithstanding any allowance or deduction which the overseers are empowered to make from the rate, shall be deemed a payment of the full rate by the occupier for the purpose of any qualification or franchise which as regards rating depends upon the payment of the poor rate.

Where Owners omit to pay Rates, the Occupiers paying the same may deduct the Amount from the Rent.

8. Where an owner who has undertaken, whether by agreement with the occupier or with the overseers, to pay the poor rates, or has otherwise become liable to pay the same, omits or neglects to pay any such rate, the occupier may pay the same and deduct the amount from the rent due or accruing due to the owner, and the receipt of such rate shall be a valid discharge of the rent to the extent of such rate so paid.

Owners to give List of Occupiers, and liable to Penalty for wilful Omission.

9. Every owner who agrees with the overseers to pay the poor rate, or who is rated or liable to be rated for any hereditament instead of the occupier, shall deliver to the overseers, from time to time, when required by them, in writing, a list containing the names of the actual occupiers of the hereditaments comprised in such agreement, or for which he is so rated or liable to be rated; and if any such owner wilfully omits to deliver such list when required to do so, or wilfully omits therefrom or misstates therein the name of any occupier, he shall for every such omission or misstatement be liable on a summary conviction, to a penalty not exceeding two pounds.

Notice to Occupiers of Rates in arrear.

10. Section twenty-eight of the "Representation of the People Act, 1867," with respect to notice to be given of rates in arrear, shall apply to occupiers of premises capable of conferring the parliamentary franchise, although the owners of such premises have become liable to the rates assessed thereon under the provisions of this act.

Liability of Owner under Agreement.

11. Where the owner has become liable to the payment of the poor rates, the rates due from him, together with the costs and charges of levying and recovering the same, may be levied on the goods of the owner, and be recovered from him in the same way as poor rates may be recovered from the occupier.

Recovery of Rates unpaid by Owner, from Occupier.

12. Notwithstanding the owner of any such rateable hereditament as aforesaid has become liable for payment of the poor rates assessed thereon, the goods and chattels of the occupier shall be liable to be distrained and sold for payment of such rates as may accrue during his occupation of the premises, at any time whilst such rates remain unpaid by the owner, subject to the following provisions:—

1. That no such distress shall be levied unless the rate has been demanded in writing by the overseers from the occupier, and the occupier has failed to pay the same within fourteen days after the service of such demand:
2. That no greater sum shall be raised by such distress than shall at the time of making the same be actually due from the occupier for rent of the premises on which the distress is made:

(*j*) Also wholly repealed by the Statute Law Revision Act, 1875.

APP. A. s. 6. 32 & 33 VICT. c. 41.

3. That any such occupier shall be entitled to deduct the amount of rates for which such distraint is made, and the expense of distraint, from the rent due or accruing due to the owner, and every such payment shall be a valid discharge of the rent to the extent of the rate and expenses paid.

Owner may appeal against Valuation List and Rate.

**13.** Every owner of any hereditament for the rates of which he has become liable shall have the same right of appeal (subject to the same conditions and consequences) against the valuation lists and the poor rates as if he were the occupier thereof.

The Overseers to state the Period for which Poor Rate is made.

**14.** The overseers of every parish when they make the poor rate shall set forth in the title of the rate the period for which the same is estimated, and if the same is payable by instalments, the amount of each instalment and the date at which each instalment is payable; provided that if the necessities of the parish shall require it, another rate may be made before such period shall have elapsed.

Proviso. Overseers may make Poor Rate payable by instalments.

**15.** The overseers who make the poor rate for a period exceeding three months may declare that the same shall be paid by instalments at such times as they shall specify, and thereupon each instalment only shall be enforceable as and when it falls due, and the payment of any such instalment shall, as respects any qualification or franchise depending upon the payment of the poor rate, be deemed a payment of such rate in respect of the period to which such instalment applies.

Provision for successive Occupiers and for Occupiers coming into unoccupied Hereditaments.

**16.** If the occupier assessed in the rate when made shall cease to occupy before the rate shall have been wholly discharged, or if the hereditament being unoccupied at the time of the making of the rate become occupied during the period for which the rate is made, the overseers shall enter in the rate-book the name of the person who succeeds or comes into the occupation, as the case may be, and the date when such occupation commences, so far as the same shall be known to them, and such occupier shall thenceforth be deemed to have been actually rated from the date so entered by the overseer (*sic*), and shall be liable to pay so much of the rate as shall be proportionate to the time between the commencement of his occupation and the expiration of the period for which the rate was made, in like manner, and with the like remedy of appeal, as if he had been rated when the rate was made; and an outgoing occupier shall remain liable in like manner for so much and no more of the rate as is proportionate to the time of his occupation within the period for which the rate was made; [and the twelfth section of the statute 17 Geo. 2, c. 38, shall be repealed (*k*)].

When the Poor Rate shall be deemed to be made.

**17.** A poor rate shall be deemed to be made on the day when it is allowed by the justices, and if the justices sever in their allowance then on the day of the last allowance.

Evidence of making and publication of Rates.

**18.** The production of a book purporting to contain a poor rate, with the allowance of the rate by the justices, shall, if the rate is made in the form prescribed by law, be primâ facie evidence of the due making and publication of such rate.

Overseers to insert Names of all Occupiers in the Rate.

**19.** (*l*) The overseers in making out the poor rate shall, in every case, whether the rate is collected from the owner or occupier, or the owner is liable to the payment of the rate instead of the occupier, enter in the occupiers' column of the rate-book the name of the occupier of every rateable hereditament, and such occupier shall be deemed to be duly rated for any qualification or franchise as aforesaid; and if any overseer negligently or wilfully and without reasonable cause omits the name of the occupier of any rateable hereditament from the rate, or negligently or wilfully misstates any name therein, such overseer shall for every such omission or misstatement be liable on summary conviction to a penalty not exceeding two pounds, provided that any occupier whose name has been omitted shall, notwithstanding such omission and that no claim to be rated has been made by him, be entitled to every qualification and franchise depending upon rating, in the same manner as if his name had not been so omitted.

Penalty for Omission.

Saving of Franchises.

Interpretation of Terms.

**20.** The word "overseer" shall include every authority that makes an assessment for the poor rate: the words "poor rate" shall mean the assessment for the relief of the poor, and for the other purposes chargeable thereon according to law, and in the metropolis shall extend to every rate made by the overseers, and chargeable upon the same property as the poor rate; the word "owner" shall mean any person receiving or claiming the rent of the hereditament for his own

(*k*) Words in brackets repealed by Statute Law Revision Act, 1883.

(*l*) See further s. 14 of the Parliamentary and Municipal Registration Act, 1878, 41 & 42 Vict. c. 26, Chitty's Statutes, tit. "*Parliament.*"

use, or receiving the same for the use of any corporation aggregate, or of any public company, or of any landlord or lessee who shall be a minor, a married woman, or insane, or for the use of any person for whom he is acting as agent; the word "parish" shall signify every place for which a separate overseer can be appointed; the word "vestry" shall include not only the vestry of a parish existing under the authority of some general or special act of parliament, or by special custom or otherwise, but also the meeting of the inhabitants of any township, vill, or place having a separate overseer, and for which a separate poor rate is made, held after notice given in like manner as is required by law in regard to the meetings of vestries; and the word "metropolis" shall include only the metropolis as defined by "The Metropolis Management Act, 1885."

Application of Act.

**21.** This act shall not extend to Scotland or to Ireland.

Short Title.

**22.** This act may be cited as "The Poor Rate Assessment and Collection Act, 1869," and shall come into operation on the twenty-ninth day of September, 1869; provided that the vestry of any parish may before that day order that the owners shall be rated instead of the occupiers under this act, but no such order shall take effect until after the said twenty-ninth day of September, 1869.

Commencement of Act.

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## Sect. 7.—43 & 44 Vict. c. 47 (Ground Game Act, 1880).

[See Chap. XVIII., Sect. 5 (b), p. 765.]

*An Act for the better Protection of Occupiers of Land against Injury to their Crops from Ground Game.* [*7th September*, 1880.]

Whereas it is expedient in the interest of good husbandry, and for the better security for the capital and labour invested by the occupiers of land in the cultivation of the soil, that further provision should be made to enable such occupiers to protect their crops from injury and loss by ground game: Be it enacted as follows:—

Occupier to have a Right inseparable from his Occupation to kill Ground Game concurrently with any other person entitled to kill the same on Land in his Occupation.

**1.** Every occupier of land shall have, as incident to and inseparable from his occupation of the land, the right to kill and take ground game thereon, concurrently with any other person who may be entitled to kill and take ground game on the same land: Provided that the right conferred on the occupier by this section shall be subject to the following limitations:

(1.) The occupier shall kill and take ground game only by himself or by persons duly authorised by him in writing:

(*a.*) The occupier himself and one other person authorised in writing by such occupier shall be the only persons entitled under this act to kill ground game with firearms;

(*b.*) No person shall be authorised by the occupier to kill or take ground game, except members of his household resident on the land in his occupation, persons in his ordinary service on such land, and any one other person bonâ fide employed by him for reward in the taking and destruction of ground game;

(*c.*) Every person so authorised by the occupier, on demand by any person having a concurrent right to take and kill the ground game on the land or any person authorised by him in writing to make such demand, shall produce to the person so demanding the document by which he is authorised, and in default he shall not be deemed to be an authorised person.

(2.) A person shall not be deemed to be an occupier of land for the purposes of this act by reason of his having a right of common over such lands: or by reason of an occupation for the purpose of grazing or pasturage of sheep, cattle, or horses for not more than nine months.

(3.) In the case of moorlands, and uninclosed lands (not being arable lands), the occupier and the persons authorised by him shall exercise the rights conferred by this section only from the eleventh day of December in one year until the thirty-first day of March in the next year, both inclusive; but this provision shall not apply to detached portions of moorlands or uninclosed lands adjoining arable lands, where such detached portions of moorlands or uninclosed lands are less than twenty-five acres in extent.

Occupier entitled to kill Ground Game.

**2.** Where the occupier of land is entitled otherwise than in pursuance of this act to kill and take ground game thereon, if he shall give to any other person a title to kill and take such ground game, he shall nevertheless retain and have, as incident to and inseparable from such occupation, the same right to kill and

APP. A. s. 7. 43 & 44 VICT. c. 47.

take ground game as is declared by section one of this act. Save as aforesaid, but subject as in section six hereafter mentioned, the occupier may exercise any other or more extensive right which he may possess in respect of ground game or other game, in the same manner and to the same extent as if this act had not passed.

Agreements in Contravention of Right of Occupier void.

**3.** Every agreement, condition, or arrangement which purports to divest or alienate the right of the occupier as declared, given, and reserved to him by this act, or which gives to such occupier any advantage in consideration of his forbearing to exercise such right, or imposes upon him any disadvantage in consequence of his exercising such right, shall be void.

Exemption from Game Licences.

**4.** The occupier and the persons duly authorised by him as aforesaid shall not be required to obtain a licence to kill game for the purpose of killing and taking ground game on land in the occupation of such occupier, and the occupier shall have the same power of selling any ground game so killed by him, or the persons authorised by him, as if he had a licence to kill game: provided that nothing in this act contained shall exempt any person from the provisions of the Gun Licence Act, 1870.

Saving clause for reservations in existing Leases.

**5.** Where at the date of the passing of this act the right to kill and take ground game on any land is vested by lease, contract of tenancy, or other contract bonâ fide made for valuable consideration in some person other than the occupier, the occupier shall not be entitled under this act, until the determination of that contract, to kill and take ground game on such land. And in Scotland when the right to kill and take ground game is vested by operation of law or otherwise in some person other than the occupier, the occupier shall not be entitled by virtue of this act to kill or take ground game during the currency of any lease or contract of tenancy under which he holds at the passing of this act, or during the currency of any contract made bonâ fide for valuable consideration before the passing of this act whereby any other person is entitled to take and kill ground game on the land.

Determination of Tenancies from year to year.

For the purposes of this act, a tenancy from year to year, or a tenancy at will, shall be deemed to determine at the time when such tenancy would by law become determinable if notice or warning to determine the same were given at the date of the passing of this act.

Nothing in this act shall affect any special right of killing or taking ground game to which any person other than the landlord, lessor, or occupier may have become entitled before the passing of this act by virtue of any franchise, charter, or act of parliament.

Prohibition of Night Shooting, Spring Traps above Ground, or Poison.

**6.** No person having a right of killing ground game under this act or otherwise shall use any firearms for the purpose of killing ground game between the expiration of the first hour after sunset and the commencement of the last hour before sunrise; and no such person shall, for the purpose of killing ground game, employ spring traps except in rabbit holes, nor employ poison; and any person acting in contravention of this section shall, on summary conviction, be liable to a penalty not exceeding two pounds.

As to Non-Occupier having Right of Killing Game.

**7.** Where a person who is not in occupation of land has the sole right of killing game thereon (with the exception of such right of killing and taking ground game as is by this act conferred on the occupier as incident to and inseparable from his occupation), such person shall, for the purpose of any act authorising the institution of legal proceedings by the owner of an exclusive right to game, have the same authority to institute such proceedings as if he were such exclusive owner, without prejudice nevertheless to the right of the occupier conferred by this act.

"Ground Game."

**8.** For the purpose of this act—

The words "ground game" mean hares and rabbits.

Exemption from Penalties.

**9.** A person acting in accordance with this act shall not thereby be subject to any proceedings or penalties in pursuance of any law or statute.

Saving of existing Prohibitions.

**10.** Nothing in this act shall authorise the killing or taking of ground game on any days (*k*) or seasons (*l*), or by any methods, prohibited by any act of parliament in force at the time of the passing of this act.

Short Title.

**11.** This act may be cited for all purposes as the Ground Game Act, 1880.

(*k*) The reference is apparently to 1 & 2 Will. 4, c. 31, s. 3, by which the killing or taking of hares (not rabbits) on Sunday or Christmas day is prohibited.

(*l*) The reference is apparently to 42 & 43 Vict. c. 23 (the Hares Preservation (Ire-

Sect. 8.—Extract from Solicitors' Remuneration Order, 1882.

App. A. s. 8. Solicitors' Remuneration Order, 1882.

**2.** (*b*) In respect of leases, and agreements for leases, of the kinds mentioned in Part II. of Schedule I. to this Order, or conveyances reserving rent, or agreements for the same, when the transactions shall have been completed, the remuneration of the solicitor having the conduct of the business is to be that prescribed in Part II. of such Schedule I.

Remuneration for Leases, &c.

**3.** Drafts and copies made in the course of business, the remuneration for which is provided for by this Order, are to be the property of the client.

Drafts.

**4.** The remuneration prescribed by Schedule I. to this Order is not to include stamps, counsel's fees, auctioneer's or valuer's charges, travelling or hotel expenses, fees paid on searches to public officers, on registrations, or to stewards of manors, costs of extracts from any register, record, or roll, or other disbursements reasonably and properly paid, nor any extra work occasioned by changes occurring in the course of any business, such as the death or insolvency of a party to the transaction, nor is it to include any business of a contentious character, nor any proceedings in any court, but it shall include law stationer's charges, and allowances for time of the solicitor and his clerks, and for copying and parchment, and all other similar disbursements.

Disbursements.

## Part II.

[See Chap. V., Sect. 16(b), p. 207.]

*Scale of Charges as to Leases, or Agreements for Leases, at Rack Rent (other than a Mining Lease, or a Lease for Building Purposes, or Agreement for the same).*

Lessor's solicitor for preparing, settling, and completing lease and counterpart:—

| | |
|---|---|
| Where the rent does not exceed 100*l.* | 7*l.* 10*s.* per cent. on the rental, but not less in any case than 5*l.* |
| Where the rent exceeds 100*l.* and does not exceed 500*l.* | 7*l.* 10*s.* in respect of the first 100*l.* of rent, and 2*l.* 10*s.* in respect of each subsequent 100*l.* of rent. |
| Where the rent exceeds 500*l.* | 7*l.* 10*s.* in respect of the first 100*l.* of rent, 2*l.* 10*s.* in respect of each 100*l.* of rent up to 500*l.* and 1*l.* in respect of every subsequent 100*l.* |
| Lessee's solicitor for perusing draft and completing | One-half of the amount payable to the lessor's solicitor. |

*Scale of Charges as to Conveyances in Fee, or for any other Freehold Estate, Reserving Rent, or Building Leases Reserving Rent, or other Long Leases not at Rack Rent (except Mining Leases) or Agreements for the same respectively.*

Vendor's or lessor's solicitor for preparing, settling, and completing conveyance and duplicate, or lease and counterpart:—

| Amount of Annual Rent. | Amount of Remuneration. |
|---|---|
| Where it does not exceed 5*l.* | 5*l.* |
| Where it exceeds 5*l.* and does not exceed 50*l.* | The same payment as on a rent of 5*l.* and also 20 per cent. on the excess beyond 5*l.* |
| Where it exceeds 50*l.* but does not exceed 150*l.* | The same payment as on a rent of 50*l.*, and 10 per cent. on the excess beyond 50*l.* |
| Where it exceeds 150*l.* | The same payment as on a rent of 150*l.*, and 5 per cent. on the excess beyond 150*l.* |

land) Act, 1879), replacing the Act of the Irish Parliament, 27 Geo. 3, c. 35, repealed by the Statute Law Revision Ireland Act, 1879, 42 & 43 Vict. c. 24, by which the killing of hares between the 20th April and the 12th August, is prohibited, under a penalty of 1*l.* There is no close time for hares in England, nor for rabbits in any part of the United Kingdom (*except as provided by section* 1, *subsection* 3 *of the present act as to moor-lands, &c.*).

App. A. s. 8. Solicitors' Remuneration Order, 1882.

Where a varying rent is payable, the amount of annual rent is to mean the largest amount of annual rent.

Purchaser's or lessee's solicitor for perusing draft and completing . . . . . { One-half of the amount payable to the vendor's or lessor's solicitor.

## RULES APPLICABLE TO PART II. OF SCHEDULE I.

*As to all Leases, or Conveyances at a Rent, or Agreements for the same, other than Mining Leases and Agreements therefor.*

Title. **1.** Where the vendor or lessor furnishes an abstract of title, it is to be charged for according to the present system as altered by Schedule II.

Same Solicitor for both Parties. **2.** Where a solicitor is concerned for both vendor and purchaser, or lessor and lessee, he is to charge the vendor's or lessor's solicitor's charges and one-half of that of the purchaser's or lessee's solicitor.

Mortgage. **3.** Where a mortgagee or mortgagor joins in a conveyance or lease the vendor's or lessor's solicitor is to charge 1*l.* 1*s.* extra.

Separate Solicitor. **4.** Where a party other than a vendor or lessor joins in a conveyance or lease, and is represented by a separate solicitor, the charges of such separate solicitor are to be dealt with under the old system as altered by Schedule II.

Premium. **5.** Where a conveyance or lease is partly in consideration of a money payment or premium, and partly of a rent, then, in addition to the remuneration hereby prescribed in respect of the rent, there shall be paid a further sum equal to the remuneration on a purchase at a price equal to such money payment or premium.

Fractions. **6.** Fractions of 5*l.* are to be reckoned as 5*l.*

# SCHEDULE II.

## INSTRUCTIONS FOR AND DRAWING AND PERUSING DEEDS, WILLS, AND OTHER DOCUMENTS.

Such fees for instructions as, having regard to the care and labour required, the number and lengths of the papers to be perused, and the other circumstances of the case, may be fair and reasonable. In ordinary cases, as to drawing, &c., the allowance shall be

| | |
|---|---|
| For drawing . . . . . | 2*s.* per folio. |
| For engrossing . . . . . | 8*d.* ,, ,, |
| For fair copying . . . . . | 4*d.* ,, ,, |
| For perusing . . . . . | 1*s.* ,, ,, |

### ATTENDANCES.

| | *s.* | *d.* |
|---|---|---|
| In ordinary cases . . . . . | 10 | 0 |

In extraordinary cases the taxing master may increase or diminish the above charge, if for any special reasons he shall think fit.

### ABSTRACTS OF TITLE (WHERE NOT COVERED BY THE ABOVE SCALES).

| | *s.* | *d.* |
|---|---|---|
| Drawing each brief sheet of 8 folios . . . . . | 6 | 8 |
| Fair copy . . . . . | 3 | 4 |

### JOURNEYS FROM HOME.

| | | | |
|---|---|---|---|
| In ordinary cases for every day of not less than seven hours employed on business or in travelling . . | £5 | 5 | 0 |
| Where a less time than seven hours is so employed, per hour . . . . . | 0 | 15 | 0 |

In extraordinary cases the taxing master may increase or diminish the above allowance, if for any special reasons he shall think fit. App. A. s. 9. 46 & 47 Vict. c. 52 (Bankruptcy).

(Signed) Selborne, C.
Coleridge, C.J.
G. Jessel, M.R.
E. Harvey.

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Sect. 9.—46 & 47 Vict. c. 52 (Bankruptcy Act, 1883).

[See Chap. VII., Sects. 10, 11, pp. 285, 286.]

Distress for Rent.

**42.** (1.) The landlord or other persons to whom any rent is due from the bankrupt may at any time, either before or after the commencement of the bankruptcy, distrain upon the goods or effects of the bankrupt for the rent due to him from the bankrupt, with this limitation, that if such distress for rent be levied after the commencement of the bankruptcy it shall be available only for *one year's rent* (*m*) accrued due prior to the date of the order of adjudication, but the landlord or other person to whom the rent may be due from the bankrupt may prove under the bankruptcy for the surplus due, for which the distress may not have been available.

(2.) For the purposes of this section, the term "order of adjudication" shall be deemed to include an order for the administration of the estate of a debtor whose debts do not exceed fifty pounds, or of a deceased person who dies insolvent.

Disclaimer of Lease.

**55.** (1.) Where any part of the property of the bankrupt consists of land, of any tenure, burdened with onerous covenants, of shares or stock in companies, of unprofitable contracts, or of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act or to the payment of any sum of money, the trustee, notwithstanding that he has endeavoured to sell, or has taken possession of the property, or exercised any act of ownership in relation thereto, but subject to the provisions of this section, may, by writing signed by him at any time within *three months* (*n*) after the first appointment of a trustee, disclaim the property. Provided, that where any such property shall not have come to the knowledge of the trustee within *one month* (*n*) after such appointment, he may disclaim such property at any time within two months after he first became aware thereof.

Effect of Disclaimer.

(2.) The disclaimer shall operate to determine as from the date of disclaimer, the rights, interests, and liabilities of the bankrupt and his property, in or in respect of the property disclaimed, and shall also discharge the trustee from all personal liability in respect of the property disclaimed, as from the date when the property vested in him, but shall not, except so far as is necessary for the purpose of releasing the bankrupt and his property and the trustee from liability, affect the rights or liabilities of any other person.

Leave of Court for Disclaimer.

(3.) A trustee shall not be entitled to disclaim a lease without the leave of the court, except in any cases which may be prescribed by general rules, and the court may, before or on granting such leave, require such notices to be given to persons interested, and impose such terms as a condition of granting leave, and make such orders with respect to fixtures, tenants' improvements, and other matters arising out of the tenancy, as the court thinks just.

Restriction on Disclaimer.

The trustee shall not be entitled to disclaim any property in pursuance of this section in any case where an application in writing has been made by the trustee by any person interested in the property requiring him to decide whether he will disclaim or not, and the trustee has, for a period of twenty-eight days after the receipt of the application, or such extended period as may be allowed by the court, declined or neglected to give notice whether he disclaims the property or not, and in the case of a contract, if the trustee, after such application as aforesaid, does not within the said period or extended period disclaim the contract, he shall be deemed to have adopted it.

(*m*) "Six months' rent" is substituted by s. 28 of the Bankruptcy Act, 1890, 53 & 54 Vict. c. 71.

(*n*) The period of twelve months is substituted by s. 13 of the Bankruptcy Act, 1890. Such substituted period may be extended by the Court of Bankruptcy.

APP. A. S. 9. 46 & 47 VICT. C. 52 (BANKRUPTCY).

(5.) The court may, on the application of any person who is as against the trustee entitled to the benefit or subject to the burden of a contract made with the bankrupt make an order rescinding the contract, on such terms as to payment by or to either party of damages for the non-performance of the contract, or otherwise, as to the court may seem equitable, and any damages payable under the order to any such person may be proved by him as a debt under the bankruptcy.

Rescission of Lease by Court.

Vesting Order.

(6.) The court may, on application by any person either claiming any interest in any disclaimed property, or under any liability not discharged by this Act in respect of any disclaimed property, and on hearing such persons as it thinks fit, make an order for the vesting of the property in or delivery thereof to any person entitled thereto, or to whom it may seem just that the same should be delivered by way of compensation for such liability as aforesaid, or a trustee for him, and on such terms as the court thinks just; and on any such vesting order being made, the property comprised therein shall vest accordingly in the person therein named in that behalf, without any conveyance or assignment for the purpose. Provided always, that where the property disclaimed is of a leasehold nature, the court shall not make a vesting order in favour of any person claiming under the bankrupt, whether as under-lessee or as mortgagee by demise, except upon the terms of making such person subject to the same liabilities and obligations as the bankrupt was subject to under the lease in respect of the property at the date when the bankruptcy petition was filed, and any mortgagee or under-lessee declining to accept a vesting order upon such terms shall be excluded from all interest in and security upon the property, and if there shall be no person claiming under the bankrupt who is willing to accept an order upon such terms, the court shall have power to vest the bankrupt's estate and interest in the property in any person liable either personally or in a representative character, and either alone or jointly with the bankrupt to perform the lessee's covenants in such lease, freed and discharged from all estates, incumbrances, and interests created therein by the bankrupt (*o*).

Proof for Injury Disclaimer.

(7.) Any person injured by the operation of a disclaimer under this section shall be deemed to be a creditor of the bankrupt to the extent of the injury, and may accordingly prove the same as a debt under the bankruptcy.

*Rule* 320 *of the Bankruptcy Rules* (*p*).

*Disclaimer of Lease.*

Disclaimer of Lease without leave.

(1.) A lease may be disclaimed without the leave of the court in any of the following cases, viz.:—

i. Where the bankrupt has not sub-let the demised premises or any part thereof or created a mortgage or charge upon the lease; and

(*a*.) The rent reserved and real value of the property leased, as ascertained by the property tax assessment, are less than 20*l*. per annum; or

(*b*.) The estate is administered under the provisions of section 121 of the Act of 1883 (*q*); or

(*c*.) The trustee serves the lessor with notice of his intention to disclaim, and the lessor does not within seven days after the receipt of such notice give notice to the trustee requiring the matter to be brought before the court.

ii. Where the bankrupt has sub-let the demised premises or created a mortgage

(*o*) By s. 13 of the Bankruptcy Act, 1890, the court may, if it thinks fit, modify the terms prescribed by the proviso in subs. 6 of this section, "so as to make the person in whose favour the vesting order may be made subject only to the same liabilities and obligations as if the lease had been assigned to him at the date when the bankruptcy petition was filed, and (if the case so requires) as if the lease had comprised only the property comprised in the vesting order."

(*p*) Substituted for former Rule 320 by Rule 69 of the Rules of 1890.

(*q*) By s. 121 of the act a bankrupt's estate may be administered in a summary manner on the court being satisfied or the official receiver reporting to the court "that the property of the debtor is not likely to exceed in value three hundred pounds."

or charge upon the lease, and the trustee serves the lessor and the sub-lessee or the mortgagees with notice of his intention to disclaim, and neither the lessor nor the sub-lessee or the mortgagees, or any of them, within fourteen days after the receipt of such notice, require or requires the matter to be brought before the court. App. A. s. 10. 46 & 47 Vict. c. 61.

(2.) The notices shall be in the forms Nos. 119A and 119B in the appendix, with such variations as circumstances may require (*r*). Forms.

(3.) Except as provided by this rule, the disclaimer of a lease without the leave of the court shall be void. Disclaimer without leave void

(4.) Where a trustee disclaims a leasehold interest he shall forthwith file the disclaimer with the proceedings in the court; and the disclaimer shall contain particulars of the interest disclaimed, and a statement of the persons to whom notice of the disclaimer has been given. Until the disclaimer is filed by the trustee the disclaimer shall be inoperative. Filing Disclaimer.

(5.) Where, in pursuance of notice by the trustee of his intention to disclaim a leasehold interest, the lessor, sub-lessee, or mortgagee requires the trustee to apply to the court for leave to disclaim, the costs of the lessor, sub-lessee, or mortgagee shall not be allowed out of the estate of the bankrupt except in cases in which the court is satisfied that such application was necessary in order to do justice between the parties. Costs of Lessor, &c., requiring Trustee to apply to Court.

(6.) A disclaimer made without leave of the court under this rule shall not be void or otherwise affected on the ground only that the notice required by this rule has not been given to some person who claims to be interested in the demised property. Failure to give Notice.

(7.) Where any person claims to be interested in any part of the property of the bankrupt burdened with onerous covenants, he shall, at the request of the official receiver or trustee, furnish a statement of the interest so claimed by him. Statement of Interest.

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Sect. 10.—46 & 47 Vict. c. 61 (Agricultural Holdings Act, 1883). [See Chap. XXI., p. 812.]

*An Act for amending the Law relating to Agricultural Holdings in England.*

[25th August, 1883.]

Be it enacted that:

## Part I.

### improvements.

*Compensation for Improvements.*

**1.** Subject as in this Act mentioned, where a tenant has made on his holding any improvement comprised in the First Schedule hereto, he shall, on and after the commencement of this Act, be entitled on quitting his holding at the determination of a tenancy to obtain from the landlord as compensation under this Act for such improvement such sum as fairly represents the value of the improvement to an incoming tenant: Provided always, that in estimating the value of any improvement in the First Schedule hereto there shall not be taken into account as part of the improvement made by the tenant what is justly due to the inherent capabilities of the soil. General Right of Tenant to Compensation.

*As to Improvements executed before the Commencement of Act.*

**2.** Compensation under this Act shall not be payable in respect of improvements executed before the commencement of this Act, with the exceptions following, that— Restriction as to Improvements before Act.

(1.) Where a tenant has within ten years before the commencement of this Act made an improvement mentioned in the third part of the First

(*r*) For these and other forms see Appendix C., post.

APP. A. s. 10.
46 & 47 VICT. c. 61.
38 & 39 Vict. s. 92.

Schedule hereto, and he is not entitled under any contract, or custom, or under the Agricultural Holdings (England) Act, 1875, to compensation in respect of such improvement; or

(2.) Where a tenant has executed an improvement mentioned in the first or second part of the said First Schedule within ten years previous to the commencement of this Act, and he is not entitled under any contract, or custom, or under the Agricultural Holdings (England) Act, 1875, to compensation in respect of such improvement, and the landlord within one year after the commencement of this Act declares in writing his consent to the making of such improvement, then such tenant on quitting his holding at the determination of a tenancy after the commencement of this Act may claim compensation under this Act in respect of such improvement in the same manner as if this Act had been in force at the time of the execution of such improvement.

*As to Improvements executed after the Commencement of Act.*

Consent of Landlord as to Improvement in First Schedule, Part I.

**3.** Compensation under this Act shall not be payable in respect of any improvement mentioned in the first part of the First Schedule hereto, and executed after the commencement of this Act, unless the landlord, or his agent duly authorised in that behalf, has, previously to the execution of the improvement and after the passing of this Act, consented in writing to the making of such improvement, and any such consent may be given by the landlord unconditionally, or upon such terms as to compensation, or otherwise as may be agreed upon between the landlord and the tenant, and in the event of any agreement being made between the landlord and the tenant, any compensation payable thereunder shall be deemed to be substituted for compensation under this Act.

Notice to Landlord as to Improvement in First Schedule, Part II.

**4.** Compensation under this Act shall not be payable in respect of any improvement mentioned in the second part of the First Schedule hereto, and executed after the commencement of this Act, unless the tenant has, not more than three months and not less than two months before beginning to execute such improvement, given to the landlord, or his agent duly authorised in that behalf, notice in writing of his intention so to do, and of the manner in which he proposes to do the intended work, and upon such notice being given, the landlord and tenant may agree on the terms as to compensation or otherwise on which the improvement is to be executed, and in the event of any such agreement being made, any compensation payable thereunder shall be deemed to be substituted for compensation under this Act, or the landlord may, unless the notice of the tenant is previously withdrawn, undertake to execute the improvement himself, and may execute the same in any reasonable and proper manner which he thinks fit, and charge the tenant with a sum not exceeding five pounds per centum per annum on the outlay incurred in executing the improvement, or not exceeding such annual sum payable for a period of twenty-five years as will repay such outlay in the said period, with interest at the rate of three per centum per annum, such annual sum to be recoverable as rent. In default of any such agreement or undertaking, and also in the event of the landlord failing to comply with his undertaking within a reasonable time, the tenant may execute the improvement himself, and shall in respect thereof be entitled to compensation under this Act.

The landlord and tenant may, if they think fit, dispense with any notice under this section, and come to an agreement in a lease or otherwise between themselves in the same manner and of the same validity as if such notice had been given.

Reservation as to existing and future Contracts of Tenancy.

**5.** Where, in the case of a tenancy under a contract of tenancy current at the commencement of this Act, any agreement in writing or custom, or the Agricultural Holdings (England) Act, 1875, provides specific compensation for any improvement comprised in the First Schedule hereto, compensation in respect of such improvement, although executed after the commencement of this Act, shall be payable in pursuance of such agreement, custom, or Act of Parliament, and shall be deemed to be substituted for compensation under this Act.

Where in the case of a tenancy under a contract of tenancy beginning after the commencement of this Act, any particular agreement in writing secures to

the tenant for any improvement mentioned in the third part of the First Schedule hereto, and executed after the commencement of this Act, fair and reasonable compensation, having regard to the circumstances existing at the time of making such agreement, then in such case the compensation in respect of such improvement shall be payable in pursuance of the particular agreement, and shall be deemed to be substituted for compensation under this Act. App. A. s. 10. 46 & 47 Vict. c. 61.

The last preceding provision of this section relating to a particular agreement shall apply in the case of a tenancy under a contract of tenancy current at the commencement of this Act in respect of an improvement mentioned in the third part of the First Schedule hereto, specific compensation for which is not provided by any agreement in writing, or custom, or the Agricultural Holdings Act, 1875.

*Regulations as to Compensation for Improvements.*

**6.** In the ascertainment of the amount of the compensation under this Act payable to the tenant in respect of any improvement there shall be taken into account in reduction thereof: Regulations as to Compensation for Improvements.

(*a.*) Any benefit which the landlord has given or allowed to the tenant in consideration of the tenant executing the improvement; and

(*b.*) In the case of compensation for manures the value of the manure that would have been produced by the consumption on the holding of any hay, straw, roots, or green crops sold off or removed from the holding within the last two years of the tenancy or other less time for which the tenancy has endured, except as far as a proper return of manure to the holding has been made in respect of such produce so sold off or removed therefrom; and

(*c.*) Any sums due to the landlord in respect of rent or in respect of any waste committed or permitted by the tenant, or in respect of any breach of covenant or other agreement connected with the contract of tenancy committed by the tenant, also any taxes, rates, and tithe rentcharge due or becoming due in respect of the holding to which the tenant is liable as between him and the landlord.

There shall be taken into account in augmentation of the tenant's compensation—

(*d.*) Any sum due to the tenant for compensation in respect of a breach of covenant or other agreement connected with a contract of tenancy and committed by the landlord.

Nothing in this section shall enable a landlord to obtain under this Act compensation in respect of waste by the tenant or of breach by the tenant committed or permitted in relation to a matter of husbandry more than four years before the determination of the tenancy.

*Procedure.*

**7.** A tenant claiming compensation under this Act shall, two months at least before the determination of the tenancy, give notice in writing to the landlord of his intention to make such claim. Notice of intended Claim.

Where a tenant gives such notice, the landlord may, before the determination of the tenancy, or within fourteen days thereafter, give a counter-notice in writing to the tenant of his intention to make a claim in respect of any waste or any breach of covenant or other agreement.

Every such notice and counter-notice shall state, as far as reasonably may be, the particulars and amount of the intended claim.

**8.** The landlord and the tenant may agree on the amount and mode and time of payment of compensation to be paid under this Act. Compensation agreed or settled by reference.

If in any case they do not so agree the difference shall be settled by a reference.

**9.** Where there is a reference under this Act, a referee, or two referees and an umpire, shall be appointed as follows:— Appointment of Referee or Referees and Umpire.

(1.) If the parties concur, there may be a single referee appointed by them jointly:

(2.) If before award the single referee dies or becomes incapable of acting, or for seven days after notice from the parties, or either of them, requiring

APP. A. s. 10.
46 & 47 VICT. c. 61.

him to act, fails to act, the proceedings shall begin afresh, as if no referee had been appointed:

(3.) If the parties do not concur in the appointment of a single referee, each of them shall appoint a referee:

(4.) If before award one of two referees dies or becomes incapable of acting, or for seven days after notice from either party requiring him to act, fails to act, the party appointing him shall appoint another referee:

(5.) Notice of every appointment of a referee by either party shall be given to the other party:

(6.) If for fourteen days after notice by one party to the other to appoint a referee, or another referee, the other party fails to do so, then, on the application of the party giving notice, the county court shall within fourteen days appoint a competent and impartial person to be a referee:

(7.) Where two referees are appointed, then (subject to the provisions of this Act) they shall before they enter on the reference appoint an umpire:

(8.) If before award an umpire dies or becomes incapable of acting, the referees shall appoint another umpire:

(9.) If for seven days after request from either party the referees fail to appoint an umpire, or another umpire, then, on the application of either party, the county court shall within fourteen days appoint a competent and impartial person to be the umpire:

(10.) Every appointment, notice, and request under this section shall be in writing.

Requisition for Appointment of Umpire by Board of Agriculture, &c.

N.B.—*The Board of Agriculture is substituted for the Land Commissioners by the Board of Agriculture Act*, 1889.

**10.** Provided that, where two referees are appointed, an umpire may be appointed as follows:

(1.) If either party, on appointing a referee, requires, by notice in writing to the other, that the umpire shall be appointed by the Land Commissioners for England, then the umpire, and any successor to him, shall be appointed, on the application of either party, by those commissioners.

(2.) In every other case, if either party on appointing a referee requires, by notice in writing to the other, that the umpire shall be appointed by the county court, then, unless the other party dissents by notice in writing therefrom, the umpire, and any successor to him, shall on the application of either party be so appointed, and in case of such dissent the umpire, and any successor to him, shall be appointed, on the application of either party, by the Land Commissioners for England.

Exercise of Powers of County Court.

**11.** The powers of the county court under this Act relative to the appointment of a referee or umpire shall be exerciseable by the judge of the court having jurisdiction, whether he is without or within his district, and may, by consent of the parties, be exercised by the registrar of the court.

Mode of submission to reference.

**12.** The delivery to a referee of his appointment shall be deemed a submission to a reference by the party delivering it; and neither party shall have power to revoke a submission, or the appointment of a referee, without the consent of the other.

Power for Referee, &c., to require production of Documents, administer Oaths, &c.

**13.** The referee or referees or umpire may call for the production of any sample, or voucher, or other document, or other evidence which is in the possession or power of either party, or which either party can produce, and which to the referee or referees or umpire seems necessary for determination of the matters referred, and may take the examination of the parties and witnesses on oath, and may administer oaths and take affirmations; and if any person so sworn or affirming wilfully and corruptly gives false evidence he shall be guilty of perjury.

Power to proceed in Absence.

**14.** The referee or referees or umpire may proceed in the absence of either party where the same appears to him or them expedient, after notice given to the parties.

Form of Award.

**15.** The award shall be in writing, signed by the referee or referees or umpire.

Time for award of Referee or Referees.

**16.** A single referee shall make his award ready for delivery within twenty-eight days after his appointment.

Two referees shall make their award ready for delivery within twenty-eight days after the appointment of the last appointed of them, or within such extended time (if any) as they from time to time jointly fix by writing under

their hands, so that they make their award ready for delivery within a time not exceeding in the whole forty-nine days after the appointment of the last appointed of them.

APP. A. s. 10. 46 & 47 VICT. c. 61.

Award in respect of Compensation under ss. 3, 4, and 5.

**17.** In any case provided for by sections three, four, or five, if compensation is claimed under this Act, such compensation as under any of those sections is to be deemed to be substituted for compensation under this Act, if and so far as the same can, consistently with the terms of the agreement (if any), be ascertained by the referees or the umpire, shall be awarded in respect of any improvements thereby provided for, and the award shall, when necessary, distinguish such improvement and the amount awarded in respect thereof; and an award given under this section shall be subject to the appeal provided by this Act.

Reference to and award by Umpire.

**18.** Where two referees are appointed and act, if they fail to make their award ready for delivery within the time aforesaid, then, on the expiration of that time, their authority shall cease, and thereupon the matters referred to them shall stand referred to the umpire.

The umpire shall make his award ready for delivery within twenty-eight days after notice in writing given to him by either party or referee of the reference to him, or within such extended time (if any) as the registrar of the county court from time to time appoints, on the application of the umpire or of either party, made before the expiration of the time appointed by or extended under this section.

Award to give Particulars.

**19.** The award shall not award a sum generally for compensation, but shall, so far as possible, specify—

(*a.*) The several improvements, acts, and things in respect whereof compensation is awarded, and the several matters and things taken into account under the provisions of this Act in reduction or augmentation of such compensation:

(*b.*) The time at which each improvement, act, or thing was executed, done, committed, or permitted;

(*c.*) The sum awarded in respect of each improvement, act, matter, or thing; and

(*d.*) Where the landlord desires to charge his estate with the amount of compensation found due to the tenant, the time at which, for the purposes of such charge, each improvement, act, or thing in respect of which compensation is awarded is to be deemed to be exhausted.

Costs of Reference.

**20.** The costs of and attending the reference, including the remuneration of the referee or referees and umpire, where the umpire has been required to act, and including other proper expenses, shall be borne and paid by the parties in such proportion as to the referee or referees or umpires appears just, regard being had to the reasonableness or unreasonableness of the claim of either party in respect of amount, or otherwise, and to all the circumstances of the case.

The award may direct the payment of the whole or any part of the costs aforesaid by the one party to the other.

The costs aforesaid shall be subject to taxation by the registrar of the county court, on the application of either party, but that taxation shall be subject to review by the judge of the county court.

**21.** The award shall fix a day, not sooner than one month after the delivery of the award, for the payment of money awarded for compensation, costs, or otherwise.

Submission not to be removable, &c.

**22.** A submission or award shall not be made a rule of any court, or be removable by any process into any court, and an award shall not be questioned otherwise than as provided by this Act.

Appeal to County Court.

**23.** Where the sum claimed for compensation exceeds one hundred pounds, either party may, within seven days after delivery of the award, appeal against it to the judge of the county court on all or any of the following grounds.

1. That the award is invalid;
2. That the award proceeds wholly or in part upon an improper application of or upon the omission properly to apply the special provisions of sections three, four, or five of this Act;
3. That compensation has been awarded for improvements, acts, or things, breaches of covenants or agreements, or for committing or permitting waste, in respect of which the party claiming was not entitled to compensation;

App. A. s. 10. 46 & 47 Vict. c. 61.

4. That compensation has not been awarded for improvements, acts, or things, breaches of covenants or agreements, or for committing or permitting waste, in respect of which the party claiming was entitled to compensation;

and the judge shall hear and determine the appeal, and may, in his discretion, remit the case to be reheard as to the whole or any part thereof by the referee or referees or umpire, with such directions as he may think fit.

If no appeal is so brought, the award shall be final.

The decision of the judge of the county court on appeal shall be final, save that the judge shall, at the request of either party, state a special case on a question of law for the judgment of the High Court of Justice, and the decision of the High Court on the case, and respecting costs and any other matter connected therewith, shall be final, and the judge of the county court shall act thereon.

Recovery of Compensation.

**24.** Where any money agreed or awarded or ordered on appeal to be paid for compensation, costs or otherwise, is not paid within fourteen days after the time when it is agreed or awarded or ordered to be paid it shall be recoverable, upon order made by the judge of the county court, as money ordered by a county court under its ordinary jurisdiction to be paid is recoverable.

Appointment of Guardian.

**25.** Where a landlord or tenant is an infant without a guardian, or is of unsound mind, not so found by inquisition, the county court, on the application of any person interested, may appoint a guardian of the infant or person of unsound mind for the purposes of this Act, and may change the guardian if and as occasion requires.

Married Women.

**26.** Where the appointment of a person to act as the next friend of a married woman is required for the purposes of this Act, the county court may make such appointment, and may remove or change that next friend if and as occasion requires.

45 & 46 Vict. c. 75.

A woman married before the commencement of the Married Women's Property Act, 1882, entitled for her separate use to land, her title to which accrued before such commencement as aforesaid, and not restrained from anticipation, shall, for the purposes of this Act, be in respect of land as if she was unmarried.

Where any other woman married before the commencement of the Married Women's Property Act, 1882, is desirous of doing any act under this Act in respect of land, her title to which accrued before such commencement as aforesaid, her husband's concurrence shall be requisite, and she shall be examined apart from him by the county court, or by the judge of the county court for the place where she for the time being is, touching her knowledge of the nature and effect of the intended act, and it shall be ascertained that she is acting freely and voluntarily.

Costs in County Court.

**27.** The costs of proceedings in the county court under this Act shall be in the discretion of the court.

The Lord Chancellor may from time to time prescribe a scale of costs for those proceedings, and of costs to be taxed by the registrar of the court.

Service of Notice, &c.

**28.** Any notice, request, demand, or other instrument under this Act may be served on the person to whom it is to be given, either personally or by leaving it for him at his last known place of abode in England, or by sending it through the post in a registered letter addressed to him there; and if so sent by post it shall be deemed to have been served at the time when the letter containing it would be delivered in ordinary course: and in order to prove service by letter it shall be sufficient to prove that the letter was properly addressed and posted, and that it contained the notice, request, demand, or other instrument to be served.

*Charge of Tenant's Compensation.*

Power for Landlord on Paying Compensation to obtain Charge.

**29.** A landlord, on paying to the tenant the amount due to him in respect of compensation under this Act, or in respect of compensation authorised by this Act to be substituted for compensation under this Act, or on expending such amount as may be necessary to execute an improvement under the second part of the First Schedule hereto, after notice given by the tenant of his intention to execute such improvement in accordance with this Act, shall be entitled to obtain from the county court a charge on the holding, or any part thereof, to the amount of the sum so paid or expended.

App. A. s. 10. 46 & 47 Vict. c. 61.

The court shall, on proof of the payment or expenditure, and on being satisfied of the observance in good faith by the parties of the conditions imposed by this Act, make an order charging the holding, or any part thereof, with repayment of the amount paid or expended, with such interest, and by such instalments, and with such directions for giving effect to the charge, as the court thinks fit.

But where the landlord obtaining the charge is not absolute owner of the holding for his own benefit, no instalment or interest shall be made payable after the time when the improvement in respect whereof compensation is paid will, where an award has been made, be taken to have been exhausted according to the declaration of the award, and in any other case after the time when any such improvement will in the opinion of the court, after hearing such evidence (if any) as it thinks expedient, have become exhausted.

The instalments and interest shall be charged in favour of the landlord, his executors, administrators and assigns.

The estate or interest of any landlord holding for an estate or interest determinable or liable to forfeiture by reason of his creating or suffering any charge thereon shall not be determined or forfeited by reason of his obtaining a charge under this Act, anything in any deed, will, or other instrument to the contrary thereof notwithstanding.

45 & 46 Vict. c. 38.

Capital money arising under the Settled Land Act, 1882, may be applied in payment of any moneys expended and costs incurred by a landlord under or in pursuance of this Act in or about the execution of any improvement mentioned in the first or second parts of the Schedule hereto, as for an improvement authorised by the said Settled Land Act; and such money may also be applied in discharge of any charge created on a holding under or in pursuance of this Act in respect of any such improvement as aforesaid, as in discharge of an incumbrance authorised by the said Settled Land Act to be discharged out of such capital money.

Incidence of Charge.

**30.** The sum charged by the order of the county court under this Act shall be a charge on the holding or the part thereof charged, for the landlord's interest therein, and for all interests therein subsequent to that of the landlord; but so that the charge shall not extend beyond the interest of the landlord, his executors, administrators, and assigns, in the tenancy where the landlord is himself a tenant of the holding.

Trustee Landlord.

**31.** Where the landlord is a person entitled to receive the rents and profits of any holding as trustee, or in any character otherwise than for his own benefit, the amount due from such landlord in respect of compensation under this act, or in respect of compensation authorised by this act to be substituted for compensation under this Act, shall be charged and recovered as follows and not otherwise; (that is to say,)

(1.) The amount so due shall not be recoverable personally against such landlord, nor shall he be under any liability to pay such amount, but the same shall be a charge on and recoverable against the holding only.

(2.) Such landlord shall, either before or after having paid to the tenant the amount due to him, be entitled to obtain from the county court a charge on the holding to the amount of the sum required to be paid or which has been paid, as the case may be, to the tenant.

(3.) If such landlord neglect or fail within one month after the tenant has quitted his holding to pay to the tenant the amount due to him, then after the expiration of such one month the tenant shall be entitled to obtain from the county court in favour of himself, his executors, administrators, and assigns, a charge on the holding to the amount of the sum due to him, and of all costs properly incurred by him in obtaining the charge or in raising the amount due thereunder.

(4.) The court shall on proof of the tenant's title to have a charge made in his favour make an order charging the holding with payment of the amount of the charge, including costs, in like manner and form as in case of a charge which a landlord is entitled to obtain.

Advance made by a Company.

**32.** Any company now or hereafter incorporated by Parliament, and having power to advance money for the improvement of land, may take an assignment of any charge made by a county court under the provisions of this act, upon such terms and conditions as may be agreed upon between such company and

App. A. s. 10. 46 & 47 Vict. c. 61.

the person entitled to such charge; and such company may assign any charge so acquired by them to any person or persons whomsoever.

*Notice to Quit.*

Time of Notice to Quit.

**33.** Where a half-year's notice, expiring with a year of tenancy is by law necessary and sufficient for determination of a tenancy from year to year, in the case of any such tenancy under a contract of tenancy made either before or after the commencement of this act, a year's notice so expiring shall by virtue of this act be necessary and sufficient for the same, unless the landlord and tenant of the holding, by writing under their hands, agree that this section shall not apply, in which case a half-year's notice shall continue to be sufficient; but nothing in this section shall extend to a case where the tenant is adjudged bankrupt, or has filed a petition for a composition or arrangement with his creditors.

*Fixtures.*

Tenant's property in Fixtures, Machinery, &c.

**34.** Where after the commencement of this act a tenant affixes to his holding any engine, machinery, fencing, or other fixture, or erects any building for which he is not under this act or otherwise entitled to compensation, and which is not so affixed or erected in pursuance of some obligation in that behalf, or instead of some fixture or building belonging to the landlord, then such fixture or building shall be the property of and be removable by the tenant before or within a reasonable time after the termination of the tenancy.

Provided as follows:—

1. Before the removal of any fixture or building the tenant shall pay all rent owing by him, and shall perform or satisfy all other his obligations to the landlord in respect to the holding:
2. In the removal of any fixture or building the tenant shall not do any avoidable damage to any other building or other part of the holding:
3. Immediately after the removal of any fixture or building the tenant shall make good all damage occasioned to any other building or other part of the holding by the removal:
4. The tenant shall not remove any fixture or building without giving one month's previous notice in writing to the landlord of the intention of the tenant to remove it:
5. At any time before the expiration of the notice of removal the landlord, by notice in writing given by him to the tenant, may elect to purchase any fixture or building comprised in the notice of removal, and any fixture or building thus elected to be purchased shall be left by the tenant, and shall become the property of the landlord, who shall pay the tenant the fair value thereof to an incoming tenant of the holding; and any difference as to the value shall be settled by a reference under this act, as in case of compensation (but without appeal).

*Crown and Duchy Lands.*

Application of Act to Crown Lands.

**35.** This act shall extend and apply to land belonging to Her Majesty the Queen, her heirs and successors, in right of the Crown.

With respect to such land, for the purposes of this act, the Commissioners of Her Majesty's Woods, Forests, and Land Revenues, or one of them, or other the proper officer or body having charge of such land for the time being, or in case there is no such officer or body, then such person as Her Majesty, her heirs or successors, may appoint in writing under the royal sign manual, shall represent Her Majesty, her heirs and successors, and shall be deemed to be the landlord.

Any compensation payable under this act by the Commissioners of Her Majesty's Woods, Forests, and Land Revenues, or either of them, in respect of an improvement mentioned in the first or second part of the First Schedule hereto, shall be deemed to be payable in respect of an improvement of land within section one of the Crown Lands Act, 1886, and the amount thereof shall be charged and repaid as in that section provided with respect to the costs, charges, and expenses therein mentioned.

Any compensation payable under this act by those Commissioners, or either of them, in respect of an improvement mentioned in the third part of the First Schedule hereto, shall be deemed to be part of the expenses of the management of the Land Revenues of the Crown, and shall be payable to those Commissioners out of such money and in such manner as the last-mentioned expenses are by law payable.

App. A. s. 10. 46 & 47 Vict. c. 61.

Application of Act to Land of Duchy of Lancaster.

**36.** This act shall extend and apply to land belonging to Her Majesty, her heirs and successors, in right of the Duchy of Lancaster.

With respect to such land for the purposes of this act, the Chancellor for the time being of the Duchy shall represent Her Majesty, her heirs and successors, and shall be deemed to be the landlord.

The amount of any compensation payable under this act by the Chancellor of the Duchy in respect of an improvement mentioned in the first or second part of the First Schedule to this act shall be deemed to be an expense incurred in improvement of land belonging to Her Majesty, her heirs or successors, in right of the Duchy, within section twenty-five of the act of the fifty-seventh year of King George the Third, chapter ninety-seven, and shall be raised and paid as in that section provided with respect to the expenses therein mentioned.

The amount of any compensation payable under this act by the Chancellor of the Duchy in respect of an improvement mentioned in the third part of the First Schedule to this act shall be paid out of the annual revenues of the Duchy.

Application of Act to Land of Duchy of Cornwall.

**37.** This act shall extend and apply to land belonging to the Duchy of Cornwall.

With respect to such land, for the purposes of this act, such person as the Duke of Cornwall for the time being, or other the personage for the time being entitled to the revenues and possessions of the Duchy of Cornwall, from time to time, by sign manual, warrant, or otherwise, appoints, shall represent the Duke of Cornwall or other the personage aforesaid, and be deemed to be the landlord, and may do any act or thing under this act which a landlord is authorised or required to do thereunder.

Any compensation payable under this act by the Duke of Cornwall, or other the personage aforesaid, in respect of an improvement mentioned in the first or second part of the First Schedule to this act shall be deemed to be payable in respect of an improvement of land within section eight of the Duchy of Cornwall Management Act, 1863, and the amount thereof may be advanced and paid from the money mentioned in that section, subject to the provision therein made for repayment of sums advanced for improvements.

*Ecclesiastical and Charity Lands.*

Landlord, Archbishop or Bishop.

**38.** Where lands are assigned or secured as the endowment of a see, the powers by this act conferred on a landlord shall not be exercised by the archbishop or bishop, in respect of those lands, except with the previous approval in writing of the Estates Committee of the Ecclesiastical Commissioners for England.

Landlord, Incumbent of Benefice.

**39.** Where a landlord is incumbent of an ecclesiastical benefice, the powers by this act conferred on a landlord shall not be exercised by him in respect of the glebe land or other land belonging to the benefice, except with the previous approval in writing of the patron of the benefice, that is, the person, officer, or authority who, in case the benefice were vacant, would be entitled to present thereto, or of the Governors of Queen Anne's Bounty (that is, the Governors of the Bounty of Queen Anne for the Augmentation of the Maintenance of the Poor Clergy).

In every case the Governors of Queen Anne's Bounty may, if they think fit, on behalf of the incumbent, out of any money in their hands, pay to the tenant the amount of compensation due to him under this act; and thereupon they may, instead of the incumbent, obtain from the county court a charge on the holding, in respect thereof, in favour of themselves.

Every such charge shall be effectual, notwithstanding any change of the incumbent.

Landlord, Charity Trustees, &c.

**40.** The powers by this act conferred on a landlord in respect of charging the land shall not be exercised by trustees for ecclesiastical or charitable purposes,

APP. A. s. 10. 46 & 47 VICT. c. 61.

except with the previous approval in writing of the Charity Commissioners for England and Wales.

*Resumption for Improvements, and Miscellaneous.*

Resumption of possession for Cottages, &c.

**41.** Where on a tenancy from year to year a notice to quit is given by the landlord with a view to the use of land for any of the following purposes:

The erection of farm labourers' cottages or other houses, with or without gardens;

The providing of gardens for existing farm labourers' cottages or other houses;

The allotment for labourers of land for gardens or other purposes;

The planting of trees;

The opening or working of any coal, ironstone, limestone, or other mineral, or of a stone quarry, clay, sand, or gravel pit, or the construction of any works or buildings to be used in connexion therewith;

The obtaining of brick earth, gravel or sand;

The making of a watercourse or reservoir;

The making of any road, railway, tramroad, siding, canal, or basin, or any wharf, pier, or other work connected therewith;

and the notice to quit so states, then it shall, by virtue of this act, be no objection to the notice that it relates to part only of the holding.

In every such case the provisions of this act respecting compensation shall apply as on determination of a tenancy in respect of an entire holding.

The tenant shall also be entitled to a proportionate reduction of rent in respect of the land comprised in the notice to quit, and in respect of any depreciation of the value to him of the residue of the holding, caused by the withdrawal of that land from the holding or by the use to be made thereof, and the amount of that reduction shall be ascertained by agreement or settled by a reference under this act, as in case of compensation (but without appeal).

The tenant shall further be entitled, at any time within twenty-eight days after service of the notice to quit, to serve on the landlord a notice in writing to the effect that he (the tenant) accepts the same as a notice to quit the entire holding, to take effect at the expiration of the then current year of tenancy; and the notice to quit shall have effect accordingly.

Provision as to limited Owners.

**42.** Subject to the provisions of this act in relation to Crown, duchy, ecclesiastical, and charity lands, a landlord, whatever may be his estate or interest in his holding, may give any consent, make any agreement, or do or have done to him any act in relation to improvements in respect of which compensation is payable under this act which he might give or make or do or have done to him if he were in the case of an estate of inheritance owner thereof in fee, and in the case of a leasehold possessed of the whole estate in the leasehold.

Provision in case of reservation of Rent.

**43.** When, by any act of parliament, deed, or other instrument, a lease of a holding is authorised to be made, provided that the best rent, or reservation in the nature of rent, is by such lease reserved, then, whenever any lease of a holding is, under such authority, made to the tenant of the same, it shall not be necessary, in estimating such rent or reservation, to take into account against the tenant the increase (if any) in the value of such holding arising from any improvements made or paid for by him on such holding.

## PART II.

*Distress.*

Limitation of Distress in respect of Amount and Time.

**44.** After the commencement of this act it shall not be lawful for any landlord entitled to the rent of any holding to which this act applies to distrain for rent, which became due in respect of such holding, more than one year before the making of such distress, except in the case of arrears of rent in respect of a holding to which this act applies existing at the time of the passing of this act, which arrears shall be recoverable by distress up to the first day of January one thousand eight hundred and eighty-five to the same extent as if this act had not passed.

Provided that where it appears that according to the ordinary course of dealing between the landlord and tenant of a holding the payment of the rent of such

holding has been allowed to be deferred until the expiration of a quarter of a year or half a year after the date at which such rent legally became due, then for the purpose of this section the rent of such holding shall be deemed to have become due at the expiration of such quarter or half year as aforesaid, as the case may be, and not at the date at which it legally became due.

App. A. s. 10. 46 & 47 Vict. c. 61.

**45.** Where live stock belonging to another person has been taken in by the tenant of a holding to which this act applies to be fed at a fair price agreed to be paid for such feeding by the owner of such stock to the tenant, such stock shall not be distrained by the landlord for rent where there is other sufficient distress to be found, and if so distrained by reason of other sufficient distress not being found, there shall not be recovered by such distress a sum exceeding the amount of the price so agreed to be paid for the feeding, or if any part of such price has been paid exceeding the amount remaining unpaid, and it shall be lawful for the owner of such stock, at any time before it is sold, to redeem such stock by paying to the distrainor a sum equal to such price as aforesaid, and any payment so made to the distrainor shall be in full discharge as against the tenant of any sum of the like amount which would be otherwise due from the owner of the stock to the tenant in respect of the price of feeding: Provided always, that so long as any portion of such live stock shall remain on the said holding the right to distrain such portion shall continue to the full extent of the price originally agreed to be paid for the feeding of the whole of such live stock, or if part of such price has been bonâ fide paid to the tenant under the agreement, then to the full extent of the price then remaining unpaid.

Limitation of Distress in respect of things to be Distrained.

Agricultural or other machinery which is the bonâ fide property of a person other than the tenant, and is on the premises of the tenant under a bonâ fide agreement with him for the hire or use thereof in the conduct of his business, and live stock of all kinds which is the bonâ fide property of a person other than the tenant, and is on the premises of the tenant solely for breeding purposes, shall not be distrained for rent in arrear.

**46.** Where any dispute arises—

(*a.*) in respect of any distress having been levied contrary to the provisions of this act; or

(*b.*) as to the ownership of any live stock distrained, or as to the price to be paid for the feeding of such stock; or

(*c.*) as to any other matter or thing relating to a distress on a holding to which this act applies:

Remedy for wrongful Distress under this Act.

such dispute may be heard and determined by the County Court or by a court of summary jurisdiction, and any such County Court or court of summary jurisdiction may make an order for restoration of any live stock or things unlawfully distrained, or may declare the price agreed to be paid in the case where the price of the feeding is required to be ascertained, or may make any other order which justice requires: any such dispute as mentioned in this section shall be deemed to be a matter in which a court of summary jurisdiction has authority by law to make an order on complaint in pursuance of the Summary Jurisdiction Acts; but any person aggrieved by any decision of such court of summary jurisdiction under this section may, on giving such security to the other party as the court may think just, appeal to a court of general or quarter sessions.

**47.** Where the compensation due under this act, or under any custom or contract, to a tenant has been ascertained before the landlord distrains for rent due, the amount of such compensation may be set off against the rent due, and the landlord shall not be entitled to distrain for more than the balance.

Set-off of Compensation against Rent.

**48.** An order of the County Court or of a court of summary jurisdiction under this act shall not be quashed for want of form, or be removed by certiorari or otherwise into any superior court.

Exclusion of certiorari.

[**49.** *Limitation of Costs.*—Repealed by sect. 9 of Law of Distress Amendment Act, 1888, post, being replaced by sect. 8 of that act.]

[**50.** *Appraisement and Sale.*—Repealed by sect. 9 of Law of Distress Amendment Act, 1888, post, as being replaced by sect. 5 of that act.]

[**51.** *Extension of Time to replevy, from 5 days to 15 at request of Tenant.*—Repealed by sect. 9 of Law of Distress Amendment Act, 1888, post, as being replaced by sect. 5 of that act.]

[**52.** *Certificated Bailiffs.*—Repealed by sect. 9 of Law of Distress Amendment Act, 1888, post, as being replaced by sect. 7 of that act.]

## PART III.

*General Provisions.*

Commencement of act.

**53.** This act shall come into force on the first day of January one thousand eight hundred and eighty-four, which day is in this act referred to as the commencement of this act.

Holdings to which act applies.

**54.** Nothing in this act shall apply to a holding that is not either wholly agricultural or wholly pastoral, or in part agricultural, and as to the residue pastoral, or in whole or in part cultivated as a market garden, or to any holding let to the tenant during his continuance in any office, appointment, or employment held under the landlord.

Avoidance of Agreement inconsistent with act.

**55.** Any contract, agreement, or covenant made by a tenant, by virtue of which he is deprived of his right to claim compensation under this act in respect of any improvement mentioned in the First Schedule hereto (except an agreement providing such compensation as is by this act permitted to be substituted for compensation under this act), shall, so far as it deprives him of such right, be void both at law and in equity.

Right of Tenant in respect of Improvement purchased from Outgoing Tenant.

**56.** Where an incoming tenant has, with the consent in writing of his landlord, paid to an outgoing tenant any compensation payable under or in pursuance of this act in respect of the whole or part of any improvement, such incoming tenant shall be entitled on quitting the holding to claim compensation in respect of such improvement or part in like manner, if at all, as the outgoing tenant would have been entitled if he had remained tenant of the holding, and quitted the holding at the time at which the incoming tenant quits the same.

Compensation under this act to be exclusive.

**57.** A tenant shall not be entitled to claim compensation by custom or otherwise than in manner authorised by this act in respect of any improvement for which he is entitled to compensation under or in pursuance of this act, but where he is not entitled to compensation under or in pursuance of this act he may recover compensation under any other act of parliament or any agreement or custom, in the same manner as if this act had not passed.

Provision as to Change of Tenancy.

**58.** A tenant who has remained in his holding during a change or changes of tenancy shall not thereafter on quitting his holding at the determination of a tenancy be deprived of his right to claim compensation in respect of improvements by reason only that such improvements were made during a former tenancy or tenancies, and not during the tenancy at the determination of which he is quitting.

Restriction in respect of Improvements by Tenant about to Quit.

**59.** Subject as in this section mentioned, a tenant shall not be entitled to compensation in respect of any improvements, other than manures as defined by this act, begun by him, if he holds from year to year, within one year before he quits his holding, or at any time after he has given or received final notice to quit, and, if he holds as a lessee, within one year before the expiration of his lease.

A final notice to quit means a notice to quit which has not been waived or withdrawn, but has resulted in the tenant quitting his holding.

The foregoing provisions of this section shall not apply in the case of any such improvement as aforesaid—

(1.) Where a tenant from year to year has begun such improvement during the last year of his tenancy, and, in pursuance of a notice to quit thereafter given by the landlord, has quitted his holding at the expiration of that year; and

(2.) Where a tenant, whether a tenant from year to year or a lessee, previously to beginning any such improvement, has served notice on his landlord of his intention to begin the same, and the landlord has either assented or has failed for a month after the receipt of the notice to object to the making of the improvement.

General saving of Rights.

**60.** Except as in this act expressed, nothing in this act shall take away, abridge, or prejudicially affect any power, right, or remedy of a landlord, tenant, or other person vested in or exerciseable by him by virtue of any other act or law, or under any custom of the country, or otherwise, in respect of a contract of tenancy or other contract, or of any improvements, waste emblements, tillages, away-going crops, fixtures, tax, rate, tithe rent-charge, rent, or other thing.

Interpretation.

**61.** In this act—

"Contract of tenancy" means a letting of or agreement for the letting land for a term of years, or for lives, or for lives and years, or from year to year.

A tenancy from year to year under a contract of tenancy current at the commencement of the act shall for the purposes of this act be deemed to continue to be a tenancy under a contract of tenancy current at the commencement of this act until the first day on which either the landlord or tenant of such tenancy could, the one by giving notice to the other immediately after the commencement of this act, cause such tenancy to determine, and on and after such day as aforesaid shall be deemed to be a tenancy under a contract of tenancy beginning after the commencement of this act. App. A. s. 10. 46 & 47 VICT. c. 61.

"Determination of tenancy" means the cesser of a contract of tenancy by reason of effluxion of time, or from any other cause:

"Landlord" in relation to a holding means any person for the time being entitled to receive the rents and profits of any holding:

"Tenant" means the holder of land under a landlord for a term of years, or for lives, or for lives and years, or from year to year:

"Tenant" includes the executors, administrators, assigns, legatee, devisee, or next-of-kin, husband, guardian, committee of the estate or trustees in bankruptcy of a tenant, or any person deriving title from a tenant; and the right to receive compensation in respect of any improvement made by a tenant shall enure to the benefit of such executors, administrators, assigns, and other persons as aforesaid:

"Holding" means any parcel of land held by a tenant:

"County court," in relation to a holding, means the county court within the district whereof the holding or the larger part thereof is situate:

"Person" includes a body of persons and a corporation aggregate or sole:

"Live stock" includes any animal capable of being distrained:

"Manures" means any of the improvements numbered twenty-two and twenty-three in the third part of the First Schedule hereto.

The designations of landlord and tenant shall continue to apply to the parties until the conclusion of any proceedings taken under or in pursuance of this act in respect of compensation for improvements, or under any agreement made in pursuance of this act.

**62.** On and after the commencement of this act, the Agricultural Holdings (England) Act, 1875, and the Agricultural Holdings (England) Act, 1875, Amendment Act, 1876, shall be repealed. Repeal of Acts of 1875 and 1876.

Provided that such repeal shall not affect—

(*a.*) anything duly done or suffered, or any proceedings pending under or in pursuance of any enactment hereby repealed; or

(*b.*) any right to compensation in respect of improvements to which the Agricultural Holdings (England) Act, 1875, applies, and which were executed before the commencement of this act; or

(*c.*) any right to compensation in respect of any improvement to which the Agricultural Holdings (England) Act, 1875, applies, although executed by a tenant after the commencement of this act if made under a contract of tenancy current at the commencement of this act; or

(*d.*) any right in respect of fixtures affixed to a holding before the commencement of this act:

and any right reserved by this section may be enforced after the commencement of this act in the same manner in all respects as if no such repeal had taken place.

**63.** This act may be cited for all purposes as the Agricultural Holdings (England) Act, 1883. Short Title of Act.

**64.** This act shall not apply to Scotland or Ireland. Limits of Act.

## FIRST SCHEDULE.

### PART I.

*Improvements to which consent of Landlord is required.*

(1.) Erection or enlargement of buildings.
(2.) Formation of silos.
(3.) Laying down of permanent pasture.
(4.) Making and planting of osier beds.

App. A. s. 10. 46 & 47 Vict. c. 61.

(5.) Making of water meadows or works of irrigation.
(6.) Making of gardens.
(7.) Making or improving of roads or bridges.
(8.) Making or improving of watercourses, ponds, wells, or reservoirs, or of works for the application of water power or for supply of water for agricultural or domestic purposes.
(9.) Making of fences.
(10.) Planting of hops.
(11.) Planting of orchards or fruit bushes.
(12.) Reclaiming of waste land.
(13.) Warping of land.
(14.) Embankment and sluices against floods.

PART II.

*Improvement in respect of which notice to Landlord is required.*

(15.) Drainage.

PART III.

*Improvements to which consent of Landlord is not required.*

(16.) Boning of land with undissolved bones.
(17.) Chalking of land.
(18.) Clay-burning.
(19.) Claying of land.
(20.) Liming of land.
(21.) Marling of land.
(22.) Application to land of purchased artificial or other purchased manure.
(23.) Consumption on the holding by cattle, sheep, or pigs of cake or other feeding stuff not produced on the holding.

## SECOND SCHEDULE.

Section 49.

*Levying distress. Three per centum on any sum exceeding* £20 *and not exceeding* £50. *Two and a half per centum on any sum exceeding* £50.

*To bailiff for levy,* £1 1*s.*

*To man in possession, if boarded,* 3*s.* 6*d. per day; if not boarded,* 5*s. per day.*

*For advertisements the sum actually paid.*

*To auctioneer. For sale five pounds per centum on the sum realised not exceeding* £100, *and four per centum on any additional sum realised not exceeding* £100, *and on any sum exceeding* £200 *three per centum. A fraction of* £1 *to be in all cases considered* £1.

*Reasonable costs and charges where distress is withdrawn, or where no sale takes place, and for negotiations between landlord and tenant respecting the distress; such costs and charges in case the parties differ to be taxed by the registrar of the county court of the district in which the distress is made.*—This schedule, though not expressly, is impliedly repealed, with sect. 49, by sect. 9 of the Law of Distress Amendment Act, 1888.

## COUNTY COURT RULES, 1889.

### ORDER XL.—AGRICULTURAL HOLDINGS (ENGLAND) ACT, 1883.

Interpretation.

1. When an appeal is made to the judge against an award made under the Agricultural Holdings (England) Act, 1883, the party prosecuting the appeal shall be called the appellant, and the party supporting the award the respondent.

Statement of grounds of appeal to be filed.

2. The appellant shall, within seven days after the delivery of the award, file a copy thereof, together with the concise statement in writing of his grounds of appeal, which shall contain the following particulars:—

App. A. s. 10. County Courts Order under Agricultural Holdings Act.

(1.) If the appeal shall be made on the ground mentioned in section twenty-three, sub-sections one and two, of the said Agricultural Holdings Act, a statement of the several objections to the validity of the award on which he relies:

(2.) If the appeal is on any of the grounds mentioned in section twenty-three, sub-section three, of the said Agricultural Holdings Act, a statement showing in respect of what matters compensation is alleged to have been improperly awarded:

(3.) If the appeal is made on any of the grounds mentioned in section twenty-three, sub-section four, of the said Agricultural Holdings Act, a statement showing in respect of what matters compensation is alleged to have been improperly withheld:

(4.) No ground of appeal shall be allowed at the trial unless the foregoing provision of this rule shall in respect of such ground have been complied with:

(5.) The full names and addresses of the respondent and of the appellant and his solicitor if the proceedings are commenced through a solicitor.

Copy of statement to be sent to respondent. Form 311.

3. The registrar shall, within twenty-four hours after the filing of the concise statement, transmit a copy thereof by post to every respondent at the address furnished to him, accompanied by a notice requiring the respondent to comply with the provisions of the next following rule, according to the form in the Appendix.

Respondent to deliver statement in reply.

4. The respondent shall, within seven days after the transmission of the grounds of appeal to him, deliver to the registrar a statement in writing signed by himself or his solicitor disclosing the following matters:

(1.) Whether he disputes the validity in law of all, or any, and which of the grounds of objection to the award:

(2.) Whether he disputes the truth in fact of all, or any, and which of the grounds of appeal:

(3.) Whether he admits the validity in law and truth in fact of all, or any, and which of the grounds of appeal:

(4.) Whether he prays that the case may be remitted to be re-heard:

(5.) His full name and address, and that of his solicitor if the statement be delivered through a solicitor.

Copies of both statements to be sent to Judge.

5. Upon the receipt of the statement in the last preceding rule mentioned, the registrar shall transmit a copy thereof and of the award and grounds of appeal to the judge, who shall, as soon as conveniently may be, appoint a time and place for the hearing of the appeal and instruct the registrar to give notice thereof forthwith to the parties.

Order. Form 312.

6. The judge shall hear and determine the appeal, and the order thereupon may be enforced in the same manner as any other judgment of the court.

[7. *Procedure in applications for Referee or Umpire.*—Annulled (*s*) by Rule 32 of the County Court Rules 1895, the following rule being directed to stand in lieu thereof:—]

### County Court Rules, 1895, Order XL.

Order XL., Rule 7, is hereby annulled and the following Rule shall stand in lieu thereof:

Order XL., Rule 7A. Procedure on application for appointment of referee or umpire. 46 & 47 Vict. c. 61, s. 9 (sub-s. 6, 9), s. 10 (sub-s. 2).

7A.—(1.) Where a party desires to make application to the Court for the appointment of a referee or umpire under sub-section 6 or sub-section 9 of section 9, or sub-section 2 of section 10 of the said Agricultural Holdings Act, 1883, he shall apply in writing to the registrar to fix a time and place for the hearing of such application.

(2.) If the party so applying produces to the registrar proof that the parties consent to the registrar exercising the powers of the Court, the registrar shall fix a time for the hearing of the application before himself. Such time shall be within 14 days from the date of the application to the registrar, but shall not be less than seven days from the date of such application, unless the parties or their solicitors agree to the application being heard at an earlier date.

(*s*) This Rule was held ultra vires, so far as it gave jurisdiction to the registrar to appoint without consent. *Griffiths and Morris, In re*, [1895], 1 Q. B. 866; 64 L. J., Q. B. 386; 72 L. T. 290; 43 W. R. 652; 15 R. 301, per Wills, J.

App. A. s. 10. County Courts Order under Agricultural Holdings Act.

(3.) In any other case the registrar shall fix the hearing of the application before the Judge for any court appointed to be held within fourteen days from the date of the application to the registrar, but so that the registrar shall not, except by consent of the parties, fix the hearing for a day less than seven days from the date of such application.

(4.) If there is no available Court, the registrar shall send notice of the intended application to the Judge, who shall, as soon as conveniently may be, fix a time and place for the hearing of the application. Such time shall be within fourteen days from the date of the application to the registrar, but shall not, except by consent of the parties, be less than seven days from such date.

(5.) On the time and place for the hearing of the application being fixed, the registrar shall issue to the applicant a summons under the seal of the Court, according to the form 312A in the Appendix, addressed to the other party, and requiring him to attend on the hearing of the application.

Form 312A.

(6.) Such summons shall be served by the applicant or his solicitor on the other party in accordance with section 28 of the said Act not less than four clear days before the day fixed for the hearing, unless such party, or his solicitor on his behalf, agrees to accept shorter service; and where the other party is acting by a solicitor, a copy of such summons shall be sent to such solicitor by the applicant or his solicitor.

46 & 47 Vict. c. 61, s. 28.

(7.) On the day fixed for the hearing the Judge, or by consent of the parties the registrar, shall dispose of the application, on hearing the parties, or on hearing the applicant, and on proof of service of the summons on the other party, if such other party does not appear; but where any application is heard by the registrar he may, if he shall think fit, adjourn the same for hearing by the Judge.

(8.) Before appointing any person to serve as referee or umpire, the Judge or registrar shall ascertain that such person is willing to serve, if appointed.

(9.) The appointment may be made by endorsement on the summons, or by a separate order.

(10.) The costs of the application shall be in the discretion of the Judge or registrar, who may order the same to be paid by one party to the other, or to be dealt with as costs attending the reference under section 20 of the Act. Such costs, if allowed, shall be taxed on such scale as the Judge or registrar shall direct, subject, in the case of any direction by the registrar, to review by the Judge.

46 & 47 Vict. c. 61, s. 20.

311.

*Notice to a Respondent under the Agricultural Holdings (England) Act, 1883.*

The Agricultural Holdings (England) Act, 1883.

In the county court of holden at
Between A. B., Appellant,
and
C. D., Respondent.

46 & 47 Vict. c. 61. Order XL., Rule 3.

Take notice, that you are required within eight days of the delivery of this notice to you to file in Court a statement, signed by you or your solicitor, in reply to the grounds of appeal sent herewith, and that your statement must disclose the following matters:

(1.) Whether you dispute the validity in law of all or any and which of the grounds of objection to the award:

(2.) Whether you dispute the truth in fact of all or any and which of the grounds of appeal:

(3.) Whether you admit the validity in law and truth in fact of all or any and which of the grounds of appeal:

(4.) Whether you pray that the case may be remitted to be re-heard.

(5.) Your name and address, and that of your solicitor, if the statement be delivered through a solicitor.

Dated this day of 18 .

Registrar of the court.

To the above-named respondent.

312.

App. A. s. 10.

County Courts Order under Agricultural Holdings Act.

*Order on an Appeal.*

The Agricultural Holdings (England) Act, 1883.

In the county court of holden at
In the matter of the County Courts Act, 1888, and
In the matter of the Agricultural Holdings (England) Act, 1883, and
In the matter of an appeal by A. B.
The day of 18 .

Upon the hearing this day of an appeal by [*name and description of appellant*] against an award dated [*state date*] given under the hand of [*referee's name*] whereby [*state shortly the substance of the award*], and on reading the said award, and on hearing the said A. B. and C. D., the respondent. Order XL., Rule 6.

It is ordered that [*state order, e.g.*—] the said C. D., do within fourteen days of the date of this order pay to the said A. B., the sum of £ and for costs and in default of such payments at the time aforesaid the said A. B. may proceed to execution.

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312A (*t*).

*Summons on Application for appointment of Referee or Umpire under the Agricultural Holdings (England) Act, 1883.*

In the County Court of holden at
In the matter of the Agricultural Holdings (England) Act, 1883, and
In the matter of a reference for the settlement of a difference between *A. B.* of , tenant, and *C. D.* of , landlord.

You are hereby summoned to attend before the Judge [*or where the parties consent*, the Registrar] in chambers at on the day of at the hour of in the noon, on the hearing of an application on the part of for the appointment by the Court of a referee under sub-section six of section nine of the Agricultural Holdings (England) Act, 1883, by reason of your failure to appoint such referee.

[*or* for the appointment of an umpire under sub-section nine of section nine of the Agricultural Holdings (England) Act, 1883, by reason of the failure of the referees to appoint such umpire.]

[*or* for the appointment of an umpire under sub-section two of section ten of the Agricultural Holdings (England) Act, 1883.]

And take notice, that in default of your attendance at the time and place above mentioned the Judge [*or where the parties consent*, the Registrar] will, on proof of service of this summons, proceed to hear and dispose of the said application.

Dated this day of

To

And to Mr. , his solicitor.

Registrar.

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Sect. 11.—51 & 52 Vict. c. 21 (Law of Distress Amendment Act, 1888).

*An Act to amend the Law of Distress for Rent.* [*7th August*, 1888.]

**1.** This act may be cited as the Law of Distress Amendment Act, 1888. Short Title.

**2.** This act shall not apply to Scotland or Ireland. Extent.

**3.** This act, except as in this act otherwise provided, shall come into operation from and immediately after the thirty-first day of October one thousand eight hundred and eighty-eight. Commencement.

**4.** From and after the passing of this act the following goods and chattels shall be exempt from distress for rent; namely, any goods or chattels of the Exemptions from Distress.

(*t*) Added by County Court Rules, 1895.

APP. A. s. 11. 51 & 52 VICT. c. 21.

tenant or his family which would be protected from seizure in execution under section ninety-six of the County Courts Act, 1846, or any enactment amending or substituted for the same (*u*).

Provided that this enactment shall not extend to any case where the lease, term, or interest of the tenant has expired, and where possession of the premises in respect of which the rent is claimed has been demanded and where the distress is made not earlier than seven days after such demand.

Repeal of 2 W. & M. c. 5, s. 1, except where appraisement is required in writing.

5. So much of an act passed in the second year of the reign of their Majesties King William the Third and Mary, chapter five, as requires appraisement before sale of goods distrained is hereby repealed, except in cases where the tenant or owner of the goods and chattels by writing requires such appraisement to be made, and the landlord or other person levying a distress may, except as aforesaid, sell the goods and chattels distrained without causing them to be previously appraised; and for the purposes of sale the goods and chattels distrained shall, at the request in writing of the tenant or owner of such goods and chattels, be removed to a public auction room or to some other fit and proper place specified in such request, and be there sold. The costs and expenses of appraisement when required by the tenant or owner shall be borne and paid by him; and the costs and expenses attending any such removal, and any damage to the goods and chattels arising therefrom, shall be borne and paid by the person requesting the removal.

Extension of time to replevy at request of Tenant.

6. The period of five days provided in the said act of William and Mary, chapter five, within which the tenant or owner of goods and chattels distrained may replevy the same, shall be extended to a period of not more than fifteen days if the tenant or such owner make a request in writing in that behalf to the landlord or other person levying the distress, and also give security for any additional cost that may be occasioned by such extension of time: Provided that the landlord or person levying the distress may, at the written request, or with the written consent, of the tenant or such owner as aforesaid, sell the goods and chattels distrained, or part of them, at any time before the expiration of such extended period as aforesaid.

Distress to be levied by certified Bailiffs.

7. From and after the commencement of this act no person shall act as a bailiff to levy any distress for rent unless he shall be authorised to act as a bailiff by a certificate in writing under the hand of a county court judge; and such certificate may be general or apply to a particular distress or distresses, and may be granted at any time after the passing of this act in such manner as may be prescribed by rules under this act. If any person holding a certificate shall be proved to the satisfaction of the judge of a county court to have been guilty of any extortion or other misconduct in the execution of his duty as a bailiff he shall be liable to have his certificate summarily cancelled by the said judge.

Nothing in this section shall be deemed to exempt such bailiff from any other penalty or proceeding to which he may be liable in respect of such extortion or misconduct.

A county court registrar may exercise the power of granting certificates hereby conferred upon a county court judge in cases in which he may be authorised to do so by rules made under this act.

If any person not holding a certificate under this section shall levy a distress contrary to the provisions of this act, the person so levying, and any person who has authorised him so to levy, shall be deemed to have committed a trespass.

Power to make Rules.

8. After the passing of this act the Lord Chancellor may from time to time make, alter, and revoke rules—

(1.) For regulating the security (if any) to be required from bailiffs;

(2.) For regulating the fees, charges, and expenses in and incidental to distresses; and

(3.) For carrying into effect the objects of this act.

(*u*) By s. 147 of the County Courts Act, 1888, 51 & 52 Vict. c. 43, substituted for s. 95 of the County Courts Act, 1846, 9 & 10 Vict. c. 95, a bailiff executing any county court process of execution against the goods of any person may seize any of the goods of such person "excepting the wearing apparel and bedding of such person or his family, and the tools and implements of his trade, to the value of 5*l*., which shall to that extent be protected from such seizure."

App. A. s. 12. Rules.

9. Sections forty-nine, fifty, fifty-one, and fifty-two of the Agricultural Holdings (England) Act, 1883, are hereby repealed from and after the commencement of this act, but this repeal shall not affect anything done or suffered before the commencement of this act under these sections.

Repeal of ss. 49–52 of Agricultural Holdings Act.

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Sect. 12.—Rules made Pursuant to Section Eight of the Law of Distress Amendment Act, 1888.

1. These rules may be cited as the Distress for Rent Rules, 1888.

2. Certificates granted under the Law of Distress Amendment Act, 1888, hereinafter called the act, may be either general or special. A special certificate shall specify the particular distress or distresses to which it applies. Certificates shall be in the forms Nos. 1 & 2 in appendix I. to these rules, with such variations as circumstances may require.

3. A special certificate may be granted by the judge or registrar, but a general certificate shall only be granted by the judge in person.

4. A general certificate shall authorise the bailiff named in it to levy at any place in England or Wales.

5. Any person (not being an officer of a county court) holding a certificate under the Agricultural Holdings Act, 1883, shall on application be entitled to obtain, without fee, a general certificate.

6. No certificate shall be granted to any officer of a county court.

7. Any practising solicitor of the supreme court shall, on application and on payment of the prescribed fee, be entitled to a general or special certificate.

8. A general or special certificate may, on payment of the prescribed fee, be granted to any applicant who satisfies the authority granting the same that he is a fit and proper person to hold the certificate.

9. Where the applicant for a certificate is not a ratepayer, rated on a rateable value of not less than 25*l.* per annum, he may, if the authority applied to thinks fit, be required to give security for the due performance of his duties.

10. The security shall be security to the satisfaction of the registrar. In the case of a general certificate the amount shall be 20*l.* and in the case of a special certificate the amount shall be 5*l.*

11. The security shall be given to the registrar. It may be given by deposit, or by bond, or by guarantee, as the registrar may think fit.

12. On any application to cancel (*x*) a certificate the judge may, whether he cancels the certificate or not, order that the security shall be forfeited, either wholly or in part, and that the amount directed to be forfeited shall be paid to the party aggrieved.

13. Where the judge orders that the security shall be forfeited, either wholly or in part, but does not cancel the certificate, he may direct that the bailiff shall give fresh security as a condition of retaining his certificate.

14. Subject to rule 12, where a certificate is cancelled by the judge, the security shall also be cancelled, and the deposit (if any) returned.

15. No person shall be entitled to any fees, charges, or expenses for levying a distress, or for doing any act or thing in relation thereto, other than those specified in, and authorised by, the table in appendix II. to these rules.

16. Where the rent due exceeds 20*l.* the fees, charges, and expenses specified in scale I. shall be allowed, and where the rent due does not exceed 20*l.* the fees, charges, and expenses specified in scale II. shall be allowed.

17. In case of any difference as to fees, charges, and expenses between the parties, or any of them, the fees, charges, and expenses shall be taxed by the registrar of the district in which the distress is levied. The registrar may make such order as he thinks fit as to the costs of such taxation.

18. A copy of the table of fees, charges, and expenses authorised by these rules shall be posted up by the registrar in a conspicuous place in his office, and every bailiff levying a distress shall, on the request of the tenant, produce to him his certificate and a copy of the table.

19. "Judge" means a judge of county courts.

"Certificate" means a certificate to act as a bailiff under section seven of the Act.

(*x*) Add "or make void": See Rule 7 of the Rules of 1895, infra.

App. A. s. 12. Rules.

"Registrar" means registrar of a county court, and each registrar where there is more than one, and includes a deputy registrar.

August 31, 1888. (Signed) HALSBURY, C.

## APPENDIX I.

FORM 1.—*General Certificate.*

[Date.]

In the county court of , holden at

Pursuant to section seven of the Law of Distress Amendment Act, 1888, I hereby (*y*) authorise A. B., of , to act as a bailiff to levy distresses for rent in England and Wales.

Signed

(*Seal.*)

Judge.

FORM 2.—*Special Certificate.*

[Date.]

In the county court of , holden at

Pursuant to section seven of the Law of Distress Amendment Act, 1888, I hereby authorise A. B., of , to act as a bailiff to levy a distress on the premises of C. D. of , for rent alleged to be due to E. F. of .

Signed

(*Seal.*)

Judge.

*or* Registrar.

## APPENDIX II.—TABLE OF FEES, CHARGES, AND EXPENSES.

SCALE I.—*Distresses for Rent where the Sum demanded and due shall exceed* 20*l.*

For levying distress. Three per cent. on any sum exceeding 20*l.* and not exceeding 50*l.* Two and a half per cent. on any sum exceeding 50*l.* and not exceeding 200*l.*; and one per cent. on any additional sum.

For man in possession, 5*s.* per day; to provide his own board in every case.

For advertisements the sum actually and necessarily paid.

For commission to the auctioneer. On sale by auction seven and a half per cent. on the sum realized not exceeding 100*l.*, five per cent. on the next 200*l.*, four per cent. on the next 200*l.*; and on any sum exceeding 500*l.* three per cent. up to 1,000*l.*, and two and a half per cent. on any sum exceeding 1,000*l.* A fraction of 1*l.* to be in all cases reckoned 1*l.*

Reasonable fees, charges, and expenses (subject to rule 17) where distress is withdrawn or where no sale takes place, and for negotiations between landlord and tenant respecting the distress.

For appraisement, on tenant's written request, whether by one broker or more, 6*d.* in the pound on the value as appraised, in addition to the amount for the stamp.

SCALE II.—*Distresses for Rent where the Sum demanded and due shall not exceed* 20*l.*

For levying distress, 3*s.*

For man in possession, 4*s.* 6*d.* per day; to provide his own board in every case.

For appraisement, on the tenant's written request, whether by one broker or more, 6*d.* in the pound on the value as appraised, in addition to the amount for the stamp.

For all expenses of advertisements, if any, 10*s.*

Catalogues, sale and commission, and delivery, 1*s.* in the pound on the net produce of the sale.

For removal at tenant's request, the reasonable expenses (subject to rule 17) attending such removal.

(*y*) Substitute, in the case of a renewed certificate, "by this renewed certificate": Rule 5 of the Rules of 1895, infra.

RULE MADE PURSUANT TO THE LAW OF DISTRESS AMENDMENT ACT, 1888. APP. A. s. 12. RULES.

The words "officer of a county court" in rules five and six of the Distress for Rent Rules, 1888, shall not apply to any officer who was an officer of a county court before the date of those rules.

(Signed) HALSBURY, C.

December 7th, 1888.

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SECT. 13.—COURT FEES.

*Treasury Order regulating Fees (Law of Distress Amendment Act, 1888).*

In pursuance of the powers given by the county courts acts, and of all other powers enabling us in this behalf, we, the undersigned, two of the Commissioners of Her Majesty's treasury, whose names are hereunto subscribed, do hereby, with the consent of the Lord Chancellor, order that the several fees, or sums in the name of fees, specified in the schedule hereunder written, shall be taken on the proceedings therein mentioned, and that the fees so authorised to be taken shall be received by the registrars for the use of themselves.

(Signed) HERBERT EUSTACE MAXWELL.
,, SIDNEY HERBERT.

15th September, 1888.

I approve of the annexed schedule of fees.

(Signed) HALSBURY, C.

SCHEDULE.

*The Law of Distress Amendment Act, 1888, and the Rules made thereunder.*

| Fees to be taken in the following matters :— | £ | s. | d. |
|---|---|---|---|
| For every application for a general certificate . . . | 0 | 5 | 0 |
| For every application for a special certificate . . . . | 0 | 2 | 6 |
| For approving of security by bond . . . . . | 0 | 10 | 6 |
| For receiving deposit in lieu of bond . . . . . | 0 | 4 | 0 |
| For taxation where required, if the rent exceeds 20*l*. . . | 0 | 10 | 0 |
| For taxation, where required, if the rent does not exceed 20*l*. | 0 | 5 | 0 |

---

SECT. 14.—RULES, DATED NOVEMBER 29, 1895, UNDER THE LAW OF DISTRESS (AMENDMENT) ACT, 1895. [For the Act of 1895, see p. 940, infra.]

1. An applicant for a general certificate shall satisfy the Judge that he is resident or has his principal place of business in the district of the Court, and shall state whether he has ever been refused a certificate or had a former certificate cancelled.

2. A general certificate shall (unless previously determined) have effect until the 1st of February next after the expiration of twelve months from the granting thereof, provided that the Judge of the Court where the certificate was granted may renew the same from time to time for the like period. This Rule shall apply to every certificate granted before the passing of these Rules as if it had been granted at the date of the commencement of the Act (*z*).

3. A certificate shall have effect, notwithstanding cancellation or expiration by non-renewal, for the purpose of any distress where the bailiff has entered into possession before the date of cancellation or expiration.

4. On the renewal of a certificate the registrar shall be satisfied that the security required under Rules 9 and 10 of the Distress Rules, 1888, is subsisting. The fee on the application for renewal shall be two shillings and sixpence.

5. A renewed certificate shall be under the hand of the Judge in the Form No. 1 in the Distress Rules, 1888, except that instead of the word "hereby"

(*z*) I.e., by Rules of 1896, the 6th of July, 1895, the date of the Royal Assent.

APP. A. S. 14. DISTRESS FOR RENT RULES, 1895.

the words "by this renewed certificate" shall be inserted, and that the date at which the renewed certificate shall become terminable shall be added at the foot thereof.

6. There shall be made and signed by the registrar on the 1st of February in every year, and exhibited in the office of every Court a list of the bailiffs holding certificates for the time being: and the fact of the subsequent cancellation of any such certificate shall be notified by the registrar on such list and published by him in some local newspaper.

7. Wherever "cancel" occurs in the Distress Rules, 1888, add "or make void."

8. The following form of cancellation shall be used:—

FORM 3.

*Cancellation of Certificate.*

Date.

In the County Court of holden at .

In pursuance of section 1 of the Law of Distress Amendment Act, 1895, I hereby cancel and make void the certificate granted to *A. B.* of , to act as bailiff to levy distress for rent in England and Wales, or (terms of special certificate) *save and except as to any distress whereon the said A. B. has distrained and is in possession of the goods.*

(Signed)

Judge.

The 29th of November, 1895.

(Signed) HALSBURY, C.

---

[See Chap. V., Sect. 13, p. 195.]

SECT. 15.—54 & 55 VICT. C. 39 (STAMP ACT, 1891).

*An Act to consolidate the Enactments granting and relating to the Stamp Duties upon Instruments and certain other enactments relating to Stamp Duties.*

[21*st July*, 1891.]

Charge of Duties in Schedule.

**1.** From and after the commencement of this Act the stamp duties to be charged for the use of Her Majesty upon the several instruments specified in the first schedule to this Act shall be the several duties in the said schedule specified, which duties shall be in substitution for the duties theretofore chargeable under the enactments repealed by this Act, and shall be subject to the exemptions contained in this Act and in any other Act for the time being in force.

Impressed Stamps.

**2.** All stamp duties for the time being chargeable by law upon any instruments are to be paid and denoted according to the regulations in this Act contained, and except where express provision is made to the contrary are to be denoted by impressed stamps only.

*Production of Instruments in Evidence.*

Terms upon which Instruments not duly Stamped may be received in Evidence.

**14.**—(1.) Upon the production of an instrument chargeable with any duty as evidence in any court of civil judicature in any part of the United Kingdom, or before any arbitrator or referee, notice shall be taken by the judge, arbitrator, or referee of any omission or insufficiency of the stamp thereon, and if the instrument is one which may legally be stamped after the execution thereof, it may, on payment to the officer of the court whose duty it is to read the instrument, or to the arbitrator or referee, of the amount of the unpaid duty, and the penalty payable on stamping the same, and of a further sum of one pound, be received in evidence, saving all just exceptions on other grounds.

(2.) The officer, or arbitrator, or referee receiving the duty and penalty shall give a receipt for the same, and make an entry in a book kept for that purpose of the payment and of the amount thereof, and shall communicate to the commissioners the name or title of the proceeding in which, and of the party from whom, he received the duty and penalty, and the date and description of the

instrument, and shall pay over to such person as the commissioners may appoint the money received by him for the duty and penalty. App. A. s. 15. 54 & 55 Vict. c. 39.

(3.) On production to the commissioners of any instrument in respect of which any duty or penalty has been paid, together with the receipt, the payment of the duty and penalty shall be denoted on the instrument.

(4.) Save as aforesaid, an instrument executed in any part of the United Kingdom, or relating, wheresoever executed, to any property situate, or to any matter or thing done or to be done, in any part of the United Kingdom, shall not, except in criminal proceedings, be given in evidence, or be available for any purpose whatever, unless it is duly stamped in accordance with the law in force at the time when it was first executed.

*Stamping of Instruments after Execution.*

Penalty upon Stamping Instruments after Execution.

**15.**—(1.) Save where other express provision is in this Act made, any unstamped or insufficiently stamped instrument may be stamped after the execution thereof, on payment of the unpaid duty and a penalty of ten pounds, and also by way of further penalty, where the unpaid duty exceeds ten pounds, of interest on such duty, at the rate of five pounds per centum per annum, from the day upon which the instrument was first executed up to the time when the amount of interest is equal to the unpaid duty.

Special Penalty on Lessee not Stamping Lease.

(2.) In the case of such instruments hereinafter mentioned as are chargeable with ad valorem duty, the following provisions shall have effect:

(*a.*) The instrument unless it is written upon duly stamped material, shall be duly stamped with the proper ad valorem duty before the expiration of thirty days after it is first executed, or after it has been first received in the United Kingdom in case it is first executed at any place out of the United Kingdom, unless the opinion of the commissioners with respect to the amount of duty with which the instrument is chargeable, has, before such expiration, been required under the provisions of this Act:

(*b.*) If the opinion of the commissioners with respect to any such instrument has been required, the instrument shall be stamped in accordance with the assessment of the commissioners within fourteen days after notice of the assessment:

(*c.*) If any such instrument executed after the sixteenth day of May one thousand eight hundred and eighty-eight has not been or is not duly stamped in conformity with the foregoing provisions of this sub-section, the person in that behalf hereinafter specified shall incur a fine of ten pounds, and in addition to the penalty payable on stamping the instrument there shall be paid a further penalty equivalent to the stamp duty thereon, unless a reasonable excuse for the delay in stamping, or the omission to stamp, or the insufficiency of stamp, be afforded to the satisfaction of the commissioners, or of the court, judge, arbitrator, or referee before whom it is produced.

(*d.*) The instruments and persons to which the provisions of this sub-section are to apply are as follows:—

| Title of Instrument as described in the First Schedule to this Act. | Person liable to Penalty. |
|---|---|
| Bond, covenant, or instrument of any kind whatsoever. | The obligee, covenantee, or other person taking the security. |
| Conveyance on sale. . . . . | The vendee or transferee. |
| Lease or Tack . . . . . | The Lessee. |
| Mortgage, bond, debenture, covenant, and warrant of attorney to confess and enter up judgment. | The mortgagee or obligee; in the case of a transfer or reconveyance, the transferee, assignee, or disponee, or the person redeeming the security. |
| Settlement . . . . . | The settlor. |

APP. A. s. 15. 54 & 55 VICT. c. 39.

(3.) Provided that save where other express provision is made by this Act in relation to any particular instrument:

(*a*.) Any unstamped or insufficiently stamped instrument which has been first executed at any place out of the United Kingdom, may be stamped, at any time within thirty days after it has been first received in the United Kingdom, on payment of the unpaid duty only: and

(*b*.) The commissioners may, if they fit, at any time within three months after the first execution of any instrument, mitigate or remit any penalty payable on stamping.

(4.) The payment of any penalty payable on stamping is to be denoted on the instrument by a particular stamp.

Counterparts.

**72.** The duplicate or counterpart of an instrument chargeable with duty (except the counterpart of an instrument chargeable as a lease, such counterpart not being executed by or on behalf of any lessor or grantor), is not to be deemed duly stamped unless it is stamped as an original instrument, or unless it appears by some stamp impressed thereon that the full and proper duty has been paid upon the original instrument of which it is the duplicate or counterpart.

*Leases.*

Agreements for not more than Thirty-five Years to be charged as Leases.

**75.**—(1.) An agreement for a lease or tack, or with respect to the letting of any lands, tenements, or heritable subjects for any term not exceeding thirty-five years, or for any indefinite term, is to be charged with the same duty as if it were an actual lease or tack made for the term and consideration mentioned in the agreement.

(2.) A lease or tack made subsequently to, and in conformity with, such an agreement duly stamped is to be charged with the duty of sixpence only.

Leases how to be charged in respect of Produce, &c.

**76.**—(1.) Where the consideration, or any part of the consideration, for which a lease or tack is granted or agreed to be granted, consists of any produce or other goods, the value of the produce or goods is to be deemed a consideration in respect of which the lease or tack or agreement is chargeable with ad valorem duty.

(2.) Where it is stipulated that the value of the produce or goods is to amount at least to, or is not to exceed, a given sum, or where the lessee is specially charged with, or has the option of paying after any permanent rate of conversion, the value of the produce or goods is, for the purpose of assessing the ad valorem duty, to be estimated at the given sum, or according to the permanent rate.

(3.) A lease or tack or agreement for a lease or tack made either wholly or partially for any such consideration, if it contains a statement of the value thereof, and is stamped in accordance with the statement, is, so far as regards the subject matter of the statement, to be deemed duly stamped, unless or until it is otherwise shown that the statement is incorrect, and that the lease or tack or agreement is in fact not duly stamped.

No Duty in respect of Penal Rent or Surrender of Existing Lease.

**77.**—(1.) A lease or tack, or agreement for a lease or tack, or with respect to any letting, is not to be charged with any duty in respect of any penal rent, or increased rent in the nature of a penal rent, thereby reserved or agreed to be reserved or made payable, or by reason of being made in consideration of the surrender or abandonment of any existing lease, tack, or agreement, of or relating to the same subject matter.

No duty in respect of Covenant for Improvements.

(2.) A lease made for any consideration in respect whereof it is chargeable with ad valorem duty, and in further consideration either of a covenant by the lessee to make, or of his having previously made, any substantial improvement of or addition to the property demised to him, or of any covenant relating to the matter of the lease, is not to be charged with any duty in respect of such further consideration.

Lease for Lives.

(3.) No lease for a life or lives not exceeding three, or for a term of years determinable with a life or lives not exceeding three, and no lease for a term absolute not exceeding twenty-one years, granted by an ecclesiastical corporation aggregate or sole, is to be charged with any higher duty than thirty-five shillings.

Ecclesiastical Lease.

Trinity College, Dublin.

(4.) A lease for a definite term exceeding thirty-five years granted under the Trinity College (Dublin) Leasing and Perpetuity Act, 1851, is not to be charged

with any higher duty than would have been chargeable thereon if it had been a lease for a definite term not exceeding thirty-five years.

(5.) An instrument whereby the rent reserved by any other instrument chargeable with duty and duly stamped as a lease or tack is increased is not to be charged with duty otherwise than as a lease or tack in consideration of the additional rent thereby made payable.

No duty except for Additional Rent.

**78.**—(1.) The duty upon an instrument chargeable with duty as a lease or tack of—

(*a.*) any dwelling-house, or part of a dwelling-house, for a definite term not exceeding a year at a rent not exceeding the rate of ten pounds per annum; or

(*b.*) any furnished dwelling-house or apartments for any definite term less than a year;

and upon the duplicate or counterpart of any such instrument, may be denoted by an adhesive stamp, which is to be cancelled by the person to whom the instrument is first executed.

Adhesive Stamp where Lease for not more than Year at not more than 10*l.*, or of Furnished House for less than Year.

(2.) Every person who executes, or prepares or is employed in preparing, any such instrument (except letters or correspondence) which is not, at or before the execution thereof, duly stamped, shall incur a fine of five pounds.

Penalty for preparing any such Lease Unstamped.

## SCHEDULE.

| | £ | s. | d. |
|---|---|---|---|
| Agreement for a lease or tack, or for any letting. *See* Lease or Tack, and section 75. | | | |
| Counterpart. *See* Duplicate. | | | |
| Duplicate or Counterpart of any instrument chargeable with any duty: | | | |
| Where such duty does not amount to 5*s.* | The same duty as the original instrument. | | |
| In any other case | | 0 | 5 | 0 |
| And *see* section 72. | | | |
| Lease or Tack— | | | |
| (1.) For any definite term not exceeding a year: | | | |
| Of any dwelling-house or part of a dwelling-house at a rent not exceeding the rate of 10*l.* per annum | | 0 | 0 | 1 |
| (2.) For any definite term less than a year: | | | |
| (*a.*) Of any furnished dwelling-house or apartments where the rent for such term exceeds 25*l.* | | 0 | 2 | 6 |
| (*b.*) Of any lands, tenements, or heritable subjects except or otherwise than as aforesaid | The same duty as a lease for a year at the rent reserved for the definite term. | | |
| (3.) For any other definite term or for any indefinite term: | | | |
| Of any lands, tenements, or heritable subjects— | | | |
| Where the consideration, or any part of the consideration, moving either to the lessor or to any other person, consists of any money, stock, or security: | | | |
| In respect of such consideration | The same duty as a conveyance on a sale for the same consideration. | | |
| Where the consideration or any part of the consideration is any rent: | | | |
| In respect of such consideration: | | | |
| If the rent, whether reserved as a yearly rent or otherwise, is at a rate or average rate: | | | |

App. A. s. 15. 54 & 55 Vict. c. 39.

| | If the term does not exceed 35 years, or is indefinite. | If the term exceeds 35 years, but does not exceed 100 years. | If the term exceeds 100 years. |
|---|---|---|---|
| | £ s. d. | £ s. d. | £ s. d. |
| Not exceeding 5*l.* per annum . | 0 0 6 | 0 3 0 | 0 6 0 |
| Exceeding— | | | |
| 5*l.* and not exceeding 10*l.* . | 0 1 0 | 0 6 0 | 0 12 0 |
| 10*l.* ,, ,, 15*l.* . | 0 1 6 | 0 9 0 | 0 18 0 |
| 15*l.* ,, ,, 20*l.* . | 0 2 0 | 0 12 0 | 1 4 0 |
| 20*l.* ,, ,, 25*l.* . | 0 2 6 | 0 15 0 | 1 10 0 |
| 25*l.* ,, ,, 50*l.* . | 0 5 0 | 1 10 0 | 3 0 0 |
| 50*l.* ,, ,, 75*l.* . | 0 7 6 | 2 5 0 | 4 10 0 |
| 75*l.* ,, ,, 100*l.* . | 0 10 0 | 3 0 0 | 6 0 0 |
| 100*l.* | | | |
| For every full sum of 50*l.*, and also for any fractional part of 50*l.* thereof . . . . | 0 5 0 | 1 10 0 | 3 0 0 |

(4.) Of any other kind whatsoever not hereinbefore described . 0 10 0
And *see* sections 75, 76, 77, and 78.

SURRENDER—
Of copyholds. *See* COPYHOLD.
Of any other kind whatsoever not chargeable with duty as a conveyance on sale or a mortgage . . . . . 0 10 0

---

SECT. 16.—58 & 59 VICT. C. 24 (LAW OF DISTRESS AMENDMENT ACT, 1895).

*An Act to amend the Law of Distress Amendment Act*, 1888. [*6th July*, 1895.]

Power to cancel bailiffs' certificates.

**1.** A certificate granted to a bailiff by the judge of a county court under the Law of Distress Amendment Act, 1888, may at any time be cancelled or declared void by a judge of that county court, and so much of section seven of that Act as refers to the cancellation of certificates is hereby repealed.

Penalty for acting without certificate.

**2.** If any person not holding a certificate for the time being in force under the Law of Distress Amendment Act, 1888, levies a distress contrary to the provisions of that Act, he shall without prejudice to any civil liability be liable on summary conviction to a fine not exceeding ten pounds.

Duration of certificates.

**3.** The power to make rules under the Law of Distress Amendment Act, 1888, shall extend to making provision for fixing the duration of certificates granted, or to be hereafter granted, to bailiffs.

Unlawful distress.

**4.** A court of summary jurisdiction, on complaint that goods or chattels exempt under section four of the Law of Distress Amendment Act, 1888, from distress for rent, have been taken under such distress, may, by summary order, direct that the goods and chattels so taken, if not sold, be restored; or, if they have been sold, that such sum as the court may determine to be the value thereof shall be paid to the complainant by the person who levied the distress or directed it to be levied.

Evidence by accused.

**5.** In any proceeding against any person for an offence under this Act such person shall be competent, but not compellable, to give evidence, and the wife of such person may be required to attend to give evidence as an ordinary witness in the case, and shall be competent, but not compellable, to give evidence.

Short title.

**6.** This Act may be cited as the Law of Distress Amendment Act, 1895.

# APPENDIX B.

## PRECEDENTS OF LEASES, &c.


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App. B.

## PRELIMINARY OBSERVATIONS.

IN drawing and revising the following precedents, the Editor has endeavoured to frame precedents as fairly as possible for both parties, adding alternative forms in the customary manner. It is obvious that a lease will vary greatly according as it is settled on behalf of the landlord or on behalf of the tenant, and the Editor is bound to point out that many of the precedents in use wear the appearance of leases settled on behalf of the landlord.

Conveyancing Act.

The sections of the Conveyancing Act, 1881, which principally affect leases are these—

By s. 2, sub-s. 5, the term "conveyance" in the Act (*except in s.* 7, *respecting covenants for title*) includes a lease by deed.

By s. 6 (see ante, p. 152), certain "general words" are implied in all conveyances (and therefore in all leases by deed).

By s. 7 in an assignment of a lease for value by a person *expressed to convey as beneficial owner* there is an implied covenant that the lease assigned is valid.

By ss. 10, 11, and 12 (see ante, p. 267), the rent and benefit and burden of covenants run with the reversion, and conditions are apportioned on severance of the reversion.

By s. 13 (see ante, p. 2) on a contract to grant a lease the title to a leasehold reversion is not to be required.

By s. 14 (see ante, p. 349) elaborate provisions are made for protecting the lessee against forfeiture.

By s. 18 (see ante, p. 60) ample powers of leasing are conferred upon a mortgagor and mortgagee in possession.

"Heirs, executors, assigns," &c., how included.

As to implied inclusion of heirs and assigns, or of executors, administrators and assigns, it is provided by s. 58 of the Act as follows:—

(1) A covenant relating to land of inheritance or devolving on the heir as special occupant shall be deemed to be made with the covenantee, his heirs and assigns, and shall have effect as if heirs and assigns were expressed.

(2) A covenant relating to land not of inheritance or devolving on the heir as special occupant shall be deemed to be made with the covenantee, his executors, administrators, and assigns, and shall have effect as if executors, administrators, and assigns were expressed.

(3) This section applies only to covenants made after the commencement of this Act.

Precedents in other Books.

For more special precedents than those here collected, see the following works:—

*Bythewood and Jarman's* Precedents, 4th ed., 1886, by Robbins, Vol. III., tit. "Leases."

*Davidson's* Precedents, 3rd ed., 1876, Vol. V., Part I.

*Davidson's* Concise Precedents, 16th ed., 1894.

*Key and Elphinstone's* Precedents, 4th ed., 1897, Vol. I.

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*Prideaux's* Precedents, 16th ed., 1895, by Whitcombe and Horsburgh, Vol. II.

*Sweet's* Concise Precedents, 4th ed., 1886, by Tucker and Cave, pp. 434—537.

*Lely and Edgcumbe's* Agricultural Holdings, 2nd ed., 1885, App. I.

*Lely and Peck's* "Precedents of Leases for Years and other Contracts of Tenancy and Contracts relating thereto, mainly selected or adapted from existing collections, with many additional Forms," 1889.

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SECT. 1.—*Agreement for Lease of House.*

Date and Parties.

AGREEMENT made the —— day of ——, 18—, BETWEEN A. B. of ——, in the county of —— (hereinafter called the landlord), of the one part, and C. D. of ——, in the [same] county (hereinafter called the tenant), of the other part; WITNESSETH, that [at any time after twenty-one days from the date hereof] the landlord agrees to grant and the tenant agrees to accept a lease of ALL [*describe house*], from the —— day of —— ["now last past," *or* "next," *or* "in the year 18—"] for the term (*a*) of —— years determinable as hereinafter mentioned: AT the yearly rent of £——, payable quarterly on the usual quarter days, without any deductions (except for property tax), the first of such quarterly payments to be made on the —— day of —— next. AND subject to covenants by the tenant [*here state concisely the covenants as agreed on*, ex. gr.], to pay the said rent in manner aforesaid; to pay all existing and future rates, taxes, and assessments; to keep the said premises in good tenantable repair and condition (damage by fire and tempest only excepted); to paint all the outside wood and ironwork of or belonging to the said premises twice over in good oil colour and in a workmanlike manner in every [three] years of the said term, and the inside wood and ironwork in like manner in every [seven] years of the said term: and at the end or determination of the said term to leave the premises in good and tenantable repair [reasonable use and wear thereof, and damage by fire and tempest in the meantime only excepted]. The landlord and his agents and surveyors to have liberty to enter and view the said premises [twice or oftener] in every year of the said term. The tenant to keep the premises insured in the sum of £—— at the least in the joint names of the landlord and tenant, and to produce the policies and receipts for premiums when required, and to expend all monies which may be received by virtue of any such insurance in rebuilding and reinstating the premises and to make good any deficiency: And not to convert the premises into a shop, or use the same for carrying on any trade or business: nor to assign or sub-let the premises or any part thereof (otherwise than by sub-letting furnished for six calendar months, or for any less term) without first obtaining on each occasion the licence in writing of the landlord. Provided always, and it is hereby expressly agreed that such licence shall be given free of charge, and not unreasonably withheld. The said lease also to contain the usual qualified covenant on the part of the landlord for quiet enjoyment.

Stamp (*a*).

Testatum.

Parcels, &c.

Reddendum.

Lessee's Covenants.

To pay Rent: also Rates and Taxes.

To Repair.

To Paint.

To leave in Repair.

Power to Lessor to enter and view.

Not to assign or sub-let without Licence.

Covenant by Lessor for quiet enjoyment.

Also a power for re-entry on non-payment of any of the rent for [21] days (although no formal demand thereof shall have been made (*b*); or in case the tenant, his executors, administrators or assigns shall become bankrupt or on breach of any of the tenant's covenants. Also a proviso enabling the tenant [*or* either party] to determine the lease at the end of the first seven or fourteen years of the term on six months' previous notice in writing, and on payment by the tenant (if such notice be given by him) of all arrears of rent, to the end of such notice, and then quitting possession of the said premises.

Proviso for Re-entry.

Proviso for determining Term at end of first Seven or Fourteen Years.

(*a*) If the agreed term does not *exceed* 35 years, the agreement will require the same stamp as a lease. See s. 75 of the Stamp Act, 1891, p. 938, ante.

(*b*) *Or say* (the same being lawfully demanded on any of the said days or at any time afterwards, and not paid when demanded).

APP. B. s. 2.

Power to rescind this agreement.

Expenses.

[Provided always, that if at any time within twenty-one days after date hereof the tenant shall signify in writing to the landlord his desire to rescind this agreement, and shall at the same time pay to the landlord the sum of ten pounds, then and in such case this agreement shall cease to be binding on either party (*c*), the tenant to bear the cost of this agreement if he shall take advantage of this proviso, and one-half the said cost if he shall not.]

Witness, (Signed) A. B.
E. F., of ——. C. D.

SECT. 2.—*Concise Agreement for a Lease.*

Parties and Premises.

Stamp (*d*).

AGREEMENT between A. B. [*name in full of intended landlord*] of —— and C. D. [*name in full of intended tenant*], made this —— day of ——, 18—, in which agreement the word "landlord" means the said A. B., his heirs and assigns, and the word "tenant" means the said C. D., his executors, administrators and assigns.

The landlord shall grant and the tenant shall accept a lease of ALL [*describe parcels*] for 21 years, to commence from the —— day of ——, 18—, determinable at the end of the first 3, 7, or 14 years, at the option of the tenant, to be signified by not less than six calendar months' notice in writing to the landlord at the yearly rent of £ ——, clear of all existing and future rates, taxes, and assessments.

Rent.

The said net rent shall be paid half-yearly, on the —— day of ——, and on the —— day of ——, the first of such half-yearly payments to be made on the —— day of ——, 18—.

Covenants by Tenant.

The lease shall contain the following covenants by the tenant:—

To pay net rent as aforesaid;

To pay rates and taxes;

To keep the premises with the fixtures [set forth in the schedule hereto] in good repair, damage by fire, tempest or external explosion excepted, AND to paint with two coats of good oils the inside woodwork and ironwork every 7 years, and the outside woodwork and ironwork every 3 years, AND to allow the landlord to enter four times a year to view the state of repair, AND to yield up the premises with the said fixtures in good repair at the end of the term (reasonable wear and tear and such damage as aforesaid excepted).

To use the premises as a private dwelling-house only.

Not to assign or sub-let the premises without the written consent of the landlord [provided always, and it is hereby expressly agreed that such consent shall be granted free of charge, and not be unreasonably withheld](*e*).

Covenants by Landlord.

The lease shall contain the following covenants by the landlord:—

The usual qualified covenant for quiet enjoyment;

A covenant to insure and keep insured the premises against fire to the amount of £ —— at the least, AND to rebuild within 6 months in case of fire (*f*).

The lease shall contain the following provisoes:—

A proviso for re-entry by the landlord in any of the following cases—

On non-payment of rent within 28 days after demand in writing thereof;

On the tenant becoming bankrupt;

On [here add other events, if any, to which it is intended that an *absolute* proviso for re-entry shall apply].

And it is further agreed that the landlord shall forthwith put the premises into complete tenantable repair, [*or* shall forthwith execute upon the premises the works, repairs, and decorations specified in the schedule hereto.]

The SCHEDULE above referred to.

[*Here specify the repairs, &c., to be executed.*]

(Signed) A. B.
C. D.

(*c*) As to this proviso, see p. 92, ante.

(*d*) See Sect. 1, note (*a*), supra.

(*e*) See *Treloar* v. *Bigge*, L. R., 9 Ex. 151, and 697, ante. For other forms, see Sects. 34, 35, post, and as to pecuniary consideration for licence, see p. 695, ante.

(*f*) This is unusual, the tenant insuring in most cases. But it may save trouble that the landlord should insure. The premium can be added to the rent if desired.

SECT. 3.—*Sub-lease of a House for 3 years or less.* APP. B. s. 3.

AGREEMENT made the —— day of ——, 18—, BETWEEN A. B. of &c., of the one part, and C. D. of &c., of the other part; The said A. B. lets, and the said C. D. takes, ALL [*describe parcels*, ex. gr., that messuage or dwelling-house situate and being No. 22, Harp Lane, Great Tower Street, in the city of London]. WITH the use of the fixtures belonging to the said A. B. now or at any time hereafter during the said term in or upon the said premises [the principal articles whereof are mentioned in the schedule hereunder written]; FOR the term of —— years from the —— day of —— last past (*g*); AT the clear yearly rent of £——, payable by equal quarterly payments, on the four usual quarter days, the first of such quarterly payments to be made on the —— day of —— next. AND the said C. D. hereby agrees to pay the said rent at the times and in manner hereinbefore mentioned [with interest at the rent of 5*l.* per cent. on any of the rent when in arrear for more than one calendar month, calculated from the day it became due to the time of payment (*h*)]: ALSO, to pay land tax, sewers rates, and all other rates, taxes, and impositions of every description in respect of the said premises during the said tenancy (landlord's property tax only excepted); ALSO, to paint, paper, and whitewash the said premises when, where and as often as shall be reasonably necessary, and to keep the said premises in good tenantable repair, order and condition (damage by fire, tempest, explosion of gas or gunpowder, war or riot always excepted); BUT if such premises or any part thereof shall be destroyed or damaged by fire, tempest, explosion of gas or gunpowder, war or riot, in any of such cases the said C. D. shall not be liable to pay any rent whatever (except arrears previously due) until the said A. B., his executors, administrators, or assigns shall have caused such premises to be repaired or rebuilt, as the case may require; and then only a fair and just proportion of the rent during such repairs or rebuilding, the amount thereof to be settled by mutual consent, or by an arbitrator to be mutually agreed on, or to be appointed pursuant to the Arbitration Act, 1889, and to be paid one week next after the amount thereof shall be so settled as aforesaid (*i*), the costs of any such reference and award to be in the discretion of the arbitrator (*k*), who shall direct by whom and to whom the same shall be paid and shall in other respects have all the usual powers of an arbitrator, and whose award and decision shall be final. [The exceptions hereinbefore contained not to be applicable to any case in which there shall have been negligence or wilful default on the part of the said C. D., his assigns or agents, or any of his family.] THE said C. D. not to carry on or permit to be carried on upon the said premises or any part thereof, any trade or business, but to use the premises hereby demised as and for a private dwelling-house only, nor to do or suffer or omit any act or thing whatsoever whereby or in consequence whereof the lease under which the said premises are now held, bearing date the —— day of ——, 18—, and made or expressed to be made between E. F. therein described of the one part, and the said A. B. of the other part, may be forfeited or become voidable: AND the said C. D. at the end of the said tenancy, to leave, surrender and deliver up to the said A. B., his executors, administrators, or assigns, all the said premises, together with all the fixtures which now are, or which at any time hereafter during the said tenancy may be fixed or set up by the said A. B., in good condition (fair wear and tear thereof and damage by fire excepted), [*here specify anything specially agreed to be done by the tenant on the expiration of the tenancy, ex. gr.*, the partitions dividing the attic story into four rooms, and the raised floor taken down by the said C. D., to be refixed and made good in a

Date and Parties.
Stamp.
Parcels.
General Words.
Fixtures.
Reddendum.
Covenants by Lessee.
To pay Rent.
And interest on Arrears.
Rates and Taxes.
To paint, &c.
To repair.
Cesser of Rent in case of Fire until, &c.
Against Trades.
Not to avoid original Lease.
To surrender at end of Term.
With Fixtures.
Other things to be done by Tenant at end of Term.

(*g*) *Or say* "from the —— day of —— [last *or* next], to the —— day of —— 18 ." If the term be for more than 3 years, a *deed* is necessary, by virtue of 8 & 9 Vict. c. 106, s. 3, ante, 135.

(*h*) See form of such covenant, post, p. 958.

(*i*) This will effectually prevent any action being brought before the amount has been so ascertained; *Avery* v. *Scott*, 8 Exch. 487; 5 H. L. Cas. 811. Without such a stipulation the landlord might sue for all the rent, and leave the tenant to pay into court a sufficient sum at his peril; *Bennett* v. *Ireland*, E., B. & E. 326; 28 L. J., Q. B. 48.

(*k*) With a view to costs, &c., the arbitrator should, at the commencement of the inquiry, ascertain how much the tenant offered to pay, and how much the landlord was willing to accept.

APP. B. s. 3.

Proviso for Re-entry.

Certain Repairs to be forthwith done by Landlord.

Otherwise, &c.

proper and workmanlike manner at or before the end of the tenancy]: Provided always [*here insert proviso for re-entry*, see p. 959:] [*If the landlord is to do any repairs or alterations here specify them, ex. gr.*]: THE said A. B. shall, within [twenty-eight] days from the date of this agreement, make good and support the floor of the warehouse of the said premises, and repair and make good the frame and glass of the skylight, and fix the present partition of the same warehouse, *or as the same may be agreed on* (*l*), otherwise the said C. D. shall be entitled, within [seven] days after the expiration of the said [twenty-eight] days to quit possession of the said demised premises, and determine and make void these presents by a notice in writing signed by him, and delivered to the said A. B., or left for him at [*state his place of residence*] aforesaid, without paying any rent or other compensation in respect thereof. AS WITNESS the hands of the said parties.

Witness, (Signed) A. B.
J. K., of [&c.] C. D.

The [FIRST] SCHEDULE referred to in the above written agreement.

[*Here specify the fixtures.*]

The [SECOND] SCHEDULE referred to in the above written agreement.

[*Here specify the repairs agreed to be done.*]

Witness, (Signed) A. B.
J. K. C. D.

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SECT. 4.—*Concise Agreement for letting a Furnished House* (*m*).

Stamp (*n*).

AGREEMENT made the —— day of ——, 18—, BETWEEN A. B. of &c. (hereinafter called the landlord), of the one part, and C. D. of &c. (hereinafter called the tenant), of the other part; The landlord lets, and the tenant takes, ALL that furnished dwelling-house [*describe it*], with the fixtures and appurtenances; TOGETHER with the furniture and effects mentioned in the schedule to these presents; FOR the term of —— [weeks *or* calendar months], to be computed from the —— day of —— [instant *or* next]; AT the rents of £—— [per week *or* calendar month] for the premises and of £—— for the furniture respectively, such rents to be payable, [*state when payable as agreed, ex. gr.*, on *Saturday* in each week, *or* on the *fifteenth* day of each month, *or* at the end of the said tenancy, *or* payable from month to month in advance on the —— day of each month, and to be suspended or reduced in case of damage by fire until such damage be repaired by the landlord]: The tenant agrees at the end of his tenancy to leave the demised premises, including the said fixtures, appurtenances, furniture and effects in as good state, condition and repair as they now are, reasonable wear and tear and damage by fire or tempest excepted: The landlord agrees to pay all rates and taxes of every description (except the gas rate, which shall be paid by the tenant in accordance with his consumption of gas, and shall be apportioned if necessary), and to do all necessary repairs when required during the said tenancy; also to indemnify the tenant against all ground and other rent-charges, and incumbrances (if any) affecting the said premises, and from all distresses, claims and demands in respect thereof (*o*). AS WITNESS the hands of the said parties.

THE SCHEDULE *above referred to.* [*Here specify the furniture, &c. Be particular to mention every crack or other defect.*] The following windows were cracked at the date of the above agreement, viz. [*here specify each cracked window*].

(Signed) A. B.
C. D.

Witness,
E. F., of [&c.]

(*l*) If the repairs and alterations are numerous, say "do all the repairs, alterations and improvements mentioned in the schedule to these presents;" and at the end add a schedule, specifying the work to be done.

(*m*) There is an implied warranty by landlord of fitness for occupation; *Wilson* v. *Finch-Hatton*, L. R., 2 Ex. D. 336; ante, 184.

(*n*) 2*s.* 6*d.* if rent more than 25*l.* See Stamp Act, 1891, s. 78, and sched., tit. "Lease," ante, App. A.

(*o*) Here insert any special clauses with regard to use of horses and carriages, garden produce, &c., [*e.g.*, "And it is hereby agreed that the tenant shall have all the produce of the garden as it becomes ripe, the gardener's wages being paid by the landlord."]

SECT. 5.—*Concise Agreement for letting Furnished Lodgings, with Attendance, &c.* APP. B. s. 5.

Stamp (*p*).

AGREEMENT made the —— day of ——, 18—, BETWEEN A. B. of &c. (hereinafter called the landlord), of the one part, and C. D. of &c. (hereinafter called the tenant), of the other part; The landlord hereby agrees to let, and the tenant agrees to take, ALL those the rooms or apartments following, (that is to say) [*describe the rooms, ex. gr.*, the front parlour, and the back bed-room on the second floor, and the small coal-cellar in the front area,] being parts of the house and premises of the landlord, situate at —— aforesaid, TOGETHER with all easements and appurtenances [including gas-light, which is to be supplied by the landlord]; AND also the furniture, goods, chattels and effects in the said rooms or apartments, [the principal articles whereof are mentioned in the schedule to these presents] (*q*); AND also such attendance as hereinafter mentioned; TO HOLD from the —— day of ——, from week to week [*or* from month to month], determinable by either party upon giving to the other [one week's *or* one calendar month's] previous notice in writing to quit, ending on [any *Saturday*, *or* on the —— day of any month], half such notice to be sufficient if given during the first [week *or* month]; AT the rent of £—— per week, payable on [Saturday] in each week during the said tenancy; [*or* at the rent of £—— per calendar month, payable on the —— day of each month during the said tenancy]; The tenant, at the end of his tenancy, to leave the said demised premises, together with the said furniture, goods, chattels and effects, in as good state, condition and repair as they now are, reasonable wear and tear and damage by fire and tempest excepted; The landlord agrees to pay all rates and taxes of every description: The landlord agrees to do all necessary repairs when required by the tenant; also to indemnify the tenant against all ground and other rent which is or may become due or payable to any superior landlord of the said premises during the said tenancy, and from all distresses, claims and demands in respect thereof: The landlord also agrees to find and provide the tenant with the attendance of a respectable female servant, and with all other necessary and proper attendance, including cooking and boot and shoe cleaning; also to find and provide him with proper and sufficient plate, linen, china, knives, silver or electro-plated forks and spoons, and other necessary household things, to enable him to reside comfortably in the said rooms or apartments during the said tenancy; The landlord not to do or suffer to be done anything in the said house of a noisy, noxious or offensive nature during the said tenancy: PROVIDED that if at any time during the said tenancy the tenant shall be annoyed, vexed or disturbed by anything of a noisy, noxious or offensive nature, contrary to the stipulations in that behalf above contained; or if the tenant shall find or discover anything that may give him reasonable cause to believe that there is any embarrassment on the part of the landlord, or any danger of a distress for rent, rates or taxes, or of an execution against the goods of the landlord, then and in any such case it shall be lawful for the tenant by notice in writing forthwith to determine the tenancy hereby created, and to quit possession of the said rooms or apartments without giving any previous notice to quit, anything hereinbefore contained to the contrary in anywise notwithstanding; and thereupon the tenant shall be liable to pay rent pro ratâ to the time of quitting; Provided nevertheless that the tenant shall not hereby be deprived of any of the protection afforded by the Lodgers' Goods Protection Act, 1871. AS WITNESS the hands of the said parties.

THE SCHEDULE above referred to. [*Here specify the furniture, &c. Be particular to mention every crack or other defect, also to mention the cracked windows.*]

(*p*) 2*s.* 6*d.* if rent more than 25*l.* See Stamp Act, 1891, s. 78, and sched., tit. "Lease," ante, App. A.

(*q*) The schedule of furniture, &c. may be omitted, if preferred.

APP. B. s. 6.

SECT. 6.—*Letting of Furnished House for a few weeks.*

AGREEMENT made this —— day of ——, 18—, BETWEEN A. B. of ——, (hereinafter called the landlady) of the one part, and C. D. of —— (hereinafter called the tenant) of the other part; WHEREBY the said landlady agrees to let, and the said tenant agrees to take and hire, ALL that house, garden, and premises situate and known as ——, [except the box-room, which is hereby reserved to the said landlady for storage purposes], as the same are now in her occupation; TOGETHER with the use of the furniture and piano, and of sufficient glass, crockery, kitchen utensils, and other effects, (but not including the use of plate and linen) in and upon the said house and premises more particularly described in an inventory referring thereto, and forming part of this agreement, for a term of —— weeks, to commence from the —— day of —— next, until the —— day of —— next, at the clear rent or sum of —— per week, payable as follows: The sum of —— pounds, —— shillings on the —— day of —— next; and the further sum of —— pounds, —— shillings on the —— day of —— next, the expiration of the said tenancy, the said rent to cease and the tenant to have the option of quitting in case of substantial damage by accidental fire, storm, or tempest; THE said tenant hereby also agrees to pay the rent in manner aforesaid, to use the said house and premises for private occupation only, and at the expiration of the said tenancy to quit and deliver up quiet and peaceable possession of the same, together with the said furniture and effects, clean and in as good order, and condition, and in the same place and position as the same shall be in at the commencement of the tenancy, reasonable use, wear, tear, and accidental damage by fire, storm or tempest only excepted. AND to replace with others of a similar quality, pattern, or value, or pay for the same, at his option, all such articles of the said furniture and effects as shall be found to be missing, damaged, or destroyed during the said tenancy, and if any dispute shall arise the same shall be referred to and settled by two valuers or their umpire in the usual manner. THE said tenant also further agrees not to assign, underlet, lend, or otherwise part with the possession of the whole or any portion of the said house and premises, except to a respectable person giving two references in the usual manner; and not to remove, or cause or suffer to be removed, the whole or any portion of the said furniture and effects; THE said landlady further agrees to forward to the tenant the aforesaid inventory within a fortnight from the date of this agreement, and to pay the unfurnished rent, and all rates, taxes, and impositions that may become due in respect of the said premises during the said tenancy (except the charge for gas consumed on the said premises during the said term, which the said tenant hereby agrees to pay), and to keep and maintain the walls, roof, and main timbers of the said premises in good condition, and if required in writing by the tenant to make good, with all convenient dispatch, any damage occurring through accident, by fire, storm, or tempest, and to pay all expenses of and incident to this agreement and inventory; AND it is hereby further agreed, that should the said tenant be desirous of continuing the occupation of the said premises after the expiration of the tenancy hereby created, he may do so for a further period of —— weeks at the rent of £ —— —— *s.* per week, on giving seven days' previous notice in writing to the said landlady or her agent of his intention so to do; PROVIDED ALWAYS, and it is hereby mutually agreed, that if the said rent, or any part thereof shall remain due and unpaid for the space of seven days after either of the days on which the same shall become due and payable by virtue of this agreement, or in case of the breach or non-observance on the part of the said tenant of any of the conditions or stipulations hereinbefore referred to, then and in such case it shall be lawful for the said landlady or her duly authorized agents into and upon the said premises to re-enter, and thereout remove the said tenant, or any person or persons therein, without the necessity of bringing an action of ejectment, or taking any proceedings at law for the recovery of such possession, this right to be, nevertheless, without prejudice to any remedy for enforcing payment of any rent then or thereafter due in respect of the said premises. AS WITNESS the hands of the said parties the day and year first above written.

Witness,
E. F., of [&c.]

(Signed) A. B.
C. D.

SECT. 7.—*Sub-tenancy from year to year of a Shop and Rooms unfurnished, with the Fixtures therein—Landlord to pay all Rates and Taxes—Proviso that the landlord shall keep up a subsisting Policy of Insurance* (*r*).

AGREEMENT made this —— day of ——, 18—, BETWEEN A. B. of [&c.] (hereinafter called the landlord) of the one part, and C. D. of [&c.] (hereinafter called the tenant) of the other part; THE landlord hereby lets, and the tenant takes the shop and rooms following, that is to say [two rooms on the ground floor, and the shop at the back thereof, and also two rooms on the second floor, and the back kitchen and small coal-cellar, with the use of the yard and other conveniences, and the appurtenances thereto belonging, and also the fixtures in the said shop and rooms,] being part of a house and premises situate and being [No. 67, Seymour Street, Euston Square aforesaid], now in the occupation of the landlord from the —— day of ——[instant *or* last, *or* next], from year to year (*s*); AT the yearly rent of £—— sterling, payable by equal quarterly payments, on the —— day of ——, the —— day of ——, the —— day of ——, and the —— day of ——, the first quarterly payment to be made on the —— day of —— next; AND the landlord hereby agrees to pay all rates, taxes, and assessments, which now are or shall at any time during the continuance of the said tenancy be assessed or imposed upon the said premises, or upon the occupier in respect thereof; AND further to pay all premiums at any time due in respect of the now subsisting or any future policy of insurance of the said premises and whenever required to produce to the tenant such policy or policies, and the receipt for the last premium thereof; AND further in case of destruction of or damage to the said premises by fire with all convenient speed to lay out all moneys received in respect of such insurance in rebuilding or restoring the premises, and to make good any deficiency; AND it is further agreed that when the tenant shall quit the said premises he shall leave them in as good condition and repair as they now are in, reasonable wear and tear and damage by fire and tempest only excepted. AS WITNESS the hands of the said parties.

Witness,
E. F., of [&c.]

(Signed) A. B.
C. D.

Date and Parties.
Parcels.
Fixtures.
Reddendum.
Lessor to pay all Rates and Taxes.
Repairs.
Proviso against Rent to superior Landlord.

SECT. 8.—*Agreement for Sub-lease of House for Twenty-one Years, determinable, &c.—Covenants as in Ground Lease—Lessee to have the Option of purchasing within two Years on certain Terms* (*t*).

HEAD of proposed lease from A. B. to C. D. of No. 24, —— Gardens, Maida Hill, Paddington, in the county of Middlesex, with the actual and reputed rights, members, easements and appurtenances (except [*here state any exception or reservation to the landlord*]): Term twenty-one years from the 29th September, 18—, determinable by [either party] at the end of the first seven or fourteen years, upon twelve calendar months' previous notice in writing, and upon payment by lessee, his executors, administrators or assigns (if such notice be given by him or them) of all rent and arrears of rent to the expiration of the notice, and then giving up possession. Rent 200*l*. per annum [for the first seven years, and 220*l*. per annum afterwards during the remainder of the term], payable by equal quarterly payments on the usual days, the first payment to be made on the 25th day of December next [and to be suspended in case of damage by fire, or explosion not caused or contributed to by the lessee, or tempest, &c.]. Lessee to pay the land tax (if any, sewers rates and all other rates, taxes and impositions whatsoever (except property tax). Covenants by lessee to perform and observe all the covenants and conditions in the lease from [the Bishop of London and his trustees to the said A. B.] dated the —— day of ——, 18—, so far as they are applicable to the premises hereby agreed to be demised, except the covenant to pay the rent reserved in and by such lease

Parties
Premises.
Term.
Stamp (*u*).
Rent.
Rates and Taxes.
Covenants.

(*r*) This form is taken (with variations) from *Giles* v. *Spencer*, 3 C. B., N. S. 244. It is more favourable for the tenant than usual.

(*s*) This tenancy may be determined by the usual notice to quit at the end of the first or any subsequent year thereof.

(*t*) This form is taken (with variations) from *Tildesley* v. *Clarkson*, 31 L. J., Ch. 362; 30 Beav. 419.

(*u*) Same as on lease for same term.

APP. B. s. 8.

Lessor to complete Premises before [15th] September next: otherwise, &c.

Lease and Counterpart and Expense thereof.

Option of Purchase.

[*here state any other exception*]. The lessor, at his own expense, to furnish and complete the premises in a proper and workmanlike manner, and to put them into good tenantable repair, order and condition in every respect fit for an incoming tenant, before the [15th day of September next (*x*)], otherwise the lessee to have the option of cancelling this agreement on or after that day and before the [29th day of September aforesaid], upon giving notice in writing under his hand to the lessor, or leaving such notice for him at his last known place of abode, or at No. 24, —— Gardens aforesaid. The lease and a counterpart thereof to be prepared by the lessor's solicitor at the lessee's expense, and to contain a clause giving the lessee, his executors, administrators and assigns the option of purchasing within two years from 29th September, 18—, the then residue of the lessor's term, for the sum of 3,300*l.* sterling, and 20*l.* per annum rent payable by equal [half-yearly] payments on the —— day of —— and the —— day of ——, with power to distrain for the same and to dispose of such distress as for rent-service. Upon any such purchase no proof of the lessor's title is to be required. Such lease and counterpart to be executed and possession of the premises given on or before the 29th day of September, 18—.

Date.

Dated this —— day of ——, 18—.

Witness,
E. F., of [&c.]

(Signed) A. B.
C. D.

---

SECT. 9.—*Concise outline of Agreement for lease of a Farm, with reference to a previous Lease* (*y*).

Stamp.

TERMS for the lease of a farm at ——, containing [*here describe the land &c.*]; term twelve years and a half from Lady-day last; rent 350*l.* to be paid quarterly; landlord to pay the tithe rent-charge and drainage taxes; tenant to pay all other rates, taxes, and assessments whatsoever (except property tax); landlord to put buildings, gates and posts in repair, and tenant afterwards to keep them in repair, being allowed rough timber; tenant to pay for the muck and straw upon the farm by valuation; all the other covenants and conditions to be the same as in the lease under which J. H. B. now holds the said farm, including a power of re-entry by the landlord on non-payment of rent or breach of covenant by the tenant; Landlord to allow tenant 25*l.* of the first half-year's rent: [Tenant to pay all expenses of this agreement and of the lease and counterpart] (*z*). We agree to the above conditions this —— day of ——, 18—.

(Signed) ROBERT BROWN,
Agent to William Smith, esquire.
JOHN JONES.

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SECT. 10.—*Agreement for letting a Farm from Year to Year.*

Parties.
Stamp.
Demise.
Parcels.
Term.

AGREEMENT made the —— day of ——, 18—, BETWEEN A. B. of, &c. (hereinafter called the landlord) of the one part, and C. D. of, &c. (hereinafter called the tenant) of the other part. The landlord lets and the tenant takes the dwelling-house, farm and farm buildings, cottages and appurtenances situate [*here describe the premises*] (*a*) for the term of one year commencing at Michaelmas next, and afterwards from year to year, but determinable at the end of the first or of any other year by either party giving to the other one year's written notice to quit [*or* six months' written notice to quit (*b*),* for the purpose of

(*x*) See *Tidey* v. *Mollett*, 16 C. B., N. S. 298; 33 L. J., C. P. 235.

(*y*) This form is taken (with variations) from *Collen* v. *Wright*, 7 E. & B. 301; 8 Id. 647; where it was held that the defendant, by his signature in the above form, impliedly promised that he had sufficient authority to sign.

(*z*) See ante, 206, 944.

(*a*) It will often be found convenient to give the particulars of the premises in a schedule.

(*b*) The words between asterisks though surplusage (see ante, p. 361), may perhaps as well be inserted, if the six months' notice be desired, for the sake of greater clearness.

which notice the 33rd section of the Agricultural Holdings Act, 1883, shall not apply to this agreement*] at the yearly rent of £—— clear of all tithe rent-charge and other deductions (except land tax and landlord's property tax), payable quarterly on the usual quarter days in each year, the first payment to be made on the 25th of December next; and at the additional rent of £—— for every acre, and so in proportion for any greater or less quantity than an acre of sward or permanent pasture or meadow land which, during the said tenancy, shall be cropped, tilled or cultivated contrary to the agreement hereinafter contained without the consent in writing of the landlord or his agent, and such additional rent to be paid quarterly on the days aforesaid, the first payment thereof in each case to become due and to be made on such of those quarter days as shall happen next after such cropping or cultivation as aforesaid, and to continue payable on each succeeding quarter day during the tenancy.

App. B. s. 10.

Rents.

And it is further agreed as follows:—

Exceptions and Reservations.

All game, wild fowl, rabbits and fish (subject only to the concurrent rights of the tenant under the Ground Game Act, 1880) are excepted and reserved to the landlord with the exclusive right of hunting, coursing, shooting, fishing and sporting (subject only as aforesaid); and also all timber and other trees, pollards and saplings, and all mines and minerals with full liberty of access to the landlord's agents and all persons authorized by him to cut, lop, quarry, work, and carry away the same respectively. The landlord paying to the tenant reasonable compensation for damage done to his growing crops in so doing; and also full liberty of access as aforesaid to the premises to view the state of repair of the buildings, gates and fences, and the management and cultivation of the land, and for any other reasonable purpose.

And the tenant agrees as follows:—

Agreements by Tenant.

To pay Rent and Taxes.

To pay the said yearly rent of £—— and (if the same shall become payable) the said additional rent on the days and in manner aforesaid, and to pay all tithe rent-charge and all existing and future taxes, rates, assessments and outgoings whatsoever (except as aforesaid); and personally to reside in the said dwelling-house, and not to assign, underlet or part with possession of the premises or any part thereof except the cottages (which may be let to weekly tenants) without the consent in writing of the landlord or his agent; and to keep, and at the end or sooner determination of the tenancy to leave, in thorough repair and order the said dwelling-house and cottages with all fixtures and additions thereto respectively, and all buildings for the time being on the said premises (except the main timbers, tiled roofs and outside walls of the said dwelling-house, cottages and buildings), and also the thatched roofs, roads, doors, gates, stiles, fences, walls, rails, bars, culverts, gutters, ditches, drains, pumps, ponds, wells, banks, dams, floodgates, and bridges, and to do at all times what may be necessary to allow the surface-water to flow off; and to paint all the outside wood and iron work in and upon the premises hitherto or usually painted with two coats of the best oil paint when necessary, and at least in every fourth year of the tenancy, and to tar and varnish all other wood and iron work, hitherto or usually tarred or varnished.

To reside and not to assign or underlet.

To repair

[*If the tenant is to insure, insert,* To insure the said messuage and cottages and all buildings for the time being on the said premises, &c.]

Insurance.

To cultivate the farm according to the best system of husbandry [and particularly the arable land on the four-course system, and not to have white straw crops in any two successive years]. To clean the land and keep it clean; not to cross crop the land; not to grow for seed, tares, mustard, rape or turnips or any unusual or exhausting crop except for his own use, and then not upon the whole to a greater extent than one acre without the written consent of the landlord or his agent, and [*here insert any special stipulations as to cropping*].

Cultivation and Management.

Crops.

To consume or use upon the premises all artificial as well as meadow hay, clover, root, and green crops, straw, haulm and chaff, and the muck, dung, and manure into which the same shall be converted, and not to clean off the farm or sell the same respectively under a penalty of 20*l.* for every ton so drawn off or sold at any time.

To consume Hay &c., on the Premises.

To purchase and lay out on the farm every year such lime, muck and other manure as shall be requisite for the proper cultivation thereof.

To purchase Lime, &c.

[*Here insert any other stipulations as to cultivation and management.*]

To permit the landlord and all persons authorized by him at all reasonable times during the tenancy to have access to the premises to view the state of

To permit Landlord to view Premises.

APP. B. s. 10.

repair of the buildings, gates and fences, and the cultivation and management of the farm, and for any other reasonable purpose.

To preserve Game.

To preserve all game, and the eggs and young of game, wild fowl and fish for the landlord and all persons authorized by him, subject only to the exercise by the tenant of his concurrent rights as aforesaid.

To prevent Trespass.

To permit the landlord to bring actions or take any legal proceedings against trespassers or poachers in the tenant's name, to lay information and give evidence (he being indemnified by the landlord), and to sign and serve if required notices to trespassers and others to keep off the farm.

Not to cause or suffer roads, footpaths or ways to be made over any part of the premises.

Not to cut Timber, &c.

Not to cut, lop or prune any timber or other trees or saplings. To preserve and protect the fruit trees and to replace with young trees of the best quality any that may perish through decay or accident, and to have as well those now growing as any hereafter to be planted in good order and condition. To cut the underwood in regular seasons, none to be cut of less than twelve seasons' growth. To keep in order, make and plash the hedges, none to be cut of less than six years' growth. To plant quicksets or hornbeam in the gaps or decayed places in the hedges, to weed and cleanse and protect the same from cattle. To scour and cleanse the ditches as often as necessary, and to cut and destroy at least once in every year the weeds and rubbish growing on all the banks, hedges, ditches and wastes.

Not to take or suffer to be taken any earth, clay soil, peat, marl, stone, minerals or gravel from the surface of the land without the consent in writing of the landlord or his agent.

Not to break up Pasture.

Not to plough or break up any sward or permanent pasture or meadow land.

Not to depasture.

Not to depasture any agistment stock of any kind upon the said farm in the last year of the tenancy under a penalty of 10*l.* for every head of live stock that shall be so depastured thereon.

[*Here insert any other prohibitions.*]

And the landlord agrees in manner following:—

Agreements by Landlord.

Quiet enjoyment.

To permit the tenant paying the several rents or sums hereinbefore reserved or made payable, and performing and observing the several agreements on his part therein contained; peaceably to possess and enjoy the said premises during the tenancy without any interruption or disturbance by the landlord or any person claiming under him.

To pay Land Tax, &c.

To pay all land tax and landlord's property tax [and tithe rents-charge], payable in respect of the said premises.

To repair main Timbers, &c.

To keep in good and substantial repair and order the main timbers, tiled roofs and outside walls of the said dwelling-house, cottages and all buildings for the time being on the said premises, the tenant giving timely notice that such repair has become necessary.

To supply Materials for Repairs.

To supply to the tenant on demand for all repairs to be executed by him, bricks, tiles, slates, lime and rough timber (or at the landlord's option timber in scantling and feather-edged boards) to be used by the tenant in a proper and tradesmanlike manner; and the cartage of the same to a distance not exceeding six miles from the said premises to be performed by the tenant gratis.

And it is further agreed as follows:—

Exclusion of Custom.

No customs of the country shall have any operation upon this contract of tenancy; and the right of the tenant to allowances at the end of the tenancy shall depend only upon such contract and the Agricultural Holdings Act, 1883.

Power of Re-entry.

If and whenever the said yearly rent of £—— or the additional rent or any part thereof respectively shall be in arrear for —— days, whether legally demanded or not, or if and whenever there shall be a breach of any of the tenant's agreements herein contained, or if the tenant shall become bankrupt, or make any composition with his creditors, or suffer execution upon his goods, then and in any of the said cases it shall be lawful for the landlord to enter upon any part of the premises in the name of the whole, and thereupon the tenancy shall determine.

Sale of Crops on distraint.

In case the landlord shall distrain for rent it shall be lawful for him to sell by auction or otherwise all hay, straw, and other fodder, crops, corn or roots taken under such distress, and the same may be consumed (if the landlord so wishes) on any part of the said farm, and the cattle or stock of any purchaser of the said hay, straw, and other fodder, crops, corn or roots, may be put to consume the

same on the said farm for so long a period as the landlord may deem necessary without any liability on the part of such purchaser, and without his being deemed a trespasser.

Stipulations as to rights of Parties at end of Tenancy.

The landlord (*or* incoming tenant) at the end of the tenancy shall take at a valuation all the Lent corn and other straw, chaff and fodder, and artificial as well as meadow hay of the last year's crop, which shall not have been consumed before the end of the tenancy at consuming prices, and also all wheat straw of the crop which shall not have been consumed at the end of the tenancy at full price, with a deduction of ——*s.* per load upon the said wheat straw. But all the said straw, fodder, chaff, hay, and wheat straw shall be delivered up to the landlord (*or* incoming tenant) dry and in good condition, placed under cover in the homestall or thatched and secured from the weather, and the wheat straw to be in addition trussed and tied by the tenant, he being paid for the trussing, tying and thatching. The tenant is to quit the farm, house, cottages and premises at Michaelmas day, and to have the use of the barns and rick-yards if necessary, or as much thereof as may be necessary, but no more, to thresh and market his crop of corn of the last year, and stabling for horses to carry out his corn if required, and accommodation for one man to tend the horses up to the 25th of December after the end of the tenancy.

Arbitration Clause.

[If any question or dispute (other than one the settlement of which is provided for by the Agricultural Holdings Act, 1883) shall arise between the landlord and tenant as to these conditions, or any matter or thing connected with them, or with the occupation of the farm, such matter in difference shall be referred to two arbitrators and their umpire in accordance and conformity with the provisions contained in the Arbitration Act, 1889, or any then existing statutory modification thereof; and if at the end of the tenancy there shall be, in addition to the reference to ascertain the matters hereinbefore particularly mentioned for valuation, a reference under the provisions of the Agricultural Holdings Act, 1883, to two referees appointed respectively by the landlord and tenant, the landlord and tenant shall each (except in any case where it may be impracticable so to do) appoint the same referee for both references; and so far as the landlord and tenant can control the appointment of an umpire, the same person shall be appointed to act as umpire in both references.]

Interpretation Clause.

The word "landlord" shall include his heirs and assigns, and the word "tenant" shall include his executors, administrators, and assigns. AS WITNESS, &c.

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SECT. 11.—*Agreement for letting a Cottage from Year to Year.*

Date and Parties.

AGREEMENT made the —— day of ——, 18—, BETWEEN A. B. of, &c. (hereinafter called the landlord) of the one part, and C. D. of, &c. (hereinafter called the tenant) of the other part.

Parcels.

1. The landlord hereby lets and the tenant hereby takes all that cottage situate in the parish of —— in the county of ——, formerly in the occupation of ——, together with the garden and appurtenances thereto belonging, which premises are described in the schedule hereto [for the term of one year from the —— day of ——, 18—, and afterwards from year to year at the yearly rent of £—— payable quarterly on the usual quarter days in each year, the first payment to be made on the —— day of —— next, and the last payment to be made in advance one calendar month before the expiration of the tenancy. The said rent to be paid clear of all deductions except for land tax and property tax].

Term.

Rent.

Tenant agrees to pay Rent and Taxes.

2. The tenant agrees to pay the said rent on the days and in manner aforesaid, and also all existing or future taxes, rates, assessments and outgoings of every description (except as aforesaid) for the time being payable by the tenant in respect of the premises.

To repair.

3. The tenant to whitewash the cottage when required, and to keep all cesspools and drains well cleansed, and to keep the premises (including fixtures but except the roof and outside walls) in good and tenantable repair reasonable wear and tear excepted.

To cultivate Garden and Orchard.

4. The tenant to cultivate the garden [and orchard] in a proper manner [and to prune and preserve all fruit trees, and to replace any that may perish through

APP. B. s. 11.

decay or accident, and to leave as well those now growing as any hereafter to be planted in good order and condition].

Not to assign, &c.

5. The tenant not to assign or sublet the premises or any part thereof, nor to take or retain any lodgers or allow any married son or daughter to reside with him in the said cottage without the landlord's consent.

To deliver up.

6. The tenant on the expiration or sooner determination of the tenancy to deliver up the premises in such good and tenantable repair, order and condition as aforesaid.

To permit Landlord to enter.

7. The landlord and his agents to have access to the premises at all reasonable times to view the condition of the same.

Determination of Tenancy.

8. The tenancy shall be determined at any quarter day upon three months' previous notice in writing by either party.

Power of Re-entry.

9. Provided always, that if and whenever any part of the said rent shall be in arrear for —— days, whether legally demanded or not, or if and whenever there shall be a breach of any of the tenant's agreements, the landlord may enter upon any part of the premises in the name of the whole, and thereupon the tenancy shall determine.

AS WITNESS, &c.

[The SCHEDULE above referred to.]

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SECT. 12.—*Agreement for letting a Cottage, &c. on Tenancy at Will, or from Week to Week, or from Month to Month.*

Date and Parties.

AGREEMENT made the —— day of ——, 18—, BETWEEN A. B. of, &c. of the one part, and C. D. of, &c. of the other part; the said A. B. DOTH demise unto the said C. D., his executors, administrators and assigns, ALL [*describe parcels*] together with the [outbuildings, yard, garden, land and] appurtenances to the said cottage belonging or therewith usually held and enjoyed [EXCEPT and always reserved; *here state any exception:*] From the —— day of —— [instant, *or* last *or* next], "so long as both parties shall please, upon a strict tenancy at will and not otherwise," *or say* "upon a weekly tenancy determinable by either party on any *Saturday*, upon one week's previous notice to quit in writing," *or say* "upon a monthly tenancy, determinable by either party, on the —— day of any month, upon one calendar month's previous notice to quit in writing," provided that three days' less notice than the above shall be sufficient, if given during the first [week *or* month] of the tenancy: PAYING during the said tenancy the rent of —— shillings and —— pence per week, on —— day in each week [*or* the rent of —— pounds —— shillings and —— pence per month on the —— day of each month], the first of such payments to be made on the —— day of ——. AND the said lessee agrees with the said lessor to pay rent; and to pay rates and taxes (*c*); that the said lessee will not use premises as a shop; and will not assign without leave [nor sublet the said premises or any part thereof without such leave;] and that he will leave premises in good repair. The said lessor may re-enter on non-payment of rent or non-observance of agreements. AS WITNESS, &c.

1. On a strict Tenancy at Will.

2. From Week to Week.

3. From Month to Month.

Reddendum.

Agreements by Lessee.

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SECT. 13.—*Agreement for Building Lease.*

Parties.

Stamp (*d*).

AGREEMENT made the —— day of ——, 18—, BETWEEN A. B. of, &c. (hereinafter called the lessor), of the one part, and C. D. of, &c. (hereinafter called the lessee), of the other part.

Parcels.

The lessor agrees to demise and let, and the lessee agrees to take, ALL that piece or parcel of building land situate, &c. [*parcels*], which piece of land hereby agreed to be demised is delineated with the abuttals on the plan drawn in the margin of these presents, and therein coloured red; EXCEPTING and reserving

(*c*) Omit this covenant, and such of those which follow, as are not actually agreed on.

(*d*) See Stamp Act, 1891, s. 75, ante, p. 938.

unto the lessor, &c. [*reservation*], TOGETHER with all rights, members, and appurtenances belonging or appertaining to the premises for the term of ninety-nine years from the —— day of ——, 18—, AT and under the several yearly rents following, that is to say, for the first year of the said term a peppercorn rent, if demanded; for the second year thereof the rent of £——; for the third year thereof the rent of £——; and for the fourth, and for each and every subsequent year during the said term, the full yearly rent of £——, all such several rents to be paid quarterly on the usual quarter days, the first payment of rent to be made on the —— day of ——, 18—, and such several rents to be clear of land tax, sewers, main drainage, [and Metropolitan] rates, tithe rents-charge, and all existing or future taxes, rates, charges, assessments, and deductions whatsoever, whether parliamentary, parochial, or otherwise, to which the premises, or the lessor or lessee in respect of the premises, are or is, or hereafter shall be liable, except only the landlord's property tax in respect of the said rents. AND such several rents (if required by the lessee) shall be apportioned and divided for or in respect of the messuages or buildings and land to be comprised in the leases (if more than one) to be granted pursuant to these presents, in such manner as the lessee and his nominees, and the lessor or his surveyor or agent for the time being, shall mutually agree upon, but so that the apportioned rent shall in no case exceed one-sixth of the rack-rent of the houses comprised in such leases respectively. And every such lease, and a counterpart thereof, shall be prepared by the solicitors of the lessor at the costs and charges in all respects of the lessee (*e*), and shall contain covenants to pay rents and all future and existing rates, taxes, assessments, and deductions whatsoever, except landlord's property tax, and to repair, and insure, to show receipts, and rebuild, in case of fire; and that the lessor shall have full liberty to enter and view the state of repair and condition of the premises comprised in such lease; and also a proviso for re-entry on non-payment of rent, &c. [*see ante*, Sect. 1, *substituting* "lessee or his nominee," *for* "tenant"] by the lessor (*f*); and all covenants and conditions which may be necessary in conformity with the terms of these presents, or which may be reasonably required by the lessor or his solicitor. AND IT IS HEREBY AGREED AND DECLARED that leases of the land and premises hereby agreed to be demised, may be required to be granted under these presents, upon the terms and in the events hereinafter mentioned (that is to say), that as soon as the lessee shall, to the satisfaction of the lessor or his surveyor for the time being, have erected, roofed, and covered in, or caused to be erected, roofed, and covered in, on the said land, any messuages or dwelling-houses, at the cost of £—— at the least for each messuage or dwelling-house, with its appurtenances, and according to such plans, elevations, and specifications as shall be previously approved by the surveyor for the time being of the lessor, then he the lessor shall and will, when thereunto requested, grant unto the lessee or his nominee or nominees a lease or leases of such messuages or dwelling-houses which shall have been so erected, roofed and covered in, and otherwise partially completed as aforesaid, at an apportioned annual rent to be fixed as hereinbefore mentioned. PROVIDED ALWAYS, &c. [*here insert any special stipulations with regard to the sites, frontage, or laying out, &c., of the intended houses and appurtenant land*]. AND IT IS HEREBY AGREED AND DECLARED that every lease to be granted under these presents shall contain a plan of the premises therein respectively comprised, to be prepared by the surveyor for the time being of the lessors. AND the lessee hereby agrees that he will accept every such lease as shall be granted under these presents, without requiring or investigating the lessor's title, and will execute a counterpart thereof, and pay the costs of every such lease and counterpart, and also the costs, charges, and expenses of the surveyor for the time being of the lessor, which shall have been incurred with respect to the premises comprised in such lease. AND that he will, within —— months from the date of these presents, at his own cost, sufficiently fence off the land hereby agreed to be demised, so as to protect the adjoining land from trespass

Term.

Rents.

Apportionment of Rents.

Leases to be granted.

On completion of intended Houses.

Special Stipulations.

Conditions of Leases.

Lessor's Title not to be required.

Lessee to pay Costs of Leases, &c.

To fence off Land.

(*e*) The form of lease is often prepared at the same time as the agreement, and appended as a schedule thereto; in such a case say, "and shall be in the form appended by way of schedule to these presents, or as near thereto as circumstances will admit."

(*f*) A qualification of the power of re-entry is essential for the protection of the lessee where buildings have been erected at his expense, or premium paid.

APP. B. s. 13.

and damage, and will, previously to requiring any lease to be granted under these presents, fence off the land from time to time required to be leased from the adjoining land, with a substantial wood paling, or with a brick wall of at least nine inches thick, to the satisfaction of the lessor or his surveyor or agent for the time being. AND that he will, within the period of five years from the —— day of ——, 18—, lay out and expend the sum of £—— at the least, by an expenditure of not less than £—— during the first two years ending the —— day of ——, 18—, and the further sum of £—— at the least during the three next succeeding years ending the —— day of ——, 18—, such sums of money to be laid out and expended in the erection and completion on the said land hereby agreed to be demised of good and substantial messuages or dwelling-houses at the cost of £—— at the least for each messuage or dwelling-house with its appurtenances. [*Covenants as to the materials of the houses, as to laying out roads, and as to depositing plans are also usually inserted.*] PROVIDED ALWAYS, and it is hereby agreed and declared, that notwithstanding anything hereinbefore contained in case the lessee shall not in the manner and within the respective periods aforesaid expend in and about the erection of such messuages or dwelling-houses and buildings as aforesaid the sums hereinbefore agreed to be expended in the making and completing and rendering fit for habitation the same upon the ground hereby agreed to be demised, and shall not in all other respects carry out into complete effect the agreements hereinbefore contained and on his part to be performed and observed it shall be lawful for the lessor at any time after such default shall have been made as aforesaid by notice in writing under his hand to be delivered to the lessee or left at his last known place of abode in England, to determine and make void this present agreement and every matter and thing herein contained as to all and singular the land and premises hereby agreed to be demised except such part or parts thereof as shall have been before such notice actually demised: PROVIDED ALSO that nothing in these presents contained is intended to be or shall in any way be held or construed to be or operate as a present demise or to give or vest in the lessee any term of years in the said piece or parcel of land and premises hereby agreed to be demised until such lease or leases thereof shall be actually granted as aforesaid [*insert interpretation clause* (*substituting* "lessor" *for* "landlord"), *see Sect.* 10, *ante, p.* 953]. AS WITNESS, &c.

To expend £—— within 5 Years.

Power on Default for Lessor to determine this Agreement.

Operation of Agreement.

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SECT. 14.—*Concise Lease pursuant to the Leases Act*, 1845, 8 & 9 *Vict. c.* 124 (*g*).

Date and Parties.

Stamp.

Testatum.

Parcels—Land.

Plan.

Messuage.

Exceptions.

Habendum.

THIS INDENTURE, made the —— day of ——, 18—, in pursuance of an act to facilitate the granting of certain leases, BETWEEN A. B. of ——, in the county of —— [esquire], of the one part, and C. D. of ——, in the same county [tailor], of the other part; WITNESSETH, that the said A. B. (*h*) DOTH demise unto the said C. D., his executors, administrators, and assigns. ALL [*here describe the parcels, ex. gr.*]: ALL that piece of land situate at ——, in the parish of ——, in the county of ——, containing [—— square yards, *or* —— acres, —— roods, and —— perches, or thereabouts], now or late in the occupation of —— or his undertenants; [which said piece of land is delineated in the plan drawn in the margin of these presents, *or* hereunto annexed, marked with the letter A. and with the initials of the said parties hereto, and therein edged with a *red* colour, *or say*, and therein coloured *green, or as the case may be* (the position, boundaries, and dimensions thereof appearing in the said plan) (*i*)]. TOGETHER with the [messuage or dwelling-house] and all other erections and buildings on the said land or any part thereof EXCEPT (*k*) ——: FROM the —— day of —— [instant, *or* last, *or* next, *or* 18—], for the term of —— years [and one-half, *or* three-quarters of another year, wanting —— days] thence ensuing:

(*g*) This statutory form of lease has been little, if at all, used. The Conveyancing Act, 1881, which contains other short forms, contains no short form of lease.

(*h*) *If any premium paid here say*, "In consideration of the premium or sum of —— pounds sterling, now paid to him by the said C. D. (the receipt whereof is hereby acknowledged), and of the rent and lessee's covenants hereinafter reserved and contained."

(*i*) A map or plan is not so necessary in a lease as in a conveyance; it may be omitted when more convenient.

(*k*) Here state any exceptions, as agreed on; see post, Sect. 26 *et seq.*

YIELDING therefor during the said term the rent of [*state the rent and mode of payment, ex. gr.*] £—— *per annum* by equal [quarterly, *or* half-yearly] payments on the —— day of —— [the —— day of ——, the —— day of ——], and the —— day of ——, in each year, the first of such payments to be made on the —— day of —— next. THAT the said C. D. covenants with the said A. B. to pay rent; and to pay taxes; and to repair; and to paint outside every *third* year; [*or say*, "and in every three years of the said term to paint all the outside woodwork and ironwork belonging to the said premises, with two coats of proper oil colours in a workmanlike manner;"] and to paint and paper inside every *seventh* year; [*or say*, "and in every seven years of the said term to paint the inside wood, iron and other works now or usually painted with two coats of proper oil colours in a workmanlike manner, and also repaper with paper of a quality as at present, such parts of the premises as are now papered; and also wash, stop, whiten or colour such parts of the said premises as are now plastered"]: and to insure from fire in the joint names of the said A. B. and the said C. D.; to show receipts; and to rebuild in case of fire: And that the said A. B. may enter and view state of repair, and that the said C. D. will repair according to notice: That the said C. D. will not use premises as a shop [*if the premises may be used for other purposes than as a private dwelling-house only, say according to the actual agreement of the parties*, "That the said C. D., his executors, administrators or assigns, will not at any time during the said term, use or exercise, or permit or suffer to be used or exercised in or upon the said premises or any part thereof, any noisome, noxious, offensive or dangerous trade or business whatsoever without the consent in writing of the said A. B., his heirs or assigns"]: And will not assign without leave [*if so agreed, add*, "nor sublet the said premises or any part thereof without such leave"]: And that he will leave premises in good repair: Proviso for re-entry by the said A. B. on non-payment of rent or non-performance [or non-observance] (*l*) of covenants: THE said A. B. covenants with the said C. D. for quiet enjoyment. IN WITNESS whereof the said parties hereto have hereunto set their hands and seals.

App. B. s. 14.

Reddendum.

Covenants by Lessee.

Covenants by Lessor.

Signed, sealed and delivered by the [above *or* within] named ——, in the presence of

*If any premium paid indorse a receipt as follows:* "Received of Mr. C. D. the sum of —— pounds, as within mentioned."

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SECT. 15.—*Lease of a House, &c.: the Tenant to pay all Rates and Taxes (except as otherwise agreed), to pay Interest on Rent in arrear, and to Repair, Paint, Insure, &c.: Option for Tenant to purchase the Fee.*

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN A. B. of, &c. (hereinafter called the lessor), of the one part, and C. D. of, &c. (hereinafter called the lessee), of the other part; WITNESSETH, that in consideration of [the premium or sum of —— pounds sterling, now paid by the said C. D. to the said A. B. (the receipt whereof is hereby acknowledged); and also in consideration of the expense which the said C. D. has incurred and will incur in the erection and finishing of the messuage or tenement hereinafter mentioned. and also in consideration of] the rent and lessee's covenants hereinafter reserved and contained, the lessor DOTH demise unto the lessee, his executors, administrators and assigns ALL [*state parcels and any exceptions or reservations*]: TO HOLD the said premises hereinbefore expressed to be demised, with the appurtenances [except as before excepted (*m*),] unto the lessee, his executors, administrators and assigns from the —— day of —— [last, *or* next, *or* instant, *or* 18—], for the term of —— years (*n*). YIELDING AND PAYING therefor yearly during the said term the rent of £—— sterling by equal quarterly payments on [*state days of payment, ex. gr.* the 25th day of March,

Date and Parties.

Testatum.

Consideration.

Stamp.

Operative Words.

Parcels.

General Words.

Exceptions.

Habendum.

Reddendum.

(*l*) See ante, p. 332.

(*m*) Omit these words if there be no previous exception.

(*n*) If the lease contains a proviso for determining it at the end of the first [seven *or* fourteen] years, or at some other specified period, here say, "determinable nevertheless as hereinafter mentioned," and add the proviso at the end of the deed.

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the 24th day of June, the 29th day of September and the 25th day of December (*o*), the first of such payments to be made on the —— day of —— next, and the last payment to be made in advance —— days before the expiration of the said term]. AND the lessee doth hereby for himself and his assigns, covenant with the lessor (*p*) in manner following, that is to say,

Covenants by Lessee.

To pay Rent;

THAT he the lessee, his executors, administrators and assigns, will during the said term pay the rent hereby reserved at the times and in manner hereinbefore mentioned: [AND FURTHER (*q*), that in case any of the said rent shall at any time or times be and continue in arrear and unpaid for and during one calendar month next after the day hereinbefore appointed for payment thereof, the lessee, his executors, administrators or assigns, shall and will pay to the lessor, his heirs or assigns, interest upon and for such arrears of rent at the rate of *five* pounds per centum per annum, calculated from the day hereinbefore appointed for payment of such rent to the time of the actual payment thereof; such interest to be paid together with the rent in respect whereof it becomes payable, and to be recoverable with expenses by action or distress and sale, in like manner as rent in arrear; but no interest whatever shall be payable in respect of any rent that has not been in arrear and unpaid for one calendar month or more]:

and Interest on Arrears of Rent;

and to pay Taxes;

AND ALSO will pay all taxes, rates, duties, assessments and outgoings whatsoever, whether parochial, parliamentary or otherwise, now charged or hereafter to be charged upon the said demised premises or any part thereof, or upon the rent thereof or any part thereof, or upon the lessor, his heirs or assigns in respect thereof, except landlord's property tax [*here state any further exception or extraordinary charges as agreed on, ex. gr.*, except sewers rates (*r*), *or* including all private improvement rates imposed by virtue of the Public Health Act, 1875 (*s*), and all other rates, taxes, assessments and outgoings payable entirely or in part by the landlord in the absence of a special stipulation to the contrary (*t*)].

and to repair;

AND ALSO will during the said term keep the said demised premises, and all fixtures and additions thereto, in good and substantial repair and condition [except substantial repairs to the main walls, roof and foundations, *or* fair and reasonable wear and tear and damage by fire or tempest excepted (*u*)];

and to paint Outside every —— Year;

AND ALSO will in every [third] year of the said term paint all the outside woodwork and ironwork belonging to the said premises with two coats of proper oil colours [to be approved by the lessor] in a workmanlike manner:

and to paint Inside every —— Year;

AND ALSO will in every [sixth] year of the same term paint the inside wood, iron and other works now or usually painted with two coats of proper oil colours [to be approved as aforesaid] in a workmanlike manner; and also wash, stop, whiten or colour such parts of the said premises as are now plastered [and grain and varnish such parts thereof as are now grained or varnished]:

and to Insure;

AND ALSO will during the said term keep insured the said premises hereby demised to the amount of £—— at least in some respectable fire insurance office (*x*), and will upon the request of the lessor or his heirs or assigns, or of his or their agent, show the receipt for the last premium paid for such insurance for every current year;

to show Receipts:

(*o*) The days of payment may stand in this order, whether the term commences from Christmas or any other quarter day.

(*p*) By ss. 58 and 59 of the Conveyancing Act, 1881, the lessor's heirs or executors, if he be a termor, and assigns have impliedly the benefit of these covenants.

(*q*) This covenant was drawn by the previous Editor, Mr. W. R. Cole, who strongly recommended it as equitable to both parties, and likely to induce tenants to pay their rent with reasonable punctuality, i.e., within one calendar month after it becomes due. "The loss," he considered, "of a month's interest (to say nothing of the subsequent interest till payment) would probably operate more powerfully on a tenant's mind than even a proviso for re-entry for non-payment of rent, &c., such proviso being seldom acted on strictly, except where there is ill-feeling between the landlord or his agent and the tenant." A clause giving interest on the arrears of an annuity has been held unobjectionable; *Tynte* v. *Hodge*, 2 H. & M. 287. The present Editor believes that this covenant has been seldom, if ever, used, but upon consideration retains it here, as at all events a harmless and, in his own opinion, a practicable and useful clause.

(*r*) Ante, 604.

(*s*) Ante, 615.

(*t*) See *e.g.*, Rating Act, 1874, ante, 620.

(*u*) See for liability of tenant, if this exception be omitted, p. 437, ante.

(*x*) Or say, "In the [*name of office or company*], or in some other respectable fire insurance office to be approved of by the lessor, his [heirs, *or* executors, administrators] or assigns."

and as often as the said premises hereby demised shall be damaged by fire or other accident insured against, all the moneys which shall be received by the lessee, his executors, administrators or assigns, in respect of such insurance, shall be expended by him or them in rebuilding or repairing the said demised premises, or such parts thereof as shall be so damaged: [provided, that the deficiency, if any, of such insurance moneys shall not be made up by the lessee, his executors, administrators and assigns personally, and that the covenants hereinbefore contained shall not be applicable to such damage and deficiency (*y*)]: [And that he, the lessee, his executors, administrators or assigns, shall and will at all times during the said term, at his or their own expense, keep all the plate glass of the said demised premises (except, &c., *as may be agreed*, insured to the amount of £—— at the least from all accidents and damage (whether occasioned wilfully, or by negligence or otherwise), in some respectable office for the insurance of plate glass, having an office or agent at —— aforesaid, or in London or Westminster, by a policy or policies in the usual form in that behalf: And shall and will forthwith after any accident or damage to any of the said plate glass, cause the same to be efficiently restored or replaced with other plate glass of equal value at the least, at his or their own expense, with or without the aid of any such insurance money]: And it is hereby agreed that it shall be lawful for the lessor, his heirs and assigns, and all persons authorized by him or them, at all reasonable times, during the said term, to enter the said premises to examine the condition of the said premises; and further, that all defects and wants of reparation contrary to any of the covenants hereinbefore contained which upon any such view shall be found, and for the amendment of which notice in writing (*z*) shall be left at the premises, the lessee, his executors, administrators and assigns, will, within three calendar months next after every such notice, well and sufficiently repair and make good: And also, that the lessee, his executors, administrators and assigns, will not use or suffer to be used the said premises or any part thereof as a shop, warehouse or other place for carrying on any trade or business whatsoever, or otherwise than as a private dwelling-house without the consent in writing of the lessor, his heirs or assigns: And will not without the like consent assign or underlet the said premises or any part thereof (otherwise than by will or codicil or by sub-letting from year to year, or for any less term): [Provided always, and it is hereby expressly agreed by and between the parties hereto that such consent as last aforesaid shall not be withheld without some reasonable objection to the respectability or responsibility of the proposed assignee or sub-lessee (*a*)] And further, that the lessee, his executors, administrators or assigns, will, at the expiration or other sooner determination of the said term, peaceably surrender and yield up unto the lessor, his heirs or assigns, the said premises hereby demised with the appurtenances, together with all buildings, erections and fixtures now or hereafter to be built or erected thereon (*b*) in good and substantial repair and condition in all respects [reasonable wear and tear and damage by fire only excepted (*c*)]: Provided always, and it is expressly agreed, that if the rent hereby reserved, or any part thereof, shall be in arrear for twenty-one days (although no formal demand shall have been made thereof (*d*); or if there shall be a breach of any of the lessee's covenants herein contained, or if the lessee, his executors, administrators or assigns, shall while the said premises shall remain vested in him or them be adjudicated bankrupt (*e*), or if his or their interest shall be taken in execution, then and in any of such cases it shall be lawful for the lessor, his heirs or assigns, to re-enter upon the said premises,

and to rebuild in case of Fire.

Insurance of Plate glass.

Lessor may enter to view.

Fixtures and state of Repair.

Lessee to Repair according to Notice.

Premises to be used only as a private Dwelling House, and not as a shop, &c.

Not to assign [or underlet] without Leave.

To leave in good Repair.

Proviso for Re-entry.

(*y*) This seems to be fair. The "usual" covenant runs the other way. See, for instance, the covenant as to insurance of plate glass below.

(*z*) See forms of such notice, post, Appendix C., Nos. 13, 14.

(*a*) See Chap. XVII., Sect. 2, ante; and for other forms of this provision see Sects. 35 and 36. The form in the text is taken (with modifications) from *Sheppard* v. *Hong Kong and Shanghai Banking Corporation*, 20 W. R. 459.

(*b*) (Except tenant's fixtures.)

(*c*) These words are in 8 & 9 Vict. c. 124, Form No. 10, column 2; ante, 903; but they are unusual, especially where the tenant covenants to insure.

(*d*) These words are sufficient to dispense with a formal demand of the rent; ante, p. 337; but perhaps the best form is "whether lawfully demanded or not."

(*e*) As to proviso for re-entry on the tenant's bankruptcy, see *Hodgkinson* v. *Crowe*, L. R., 19 Eq. 591, and p. 130, ante. For other forms of proviso for re-entry, see Sects. 45, 46.

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Option for Tenant to purchase the Fee.

and thereupon the said term shall absolutely determine: PROVIDED ALSO, that if at any time before the expiration of [seven] years from the date of these presents the lessee, his executors, administrators or assigns, shall be desirous to purchase the fee simple and inheritance of the said premises hereby demised at or for the sum or price of £——, and of such desire shall give to the lessor, his heirs or assigns, or leave at his usual or last known place or places of abode in England not less than six calendar months' previous notice in writing, then the lessor, his heirs or assigns, shall and will at the expiration of such notice, and on payment of the said sum of £——, and of all rent then accrued due, and at the cost in all respects of the lessee, his executors, administrators or assigns, well and effectually convey and assure the said premises and the inheritance thereof in fee simple unto such person or persons as the lessee, his executors, administrators or assigns, shall direct.

Covenant by Lessor for quiet Enjoyment.

AND the lessor doth hereby covenant with the lessee that he (*f*) may peaceably enjoy the said demised premises for the said term hereby granted, without any interruption or disturbance (except in accordance with the power of entry to view, or with the proviso for re-entry hereinbefore contained), from or by the lessor, his heirs or assigns, or any other person or persons lawfully claiming by, from or under him, them or any of them.

In witness, &c.

IN WITNESS whereof the said parties to these presents have hereunto set their hands and seals, the day and year first above written.

Attestation.

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SECT. 16.—*Lease of a House by Joint Tenants—Power for Landlord to give Orders to view previous to determination of Tenancy—Landlord to Insure.*

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN A. B. of &c., and C. D., of, &c. (hereinafter called the lessors), of the one part, and E. F. of, &c. (hereinafter called the lessee), of the other part: WITNESSETH that, in consideration of the rent and lessee's covenants hereinafter reserved and contained, the lessors do hereby demise unto the lessee, his executors, administrators and assigns, ALL [*state parcels* (*g*), *and any exceptions or reservations* (*g*), *and insert habendum, reddendum, and covenants by lessee* "with the lessors," *to pay rent and interest on arrears of rent, and taxes, and to repair and paint, to permit lessor to view, and to repair according to notice*] (*h*):

Power for Lessor to give Orders to View.

PROVIDED ALWAYS, AND IT IS HEREBY FURTHER AGREED, that during the last three calendar months of the said term it shall be lawful for the lessors or their agents to grant to any person or persons orders to inspect the said premises with a view of taking the same, and that the lessee shall and will at all reasonable times during such three months as aforesaid permit the person or persons named in such order to go over and inspect the said premises accordingly [*lessee's covenants to use as private house only, not to assign, &c. without leave, to leave in good repair and proviso for re-entry* (*h*)].

Lessors' Covenants. To insure.

AND the lessors do hereby covenant with the lessee in manner following, that is to say, THAT the lessors, or some or one of them, shall and will during the said term, at his and their own costs, insure and (unless in case any policy or policies shall be vacated or forfeited by any act of the lessee, the executors, administrators or assigns) keep insured the said premises hereby demised against loss or damage by fire to the amount of £—— at least in some respectable insurance office, and will upon the request of the lessee, his executors, administrators or assigns, show the receipt for the last premium paid for such insurance for every current year; and further, in case the said premises hereby demised or any part thereof shall be damaged or destroyed by fire, that all the moneys which shall be received by their lessors, their heirs or assigns or any of them in respect of such insurance, shall with all convenient speed be expended by them or him in rebuilding or repairing the said demised premises or such parts thereof as shall be so damaged or destroyed, and in case such moneys shall be insufficient for such purpose, shall and will make good such deficiency out of their and his own moneys [*or* PROVIDED

(*f*) The words "paying the rent and performing the covenants," &c., which appear in this covenant as usually framed (see e.g. p. 720, ante), appear from *Edge* v. *Boileau*, 34 W. R. 103, ante, 722, to be useless, and are therefore omitted.

(*g*) See post, 973. For implied "general words," see ante, 152.

(*h*) See ante, 959.

ALWAYS that the lessee, his executors, administrators and assigns shall continue liable under the general covenant to repair hereinbefore contained to make good any damage which the moneys so received in respect of insurance as aforesaid shall be insufficient to repair]. AND that they, the lessors, or some or one of them, will during the said term pay all tithe, rents-charge and land-tax for the time being payable in respect of the said premises hereby demised. AND that the lessee, paying the rent, &c. [*covenant for quiet enjoyment, ante, p.* 960]. IN WITNESS, &c. App. B. s. 16. To pay tithe. Quiet enjoyment.

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SECT. 17.—*Sub-lease subject to the Covenants in Original Lease (k); Ground Landlord being made a Party.*

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN A. B. of, &c. [*the under-lessor*], of the first part, C. D. of, &c. [*the ground landlord*], of the second part, and E. F. of, &c. [*the under-lessee*], of the third part: WHEREAS, by an indenture of lease dated the —— day of —— 18—, and expressed to be made between C. D. of [&c.], of the one part, and the said A. B., of the other part, for the consideration therein mentioned the said C. D. did demise unto the said A. B. all that [*describe parcels from the lease*] with the appurtenances [except, &c., *as in the lease*]: To hold the same unto the said A. B., his executors, administrators and assigns, from the —— day of ——, 18—, for the term of —— years, at the yearly rent of £——, payable [quarterly] as therein mentioned, and subject to the covenants and conditions therein contained on the part of the said A. B., his executors, administrators and assigns, to be performed and observed, including a covenant by the lessee not to assign or underlet the said premises without the consent in writing of the said C. D., his heirs or assigns: AND WHEREAS the said E. F. hath agreed with the said A. B. for an under-lease of the said demised premises, upon the terms and conditions hereinafter expressed, and the said C. D. has agreed to join in these presents in manner hereinafter appearing for the purpose of giving his consent in writing to the under-lease intended to be hereby granted: NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement [and in consideration of the sum of —— pounds sterling, now paid by the said E. F. to the said A. B. by way of premium for these presents, the receipt whereof the said A. B. doth hereby acknowledge], and in consideration of the rent hereinafter reserved, and of the covenants and conditions hereinafter contained or referred to on the part of the said E. F., his executors, administrators and assigns, to be respectively paid, performed and observed, HE the said A. B. (hereinafter called the lessor), with the consent in writing of the said C. D. (testified by his executing these presents), DOTH hereby demise and lease unto the said E. F. (hereinafter called the lessee), his executors, administrators and assigns, ALL THAT ["the messuage or tenement," *or as the case may be*], and all and singular other the premises described in and demised by the said recited indenture of lease, with the appurtenances (except as in the same indenture is excepted): TO HOLD [the said messuage or tenement and] all and singular [other] the premises hereby demised or intended so to be with the appurtenances (except as aforesaid) unto the lessee, his executors, administrators and assigns, from the —— day of —— [*next* or *last*], for the term of —— years [*or* for the residue of the said term of —— years (except the last three days thereof)], determinable nevertheless as is hereinafter mentioned): YIELDING AND PAYING [*insert reddendum and lessee's covenant to pay rent and other covenants to be observed by the lessee* (*m*),—*see ante*,

Date and Parties. Recital of Lease. And of Contract for Sub-lease. Testatum. Stamp (*l*). Operative Words. Parcels. Habendum. Reddendum.

(*k*) When the consent of the ground landlord is necessary to an under-lease, it is advisable, if possible, that he should be a party. A sub-lease is, however, frequently drawn without reciting the original lease or making the ground landlord a party, his licence, if required, being given by a separate document.

(*l*) See Stamp Act, 1891, App. A., p. 936, ante.

(*m*) The lessee's covenants will be similar to those contained in the original lease; which it is intended that the lessee should observe, substituting the lessor for the ground landlord, and the lessee for the lessor, who is the original lessee: the covenants not to assign or underlet, and not to erect buildings, &c. will be "without the consent in writing of the lessor, his executors, administrators, or assigns, and of the said C. D., his heirs or assigns, or other the superior landlord or landlords for the time being of the said premises hereby demised;" and the power to enter

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To perform Covenants and Conditions in original Lease;

(except as to the Rent thereby reserved);

and to indemnify Sub-Lessor therefrom, &c.

Additional Covenants (if any).

Proviso for Re-entry.

Covenants by Sub-Lessor;

for quiet Enjoyment;

and to pay Rent reserved in original Lease.

To indemnify Sub-Lessee therefrom.

To produce original Lease (*o*).

Testatum.

Parcels.

*p.* 958]: AND ALSO will during the term hereby granted perform and observe all and singular the covenants and conditions contained in the said hereinbefore recited indenture of lease, and on the part of the said A. B., his executors, administrators and assigns, to be respectively performed and observed, so far as the same respectively relate to the said premises hereby demised, except the covenant for payment of the said rent of £—— by the same indenture reserved as aforesaid, and except the covenant [*here mention any other covenant or covenants in the original lease which the under-lessee is not to perform:* ex. gr., "to insure and keep insured the said premises, and all covenants touching or relating to any such insurance," *or as the case may be*]: AND ALSO will keep indemnified the said lessor, his executors, administrators and assigns, and his and their lands, tenements, goods and chattels respectively of and from the same covenants and conditions respectively (except as aforesaid), and all actions, entries, re-entries, forfeitures, losses, damages, costs, charges and expenses whatsoever, (including costs of defence as between solicitor and client) in anywise relating thereto: AND ALSO will [*here insert such further or additional stipulations (if any) as may have been mutually agreed on between A. B. and E. F.*]. PROVIDED ALWAYS [*insert proviso for re-entry—see ante, p.* 959]. AND the lessor doth hereby covenant with the lessee that he, paying the said yearly rent of £—— hereby reserved and performing and observing all the covenants and conditions hereinbefore contained or referred to (except the said covenant for payment of the said rent of £——, reserved and contained in the said recited indenture of lease), shall and may *insert usual qualified covenant for quiet enjoyment, ante, p.* 960]: AND FURTHER, that the lessor, his executors, administrators or assigns will during the continuance of the said term hereby granted pay the said yearly rent of £——, reserved in the said recited indenture of lease, at the times and in manner therein appointed for payment thereof, and will perform and observe the covenants on his and their part to be observed and contained in the same lease to [*here insert any covenants contained in the head lease which it is intended the lessee should perform, e.g., to insure*] or (*n*) keep harmless and indemnified the lessee, his executors, administrators and assigns, and his and their lands, tenements and chattels respectively of and from the same rent and every part thereof, and all actions, suits, distresses, entries, re-entries, forfeitures, losses, damages, costs, charges and expenses whatsoever (including costs of defence as between solicitor and client) in anywise relating thereto: AND ALSO, will from time to time and at all times during the continuance of the said term hereby granted, unless prevented by [fire or other] inevitable accident, at the request and costs of the said E. F., his executors, administrators or assigns, produced to him or them, or to his or their solicitor or agent or counsel, or to such other person or persons as he or they shall direct, as occasion shall require, the said hereinbefore-recited indenture of lease, in manifestation, defence and support of the title of the said E. F., his executors, administrators and assigns, to the said hereby demised premises; and at such like request and costs make and grant true and attested or other copies, extracts or abstracts of the same indenture, and will permit such copies, extracts or abstracts to be compared with the said original lease. IN WITNESS, &c.

Attestation.

Receipt for premium (if any).

and view, &c., will be given to "the lessor, his executors, administrators or assigns, and the superior landlord or landlords for the time being of the said premises hereby demised."

(*n*) If the word "and" instead of "or" be here used, there will be two distinct covenants, viz.:—1. To pay the rent. 2. To indemnify. *Saward* v. *Anstey*, 2 Bing. 519; *Piggott* v. *Stratton*, 1 De Gex, F. & J. 33; 29 L. J., Ch. 1. Whereas the word "or" makes only one covenant in the alternative. The difference is material.

(*o*) The sub-lessee should have an attested copy of the original lease.

SECT. 18.—*Agricultural Lease—Concise Form* (*q*). APP. B. s. 18.

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN A. B. of, &c. (hereinafter called the lessor), of the one part, and C. D. of, &c. (hereinafter called the lessee), of the other part; WITNESSETH, that, HE the lessor DOTH hereby demise unto the lessee, his executors, administrators and assigns, ALL [*state parcels, ex. gr.*, that farm-house, situate in the parish of ——, in the county of —— called —— Farm, with all those three cottages, and all those several pieces or parcels of land particularised in the schedule hereto, containing by estimation eighty acres or thereabouts, and now or late in the occupation of ——]: (EXCEPT and always reserved unto the lessor, his heirs and assigns, all timber and timberlike trees, pollards and saplings now or hereafter growing on the said demised premises, and also free liberty for him and them, with workmen and others, at all reasonable times, with horses, carts and carriages, to fell, cut down, square, saw and carry away the same, and to enter, pass and re-pass into, upon and from the said demised premises, compensation being paid for any damage done to the corn, grain or seeds growing on the same)(*r*): TO HOLD the said premises hereby demised unto the lessee, his executors, administrators and assigns, from the —— day of —— next, for the term of [seven] years thence next ensuing: YIELDING AND PAYING therefor yearly during the said term the yearly rent or sum of £——, by equal half-yearly payments, on the —— day of —— and the —— day of —— in each year, clear of all deductions (except for land tax, property or income tax and quit-rent): AND the lessee, for himself and his assigns, doth hereby covenant with the lessor that he the lessee, his executors, administrators or assigns will pay the said rent of £—— hereby reserved, on the days and in manner hereinbefore mentioned for payment thereof: AND ALSO will at all times during the said term pay and discharge all tithes, tithe commutation, rent-charge, and also all taxes, rates, duties and assessments, at any time during the said term imposed on the said premises (except land tax, property tax, and quit-rents); AND ALSO will from time to time and at all times during this demise well and sufficiently repair the premises hereby demised (damage by fire or tempest excepted): and also fetch and bring to the said demised premises all such materials necessary for the repair of the premises, from any distance not exceeding five miles therefrom: AND the said farm-house and premises hereby demised, and every part thereof, being so repaired, shall and will at the end or other sooner determination of the said term peaceably leave and yield up, damage by fire or tempest excepted: AND ALSO shall and will purchase, bestow and bring upon the said lands one load of good manure for every ton of hay or clover sold off the said premises: AND ALSO shall and will leave one-third of the arable land hereby demised fallow, or in pea or bean stubble, at the end of the said term: AND ALSO shall and will at all times during the said term manage and cultivate the said lands in a good and husbandlike manner, except that the lessee, his executors, administrators or assigns, shall be at liberty to break up any of the pasture land hereby demised, without compensation or increased rent therefor: AND ALSO, that it shall be lawful for his lessor, his heirs or assigns, with or without workmen and others, to enter upon the said premises twice or oftener in every year of the said term, to view the state of repair and condition thereof, and to do all such painting and repairs as he or they may have occasion to do; PROVIDED ALWAYS [*here insert proviso for re-entry, p.* 959]: AND the lessor hereby covenants with the lessee, his executors, administrators and assigns, that he the lessor will repair all the buildings, gates, fences and hedges, and paint and tar the same whenever required, before the 11th day of October next: AND ALSO will grub in a proper manner all the hedgerows belonging to the said premises when required by the lessee, his executors, administrators or assigns: [AND ALSO, that he will pay and bear all tithes and rent-charge in lieu of tithes chargeable during the said term on the said land and premises (except the extra tithe rent-charge on hops)]: AND ALSO, that he will paint the external part of the said farm-house, with the buildings and cottages on the said farm, and all the gates and fences, twice

Date and Parties.
Testatum.
Parcels.
Exceptions of Timber, &c.
Habendum.
Reddendum.
Covenants by Lessee to pay Rent.
Rates and Taxes;
to Repair;
to leave in Repair.
Hay and Clover.
Fallows.
To cultivate in husbandlike manner.
Liberty to break up Pasture.
Liberty to Lessor to enter and view.
Proviso for Re-entry.
Covenants by Lessor.
To do certain Repairs, &c.
To grub Hedgerows.
To pay Tithes, &c.
To paint.

(*q*) Taken, with variations, from *Beer* v. *Santer*, 10 C. B., N. S. 435. It is in many respects more favourable for the tenant than is usual.

(*r*) For forms of reservation of timber, minerals and sporting rights, see pp. 968, 969.

App. B. s. 18.

To drain part.

Also Residue upon certain Terms.

To find Materials and Rough Timber for Repairs, &c.

To purchase at end of Term the Growing Crops, Stock in Trade, &c.

Proviso enabling Lessee to determine Term as to part of the Land (*t*).

Proviso enabling Lessee to determine Term in 3 or 5 Years.

during the said term [or oftener] if required by the lessee, his executors, administrators, or assigns: AND ALSO, that he and they will drain with proper drain-tiles, one rod apart, ten acres of the land now in rye grass, at his and their costs, except the carriage of the said drain pipes, which is to be borne and paid by the lessee: and will drain the remainder of the lands hereby demised in manner aforesaid and except as aforesaid (*s*), upon being paid a further yearly rent of 5*l.* for every 100*l.* so expended, and so in proportion for any less sum expended, and which the lessee hereby agrees to pay accordingly from the time of such draining; AND ALSO, that the lessor, his heirs or assigns, will find and provide all such materials as may be necessary for repairs, and all rough timber within five miles of the said premises, and will pay half-part of the labour on such timber and repairs, the lessee paying the other half-part: AND ALSO, that he the lessor, his heirs or assigns, or the succeeding tenants, shall and will take and pay for, to the lessee, his executors, administrators or assigns, the growing crops, and all hay, clover, straw and manure, at sale prices, household furniture, live and dead stock, and all machinery necessary for carrying on a farm of eighty acres that shall be erected by the lessee on the said premises, and effects which shall be in, upon and about the said messuage, lands and premises at the expiration of the said term, at a fair valuation thereof to be made by two valuers, one to be chosen by each party, or in the event of their differing, then by a third person to be chosen by such valuers: PROVIDED ALSO (*t*), that in the event of the lessor, his heirs or assigns, being desirous of putting an end to this demise, as far as it affects part of the said lands called ——, containing about [ten acres], at the end of the first five years of the said term, it shall be lawful for him or them so to do, upon giving to the lessee, his executors, administrators or assigns, notice of such desire at any time; and thereupon a reduction of [twenty shillings per acre, and so in proportion for less than an acre] shall be made from the said rent of ——: PROVIDED ALSO, that if the lessee, his executors, administrators or assigns, shall be desirous of putting an end to this demise at the end of the first three or five years of the said term of seven years, it shall be lawful for him and them so to do, upon giving to the lessor, his heirs or assigns, six calendar months' notice in writing of such desire, whereupon this demise shall cease, determine and be at an end as if by effluxion of time, anything hereinbefore contained to the contrary notwithstanding. IN WITNESS, &c.

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SECT. 19.—*Public-house Lease—Lease for —— years—Covenant by Tenant to reside and conduct Business—Proviso for re-entry on Forfeiture of Licence, &c.*

Parties.

Testatum.

Parcels.

Habendum.

Reddendum.

Covenants by Tenant.

To apply for Licence.

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN A. B. of —— and C. D. of —— (in which indenture the term "landlord" means the said A. B., and includes the heirs and assigns of the said A. B., and the term "tenant" means the said C. D. and includes the executors, administrators and permitted assigns of the said C. D.); WITNESSETH, that the landlord doth demise unto the tenant ALL THAT public-house known as the Swan Inn, situate in —— Street, in the parish of ——, in the county of ——; together with all easements and appurtenances whatsoever, TO HOLD the said premises unto the tenant, from the —— day of ——, 18—, for the term of —— years thence next ensuing, YIELDING AND PAYING [*insert reddendum*]: AND the tenant hereby covenants with the landlord as follows: That he will pay the said net rent as aforesaid: AND will [*insert covenants to repair, keep in repair, &c., as agreed on. See ante, p. 958*]: AND will apply for and endeavour to obtain the licence or renewal of licences which may for the time being be necessary for the opening and keeping open during the tenancy the said premises as a house for the sale of ale, beer, wine and spirits to be consumed on or off the premises; AND will, so long as the necessary licences can be obtained for the purpose, use the said premises as a licensed inn or victualling house only: AND will at all times during the said term reside on the premises hereby demised, and will personally conduct the business of the said public-

(*s*) If the words "and except as aforesaid" be omitted, the landlord must pay for the carriage of the drain pipes for the remainder of the land; *Beer* v. *Santer*, 10 C. B., N. S. 435.

(*t*) See Ag. Hold. Act, s. 41, p. 361.

house in a proper and orderly manner, not permitting drunkenness, disorder, gaming or unlawful games therein: AND will not do or suffer to be done upon the premises anything which may be or grow to be an annoyance or damage or disturbance to the lessors or their tenants, or whereby such licences as aforesaid, or any of them, may be forfeited or suspended or a renewal thereof withheld: AND will not assign or sub-let (*x*) the premises hereby demised or any part thereof, without on each occasion first obtaining the consent in writing of the landlord: AND the landlord covenants with the tenant as follows: That he will forthwith insure and during the said term keep insured the said premises against fire to the amount of £—— at least in the —— Fire Office or some other respectable fire office in the joint names of the landlord and tenant, and as often as the said premises shall be destroyed or damaged by fire, that the landlord will expend the moneys received from such insurance office in rebuilding or reinstating the same, it being agreed that the landlord shall not be liable to rebuild or reinstate the premises out of his own moneys in any case whatever: AND that [*insert covenant for quiet enjoyment, p.* 960]: PROVIDED ALWAYS, and these presents are upon the express condition that, if the tenant fail to obtain a licence for the sale of intoxicating liquors to be consumed both on and off the premises, or if and whenever any part of the rent hereby reserved shall be in arrear for twenty-one days, whether having been legally demanded or not, or in case of breach or non-performance or non-observance of any or either of the covenants on the part of the tenant hereinbefore contained [except the covenants to apply for licences and to sell liquors so far as the same relate to spirits (*y*)], or if and whenever the tenant shall be adjudicated bankrupt, or if the licence of the tenant shall be forfeited, or if the tenant shall be convicted of any offence against the existing or future Licensing Acts [which shall be recorded on the licence of the tenant] (*z*): then and in any of such cases the landlord may enter upon the premises hereby demised or intended to be demised, and the same may have again, repossess, and enjoy as of his former estate. IN WITNESS, &c.

App. B. s. 19.

Not to Assign.

Covenants by Landlord.

To Insure.

Quiet Enjoyment.

Proviso for Re-entry.

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SECT. 20.—*Lease by a Tenant for Life, &c., under Settled Land Act*, 1882 (*ante, p.* 7).

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN A. B. of ——, in the county of —— [esquire], of the one part, and C. D. of ——, in the county of —— [farmer], of the other part: WHEREAS the said A. B. is entitled to the receipt of the rents and profits of the hereditaments hereinafter described and intended to be hereby demised, as tenant thereof for his own life, by virtue of a settlement created [by the will of E. F., late of ——, esquire, deceased, bearing date on or about the —— day of ——, 18—, and proved at ——, on or about the —— day of ——, 18—, *or*, by an indenture dated on or about the —— day of ——, 18—, and made or expressed to be made between, &c., *as the case may be*]: WITNESSETH, that HE the said A. B. DOTH by these presents, made in exercise and execution of the power vested in him by the Settled Land Act, 1882, and of all other powers in anywise enabling him in this behalf, demise and lease unto the said C. D., his executors, administrators and assigns, ALL [*describe parcels*, EXCEPT, and always reserved unto the said A. B. and his assigns, *here state any exceptions as agreed on* (*a*),] TO HOLD the said [*short general description of property, ex. gr.*, "farm and lands"] unto the said C. D., his executors, administrators and assigns, from the —— day of —— last (*b*), for the term of —— years (*c*) thence next ensuing, YIELDING AND PAYING therefor yearly and every year during the said term (*d*) the rent of

Date and Parties.

Recital of Lessor's Title.

Agreement for Lease.

Testatum.

Operative Words.

Parcels.

Exceptions.

Habendum.

Reddendum.

(*x*) For form of stipulation for leaving assignment or sub-lease with solicitor of ground landlord for registration, see *Brooks* v. *Drysdale*, 3 C. P. D. 53.

(*y*) This is suggested by the increase of duties under the Inland Revenue Act, 1880 (43 & 44 Vict. c. 20, ss. 40—43).

(*z*) See *Wooler* v. *Knott*, 1 Ex. D. 625; and p. 714, ante.

(*a*) See forms, post, pp. 968, 969.

(*b*) As to date see ante, 7.

(*c*) Not exceeding 21 years, ante, 7.

(*d*) If necessary, here say, "except such part thereof as elapsed on or before the —— day of —— last." Back rent may be considered as a benefit to the tenant for life in the nature of a fine or premium, that should be avoided.

App. B. s. 20.

£——, by equal [quarterly *or* half-yearly] payments, on the —— day of —— &c., *state days of payment*, the first of such payments to be made on the —— day of —— next: AND the said C. D. doth hereby for himself, and his assigns covenant with the said A. B., in manner following, that is to say, that he the said C. D., his executors, administrators or assigns, will, during the said term, pay unto the said A. B. or his assigns, the rent hereby reserved, at the times and in manner hereinbefore mentioned and appointed for payment thereof: AND FURTHER [*here insert such usual and proper covenants as the lessor shall think fit, and also a condition of re-entry on non-payment for a period of* 28 *days, or some less period, of the rent reserved—All the covenants should be made with the said A. B.* "and his assigns"—*And after the usual qualified covenants for quiet enjoyment, add the following proviso*, viz.]: "Provided always, and it is hereby agreed and declared, that neither the heirs, executors nor administrators of the said A. B. (but only his assigns) shall be liable for any breach of the above covenant happening after the death of the said A. B.: AND it is hereby declared and agreed, that whenever the assigns of the said A. B. are hereinbefore mentioned, such words 'assigns' shall be construed and deemed and taken to include the persons or person for the time being entitled to the reversion of the said demised premises immediately expectant upon the determination of the said term hereby granted, unless there be something in the subject or context repugnant to such construction" (*c*). IN WITNESS, &c.

Covenants by Lessee.

Condition of Re-entry.

In witness, &c.

(Indorsement.)

Received this —— day of ——, 18—, of Mr. C. D., a counterpart of the within-written indenture duly executed by him.

Witness,
E. F.

A. B.

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SECT. 21.—*Lease of Right of Shooting.*

THIS INDENTURE made the —— day of ——, 18—, BETWEEN A. B. of, &c. (hereinafter called the lessor) and C. D. of, &c. (hereinafter called the lessee): WITNESSETH that in consideration of the rent and lessee's covenant hereinafter reserved and contained THE said lessor doth hereby demise unto the said lessee ALL THAT the sole and exclusive right (subject only to the concurrent rights of tenants under the Ground Game Act, 1880) of shooting, fowling, coursing, fishing and sporting in, over and upon the farms, lands, woods and plantations mentioned in the schedule hereunder written and situated in the several parishes mentioned in the same schedule, and containing altogether —— acres or thereabouts, and also all that keeper's lodge situate at ——, now in the occupation of E. F.: TO HOLD the said premises unto the said lessee from the —— day of —— last past, for the term of —— years, if the said lessee shall so long live: YIELDING AND PAYING therefor the yearly rent of £——, by equal quarterly payments on the 25th day of March, the 24th day of June, the 29th day of September, and the 25th day of December in each year, with a proportionate part of the said rent up to the day of the decease of the said lessee within the said term, the first payment to be made on the —— day of —— next: AND the said lessee doth hereby covenant with the said lessor, in manner following, that is to say, that he the lessee will pay the said rent at the times hereinbefore mentioned, and will also pay all rates and taxes payable in respect of the said keeper's lodge: AND will exercise the said rights and privileges hereby demised in a proper and sportsmanlike manner: AND will during the said term at his own cost keep at least one effective gamekeeper who shall live in the said keeper's lodge: AND will at all times during the said term keep up a proper stock of game, and particularly of hen pheasants, and will to the best of his power preserve the eggs and young of game birds from being destroyed or injured; AND will not at any time assign or underlet, or otherwise part with the said rights and privileges, and other the premises hereby demised, or any of them, without the consent in writing of the lessor, his heirs or assigns, first had and obtained for that purpose: AND the said lessor doth hereby covenant with the said lessee that he paying the —— rent hereby reserved, and observing and performing the covenants hereinbefore

Parcels.

Covenant to keep up Game.

(*c*) As to the necessity for this proviso, see *Williams* v. *Burrell*, 1 C. B. 402.

on his part contained, shall and may peaceably possess and enjoy the rights and privileges and other the premises hereby demised without any interruption or disturbance from or by the lessor, his heirs or assigns, or any person or persons lawfully claiming through, under or in trust for him or them or any of them: AND that if this lease shall determine by the death of the said lessee during the said term, he the said lessor, his heirs or assigns, will pay or allow to the executors, administrators and assigns of the said lessee all expenses incurred by the said lessee in preserving and rearing the game from the end of the preceding season up to the day of the death of the said lessee. IN WITNESS, &c. App. B. s. 21.

[*The Schedule above referred to.*]

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SECT. 22.—*Parcels—House in a Town.*

ALL that messuage or dwelling-house [with the coach-house, stables, yard, garden, and outbuildings thereto belonging] situate and known as No. ——, —— Street in the parish of —— in the county of ——, and now in the occupation of E. F.

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SECT. 23.—*Parcels—Piece of Land.*

ALL that piece or parcel of land situate at —— in the parish of —— in the county of ——, and containing by admeasurement —— acres, —— roods, and —— perches or thereabouts, as the same is delineated in the plan drawn in the margin of these presents and therein coloured ——. AND ALSO the messuage or dwelling-house and outbuildings now standing on part of the same piece or parcel of land and also delineated in the said plan and therein coloured ——.

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SECT. 24.—*Parcels—Farm.*

ALL that messuage or farm-house and farm with the —— cottages (now let with the farm), barns, stables, sheds, buildings, and several closes and pieces or parcels of land thereto belonging, known as the —— farm, situate in the parish of —— in the county of —— and containing by admeasurement —— acres, —— roods, and —— perches or thereabouts, and late in the occupation of ——, and all which premises are more particularly described in the schedule hereunder written and delineated with the chattels in the map or plan drawn in the margin of these presents and therein coloured —— [such schedule and map being respectively extracts from the apportionment of tithe commutation rent-charge for the parish of —— aforesaid and from the map referred to in the same apportionment].

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SECT. 25.—*Grant of a Right of Road (in a Lease).*

*Together* with full and free liberty, licence, power and authority for the lessee, his executors, administrators and assigns, at all times during the continuance of this demise for him and them and his and their agents, servants and workmen, and the tenants and occupiers for the time being of the land hereby demised, or of any buildings to be erected thereon, at his and their will and pleasure, and whether by night or by day, and for all legitimate purposes whatsoever to go and return, pass and repass with or without horses, carts, waggons, wains and carriages of any description laden or unladen, and also to drive all manner of cattle and beasts whatsoever, in, along, over and through [ten] feet at least in breadth of certain closes of land of him the lessor, situate and adjoining the [most easterly end and the south-easterly side] of the said plot of land hereinbefore described and hereby demised, in order to afford free egress and regress from and to the said plot of land hereby demised, and the high road leading from —— to ——, and which said intended right of road or way, together with

Appurtenances.
Right of Road.
With Horses, Carts, &c.
And with Cattle, &c.

APP. B. s. 25.

Road delineated in Plan.

its course or direction, is delineated and set forth in the said plan hereupon indorsed and therein coloured *brown*, the lessee, his executors, administrators and assigns, nevertheless making good from time to time all damage done to the said land, the right of road over which is so granted as aforesaid.

SECT. 26.—*Exception and Reservation of Use of Roads.*

EXCEPT and always reserved unto the lessor [his heirs and assigns *or* executors, administrators and assigns], and his and their lessees and tenants in common with the lessee, the full and free use of all roads and ways which may at any time during the term hereby [agreed to be] granted, be made or set out upon or over any part or parts of the said land hereby [agreed to be] demised; he the lessee, his executors, administrators and assigns, repairing, keeping and leaving the same in good repair so long as the same shall continue private roads or ways.

SECT. 27.—*Exception and Reservation of Use of Drains, &c.*

EXCEPT and always reserved unto the lessor [his heirs and assigns *or* executors, administrators and assigns], and his and their lessees and tenants, free passage and running of water and soil coming or to come from any other lands or buildings of the lessor, his [heirs *or* assigns, *or* executors, administrators or assigns], adjoining or near to the premises hereby demised, in and through the channels, drains, sewers and watercourses belonging or to be made thereto (*f*).

SECT. 28.—*Exception and Reservation to Landlord of all Timber and Trees, Mines, Minerals, Quarries and Game, &c.*

Exceptions of Timber and Trees.

EXCEPT and always reserved unto the lessor, his heirs and assigns, all timber and timberlike trees and trees likely to become timber and all other trees whatsoever, whether now standing or being, or which hereafter during the said term shall be standing or being upon the said demised premises: AND ALSO all

Mines, Minerals and Quarries.

mines, minerals and quarries: AND ALSO (subject only to the concurrent rights of the lessee under the Ground Game Act, 1880 (*g*)) all game and wild fowl,

Game.

woodcock, snipes, quails, landrails [deer] and rabbits, and also the sole liberty

Sporting.

of hunting, coursing and shooting in, upon, through and over the said lands and premises, and at his and their free will and pleasure, and for that purpose it is hereby declared and agreed that the lessor, his heirs and assigns, and his and their friends (*h*), companions and servants, with dogs and horses, from time to time, at all seasonable times of the year during the term hereby granted, may enter into and upon the said demised premises or any part thereof, to hunt, course and shoot thereon, and the game and wild fowl, woodcocks, snipes, quails, landrails and rabbits there killed and taken to have and carry away to the use of the lessor, his heirs and assigns, he and they doing no more damage to the said lands and premises or the crops thereon growing and being than what necessarily happens in killing, taking and following such game and other

Nests, Eggs and young Birds to be preserved.

animals: AND ALSO, that he the lessee, his executors, administrators and assigns, shall and will from time to time and at all times during the said term use his utmost endeavours to preserve the nests and eggs of all partridges and pheasants, as well as the young of those birds and of all manner of game, free from injury and from being taken and removed from the places where the same may be found, except for the necessary provision thereof, and when such removal shall become necessary, then the lessee, his executors, administrators

(*f*) This exception extends to water and soil coming *through* the adjoining premises but not to the refuse of tan pits. *Chadwick* v. *Marsden*, L. R., 2 Ex. 285; 36 L. J., Ex. 177.

(*g*) In law, it is immaterial whether this saving is inserted, but it may be desirable to insert it to show that the statutory right of the tenant under the Act of 1880 has not been forgotten.

(*h*) The words "any friend" are not confined to a single friend at a time; *Gardner* v. *Colyer*, 12 W. R. 979; 10 L. T., N. S. 715, Q. B.

and assigns, shall and will take due and proper care of such eggs and young birds as aforesaid, and endeavour to rear them for the use of the lessor, his heirs and assigns: And also reserving to the lessor, his heirs and assigns, free liberty and power into, upon or over the said demised premises, upon or for any other reasonable purpose or occasion whatsoever, doing thereby no wilful or unnecessary injury or damage to the corn, hay, grass or fences of the lessee, his executors, administrators or assigns.

App. B. s. 28.

Right of Entry.

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Sect. 29.—*Exception and Reservation to Landlord of all Mines, &c.*

Except and always reserved unto the lessor, his heirs and assigns, all mines, veins, seams and beds of stones, coal and cannel, and all other mines, minerals, delphs and quarries whatsoever, which now are or hereafter during the said term hereby granted or created, shall be found to be within or under the said hereby demised land and premises, or any part thereof; together with full and free liberty, power and authority to and for the lessor, his heirs and assigns, and his and their servants and workmen and others, by his and their authority, with or without horses, carts and other carriages and all necessary implements and materials, at all times during the said term to enter into and upon the land and premises hereby demised, or any part thereof other than any such part or parts of the surface thereof in or upon which there shall be any building, reservoir, drain, watercourse or stream in use for carrying on the business which may be carried on by the lessee, his executors, administrators or assigns in or upon the said premises or adjacent thereto: And to sink any pit or shaft therein, and to make any way or ways therein or thereon for the purpose of carrying and conveying coals, stone or minerals, and to bore, search for, dig, get, carry away and dispose of such coal, cannel, stone, slate and minerals respectively, without paying any compensation for any unavoidable or ordinary damage to be done or occasioned thereby, he and they making compensation to the lessee, his executors, administrators or assigns, for all damages to be done or occasioned in or by the making any pit or shaft in or under the said premises, or by making any rail or other ways as aforesaid thereon, or by digging, getting and carrying away such coals and cannel, stone, slate and other minerals in or after the rate and proportion following (that is to say), at the rate of —— for every superficial square yard of land for a year, and so in proportion for any greater or less quantity than a yard, or a longer or a shorter space than a year: And also, excepting and reserving unto the lessor, his heirs and assigns, full and free liberty at all reasonable times during the said term hereby created, with or without surveyors and workmen, to enter into and upon all or any part of the said hereby demised premises, in order to inspect the condition thereof.

Except all Mines, &c.

With liberty to work them.

And to sink Pits and Shafts and make Ways.

And to dig and get Minerals, &c.

Compensation.

Right to enter and view State and Condition, &c.

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Sect. 30.—*Reservation of Timber and Minerals (Concise form).*

Except and always reserved unto the lessor, his heirs and assigns, all timber and other trees, pollards and saplings, and all mines and minerals, with full liberty of access to cut, work, and carry away the same respectively.

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Sect. 31.—*Special form of Covenant not to Assign or Underlet.*

And that the tenant [the said C. D., his executors, administrators and assigns] will not assign or underlet the premises hereby demised or any part thereof, except to a respectable and solvent assignee or under-tenant, nor without having given two months' previous notice in writing to the landlord [the said A. B., his heirs and assigns] of the name and abode of such proposed assignee or under-tenant.

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App. B. s. 32.

SECT. 32.—*Another form for a Dwelling-house.*

AND that the tenant [the said C. D., his executors, administrators and assigns] will not assign or underlet the premises hereby demised or any part thereof except furnished for the period of —— months, without the leave in writing of the landlord [the said A. B., his heirs or assigns] first obtained: Provided always, and it is hereby agreed by and between the parties hereto that such leave shall not be withheld in the case of a proposed assignee or undertenant being respectable and solvent.

SECT. 33.—*Covenant for Notice of Assignments, "The Norfolk Clause."*

AND upon every assignment of the said premises, or any part thereof not being by will or operation of law without deed, will, within one calendar month thereafter, give notice thereof in writing to the reversioner or reversioners, or his or their agent, stating in such notice the name, place, or residence, or business, and description of the party to whom such assignment shall be made, and will, within such period of one calendar month produce to the reversioner or reversioners, or his or their agent, such assignment or a duplicate or attested copy thereof, of which notice and production having been duly given and made a stamp or memorandum on such assignment duplicate or attested copy, or on a duplicate of such notice, signed by the reversioner or reversioners, or by his or their agent on his or their behalf, shall be conclusive evidence.

SECT. 34.—*Covenant to Insure.*

AND also will during every part of the said term other than the last twenty years thereof, insure and keep insured the buildings for the time being, on the ground hereby demised, in some respectable office for insurance against fire in England in the sum of ——, and will, during the last twenty years of the said term, keep insured the buildings for the time being on the ground hereby demised, in some respectable office for insurance against fire in England, in such sum as the agent for the time being of the reversioner or reversioners shall at the commencement of, or during such twenty years, from time to time, fix and determine, and in default of any such fixing or determination in the sum of ——, and will, if required so to do, produce the receipts for the premium of such insurance for every current year to such agent as aforesaid.

SECT. 35.—*Covenant to produce Copies of Deeds of Assignment, &c.*

AND will, if and whenever the said premises hereby demised, or any part thereof, shall be assigned, underlet or otherwise disposed of, deliver, at his [and their] own expense, an attested copy of the deed of assignment, underletting or disposition, and of every plan thereon, to the landlord [the said C. D., his heirs or assigns], or his [*or* their] solicitors within —— days after the execution thereof.

SECT. 36.—*Proviso that Tenant may remove Buildings or Fixtures* (*i*).

PROVIDED ALWAYS, and it is hereby agreed and declared, that if the tenant shall affix to or erect on the premises any fixture or building which shall not be so affixed or erected, instead of some fixture or building affixed to or being on the premises at the date of the commencement of the lease hereby granted, then such fixture or building shall belong to and be removable by the tenant at any time during the term hereby granted, or within twenty-one days after the

(*i*) This clause is an adaptation to non-agricultural tenancies of the 34th section of the Agricultural Holdings Act, 1883.

determination thereof: Provided always, that the tenant shall make good all damage to the said premises hereby demised or any part thereof by such removal, and shall give one month's previous notice in writing to the landlord of his intention to remove such fixture, and at any time before the expiration of the notice of removal the landlord by notice in writing to the tenant may elect to purchase such fixture at a fair value, and thereupon the same shall be left by the tenant and become the property of the landlord: Provided also, and it is hereby agreed and declared, that the landlord shall, during the remainder of the said term, be entitled to additional rent equal to 5*l.* per cent. on the purchase-money of any fixture so purchased by him as aforesaid, to be enforceable in the same manner as the original rent hereby reserved.

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Sect. 37.—*Proviso for Compensation for Tenant's Improvements of House.*

Provided always, and it is hereby agreed and declared that the tenant may execute, in a workmanlike manner, all such improvements of and additions to the said messuage and premises as he may think proper, keeping and delivering up in good repair all such improvements and additions, and that at the expiration of the term hereby created the landlord shall pay to the tenant a sum equal to [ten] years' purchase of the additional rent, if any, which shall be obtained for the said messuage and premises by reason of such improvements and additions, such sum to be payable either immediately on a reletting of the said messuage and premises, or at the option of the landlord, by [ten] yearly instalments with interest upon unpaid instalments at the rate of five per cent. per annum.

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Sect. 38.—*Proviso for allowing House to be inspected by intending New Tenant during last Three Months of Term* (*k*).

And that the tenant will at all reasonable times [at any time between the hours of two and five in the afternoon] during the three calendar months preceding the termination of the tenancy of the request of the landlord or his agent, permit the said demised premises to be inspected by any person or the agent authorized in writing of any person bonâ fide desirous of becoming tenant to the landlord, and having given his name and address to the tenant or one of his servants.

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Sect. 39.—*Proviso for Resumption of Lessor of all or any part of the Land demised, on giving Three Months' Notice, and making Compensation for Improvements, &c.—Residue of Rent to be reduced proportionately* (*l*).

Provided nevertheless, and it is hereby lastly declared and agreed by and between the said parties hereto, that in case the lessor, his heirs or assigns, shall at any time, or from time to time during the continuance of the said term hereby granted, be minded and desirous of having any part [or parts of the whole] of the said land hereby demised delivered up to him or them, and of such his or their mind and desire, shall give three calendar months' notice in writing to the lessee, his executors, administrators or assigns, or leave the same at his or their last or usual place of abode, or upon the said demised premises, such notice to expire at any time of the year, then at the expiration of such notice so given or left as aforesaid, he the lessee, for himself, his executors, administrators and assigns, doth hereby covenant peaceably and quietly to yield and surrender up, and that the lessor, his heirs and assigns, shall and may take peaceable and quiet possession of such part or parts of the said land as shall be mentioned and included in such notice as aforesaid, he the lessor, his heirs or assigns, paying to the lessee, his executors, administrators or assigns, a reasonable and fair compensation in respect of the monies which may

(*k*) See another proviso, ante, Sect. 16.

(*l*) As to resumption for certain purposes of land held on a tenancy from year to year, see sect. 41 of the Agricultural Holdings Act, 1883.

App. B. s. 39.

have been laid out by the lessee, his executors, administrators or assigns, in improving the condition of so much of the said land as shall be so given up to the lessor, his heirs or assigns as hereinbefore mentioned, and then and from thenceforth the rent reserved by this indenture shall be reduced at the rate of [2*l.* 2*s.*] for each and every acre, and so in proportion for a less quantity than an acre, that may be given up to the lessor, his heirs and assigns as aforesaid, and the remainder of the said land shall be held by the lessee, his executors, administrators or assigns, at such reduced rent, and the lessor, his heirs and assigns, shall have the same powers and remedies in all respects as if the lease had originally been granted at such reduced rent, and all and every the covenants, clauses, provisions, stipulations and agreements herein contained shall be as valid and effectual of and for so much of the land hereby demised as shall not be included in any such notice, and this indenture shall be read and construed in all respects, in reference thereto, as if such reduced rent had been the original rent reserved therein and the land originally demised had been the land not included in any such notice as aforesaid, and the covenants, clauses, provisoes, stipulations and agreements herein contained had only related to such last-mentioned land.

SECT. 40.—*Notice to take Land pursuant to the above Proviso.*

To Mr. J. G., the executor of the will of C. D., deceased, and to all others whom it may concern:

PURSUANT to and by virtue of a certain indenture of lease, dated the —— day of ——, 18—, and made between A. B. therein described of the one part, and the said C. D. of the other part, I hereby give you notice, that I am desirous of having delivered up to me at the expiration of three calendar months from the service of this notice upon you, the peaceable and quiet possession of all that piece of land situate, &c. [and which said piece of land contains by admeasurement 22A. 2R. 14P. or thereabouts, and is bounded by the sea wall towards the river Thames, and on all other sides by a ditch which separates the same from other marsh land now belonging to me], together with all the appurtenances thereunto belonging: And I require you to deliver up possession of the same to me accordingly, and to surrender all your interest in the same to me, at the expiration of the said three calendar months; and, in consideration thereof, I hereby offer and agree to allow you a reasonable and fair compensation in respect of any monies which may have been laid out by you in improving the condition of the said piece or parcel of land above described, and to release you from all liability to the payment of rent, for the said piece of land with the appurtenances under the said indenture of lease from the time of my taking possession of the said piece of land: And I hereby further give you notice that the reversion in fee simple of and in all and singular the land and hereditaments comprised in the said indenture of lease with the appurtenances was conveyed to me by the said A. B. by indenture dated the —— day of ——, 18—, and made between the said A. B. of the one part, and me the undersigned E. F. of the other part, and that I am now the absolute owner of the said reversion. Dated this —— day of ——, 18—.

E. F. of, &c.

SECT. 41.—*Covenant by Lessor for Renewal of Lease.*

AND the lessor doth hereby for himself and his assigns, covenant with the lessee, that if the lessee, his executors, administrators or assigns, shall be desirous of taking a renewed lease of the said premises for the further term of —— years from the expiration of the said term hereby granted, and of such desire shall, prior to the expiration of the said last-mentioned term, give to the lessors, their heirs or assigns, or leave at the last known place of business or abode in England six calendar months' previous notice in writing, and shall pay the said rent hereby reserved, and observe and perform the several covenants and agreements herein contained, and on the part of the lessee, his executors, administrators or assigns, to be observed and performed up to the expiration of the said term hereby granted, they the lessors, their heirs or assigns, will upon

the request and at the expense of the lessee, his executors, administrators or assigns (and upon payment by him or them of the sum of £—— as a premium for such renewal), and upon his or their executing and delivering to the lessors, their heirs or assigns, a counterpart thereof, forthwith execute and deliver to the lessee, his executors, administrators or assigns, a renewed lease of the said premises for the further term of —— years at the same yearly rent, and under and subject to the same covenants, provisoes and agreements as are herein contained, other than this present covenant.

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Sect. 42.—*Covenant by Lessor against Nuisance in adjoining Houses or Flats* (*a*).

And further that he, the lessor, will not do or permit or suffer to be done in or upon any of the other houses and land appertaining thereto respectively, situate in —— Square aforesaid [*or* on any of the other floors of the said —— Mansion], and of which the said lessor is in anywise owner, any act which may be or grow to be a nuisance to the lessee, and that the lessor will at all times upon the reasonable request of the lessee permit him to bring any action or proceeding, and prosecute the same at law or otherwise in the name of the lessor against any lessee or occupier of any such other houses [*or* floors] causing a nuisance to the lessee, and that the lessor will not waive the breach of any covenant by any such lessee with the lessor against nuisances.

And will not convert or suffer to be converted any of the said houses [*or* floors] into shops or in any way use them or suffer them to be used otherwise than as private dwelling-houses.

And will within three months after request in writing thereto by any three of the said lessees proceed by action of ejectment against any other of the lessees of the said houses [*or* floors] for any breach of any covenant with him the lessor not to use or suffer to be used any of such houses [*or* floors] otherwise than as a private dwelling-house.

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Sect. 43.—*Covenant by Lessor to produce to Lessee his Title Deeds, &c.*

*After the usual qualified covenant for quiet enjoyment, say*, "And also shall and will at all times during the said term at the request and expense of the lessee, his executors, administrators and assigns (unless prevented by inevitable accident) produce and show forth to them or either of them, or to their or his attorney or agent in England, the several deeds, evidences and writings mentioned in the schedule hereunder written, and at the like request and costs (unless prevented as aforesaid) furnish the lessee, his executors, administrators and assigns, with copies or extracts attested or unattested of or from the same deeds, evidence and writings of any of them, and shall and will permit any person or persons lawfully appointed by the lessee, his executors, administrators or assigns, to examine such copies and extracts respectively with the originals: *Provided always*, and it is hereby agreed and declared between and by the said several parties hereto, that in case the lessor, his heirs or assigns, shall at any time hereafter during the said term deliver up or cause to be delivered up to any person or persons the said deeds, evidences and writings hereinbefore covenanted to be produced, and shall procure the person or persons to whom the same shall be so delivered, at his and their own cost, to enter into a covenant with the lessee, his executors, administrators or assigns, to the same purport and effect and of the same legal validity as the covenant lastly hereinbefore contained, then and in that case and upon delivery to the lessee, his executors, administrators or assigns of such new covenant, the said covenant lastly hereinbefore contained shall cease and be void.

*Add a schedule of the deeds, &c., at the end of the deed.*

(*a*) See *Spicer* v. *Martin*, 14 App. Cas. 12, and p. 707, ante, and for application of the doctrine of that case to flats, see *Hudson* v. *Cripps*, [1896] 1 Ch. 265, and p. 728, ante.

For form of lease of flat, with reservation of right to lessor to build on adjacent property notwithstanding injury to free access of light and air, see 3 Bythewood & Jarman, 462, and for form of covenant by lessor of house not to build so as to obstruct lights, see 1 Key & Elphinstone, 695.

APP. B. s. 44.

SECT. 44.—*Covenant by Landlord not to Distrain.*

AND the landlord hereby for himself, his heirs, executors, administrators and assigns, covenants with the tenant, his executors and administrators and assigns that except in the case of the bankruptcy of the tenant or his assigns, he the said landlord will not distrain for rent in arrear, if any, but will recover the said rent so in arrear by ordinary action at law only.

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SECT. 45.—*Proviso for Re-entry* (*m*).

PROVIDED ALWAYS, and it is expressly agreed, that if the rent hereby reserved, or any part thereof shall be unpaid for fifteen days after any of the days on which the same ought to have been paid (although no formal demand shall have been made thereof), or in case of the breach of any of the covenants and agreements herein contained on the part of the said lessee, his executors, administrators and assigns, then and in either of such cases it shall be lawful for the said lessor at any time thereafter into and upon the said demised premises, or any part thereof, in the name of the whole to re-enter, and the same to have again, repossess and enjoy as of his or their former estate, anything hereinafter contained to the contrary notwithstanding.

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SECT. 46.—*Proviso for Re-entry.* (*Compensation to Tenant for Improved Value.*)

PROVIDED ALWAYS, and these presents are on the express condition that if and whenever the rent hereby reserved, or any part thereof, shall be in arrear for —— days (although no formal demand shall have been made thereof), or if and whenever there shall be a breach of any of the lessee's covenants herein contained, then it shall be lawful for the landlord to re-enter the said premises and re-possess the same in the manner and on the conditions following, that is to say: the tenant shall pay to the landlord all costs as between solicitor and client of and incident to such re-entry, and the landlord shall pay to the tenant such sum (if any) as shall be equivalent to nine-tenths of the premium or increased capital value of such premises accruing to the landlord by reason of such re-entry: saving always to the landlord his rights to damages for breaches of covenant.

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SECT. 47.—*Arbitration Clause.*

PROVIDED ALWAYS, and it is hereby agreed and declared that if and whenever any dispute or question shall arise between the lessor and lessee, and their respective heirs, executors, administrators or assigns, touching these presents or anything herein contained, or the construction hereof, or the rights, duties or liabilities in relation to the premises, the matter in difference shall be submitted and referred to two arbitrators or their umpire in all respects pursuant to "The Arbitration Act, 1889."

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SECT. 48.—*Assignment of a Lease (by Indorsement). Landlord being made a Party to give his Consent to the Assignment.*

Date and Parties.

THIS INDENTURE, made the —— day of ——, 18— (*n*), BETWEEN the within-named C. D. of the first part, the within-named A. B. of the second part, and E. F. of, &c., of the third part: WITNESSETH, that in consideration of the sum

Testatum.

of —— pounds sterling (*o*) now paid by the said E. F. to the said C. D. (the

Stamp (*o*).

(*m*) As to notice before proceeding on this proviso, see s. 14 of the Conveyancing Act, 1881, and p. 353, ante.

(*n*) The date of assignment is frequently material: because on it depends whether the assignor or the assignee is to pay the quarter's rent.

(*o*) As to the stamp, see Stamp Act, 1891, and sched. tit. "Conveyance."

receipt whereof the said C. D. doth hereby acknowledge, and from the same doth release and discharge the said E. F., his executors, administrators and assigns), HE the said C. D., as beneficial owner (*p*) [with the consent in writing of the within-named A. B., testified by his execution of these presents], DOTH assign unto the said E. F., his executors, administrators and assigns, ALL [*parcels*], comprised in and expressed to be demised by the within-written indenture, TOGETHER with the appurtenances [except as within excepted (*q*)], AND ALSO the within-written indenture (*r*); TO HOLD the said [messuage and] premises hereinbefore expressed to be assigned unto the said E. F., his executors, administrators and assigns, henceforth for the residue now unexpired of the term of —— years expressed to be granted by the within-written indenture; SUBJECT nevertheless to the payment of the rent, and the performance and observance of the covenants and conditions in the within-written indenture reserved and contained, and on the lessee's part to be paid, performed and observed. AND the said E. F. doth hereby for himself and his assigns, covenant with the said C. D., that he the said E. F., his executors, administrators or assigns, will henceforth pay the said yearly rent of £——, by the within-written indenture reserved and henceforth to become payable, and perform and observe all and every the covenants and conditions in the same indenture contained and on the part of the lessee, his executors, administrators or assigns, henceforth to be performed or observed: AND ALSO will from time to time and at all times hereafter keep indemnified the said C. D., his heirs, executors and administrators, and his and their estates and effects of, from and against all actions, suits, proceedings, costs, charges, damages, claims and demands whatsoever (including costs of any defence as between solicitor and client), which shall or may be incurred or sustained by reason or on account of the non-payment of the said rent or any part thereof, or the breach, non-performance or non-observance of the said covenants and conditions or any of them (*s*). IN WITNESS, &c.

*Attestation.*

*Receipt for consideration.*

App. B. s. 48.

Habendum.

Subject, &c.

Covenants by Assignee to pay subsequent Rent, and perform Lessee's Covenants, and indemnify Assignor therefrom, &c.

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SECT. 49.—*Assignment of Lease (not by Indorsement).*

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN G. H. of the one part, and I. K. of, &c., of the other part. WHEREAS by an indenture of lease dated the —— day of ——, 18—, and made or expressed to be made between A. B. therein described of the one part, and C. D. therein described of the other part, for the considerations therein mentioned the said A. B. did demise [and lease] unto the said C. D., his executors, administrators and assigns, ALL [*parcels from lease*] with the appurtenances, [except as therein is excepted]; To hold the same unto the said C. D., his executors, administrators and assigns, from the —— day of ——, 18—, for the term of —— years, at the yearly rent of ——, payable [quarterly], as in the said indenture mentioned; and under and subject to the covenants and conditions therein contained, and on the part of the said C. D., his executors, administrators and assigns, to be performed and observed: AND WHEREAS [by divers mesne assignments and other acts in the law, and ultimately] by an indenture dated the —— day of ——, 18—, made or expressed to be made between ["the said C. D." *or* "E. F. therein described" of the one part, and the said G. H. of the other part], ALL the [messuage, land and] premises comprised in and expressed to be demised by the said recited indenture of lease, with the appurtenances [except as in the same indenture is excepted], were assigned to and became vested in the said G. H. for the residue and remainder of the said term of —— years, subject to the payment of the rent, and the performance and observance of the covenants

Date and Parties.

Recital of Lease.

Mesne Assignments.

(*p*) By virtue of these words and s. 7 of the Conveyancing Act, 1881, covenants on the part of the assignor are implied that the lease is valid, that the rent and covenants have been paid and observed, that the assignor has right to convey, that the lease is free from incumbrances, and that the assignee shall quietly enjoy; also for further assurance.

(*q*) Omit these words, if there be no exception in the lease.

(*r*) If there be a fire policy, here insert an assignment thereof as in the next section, and alter the habendum as in that section.

(*s*) See *Moule* v. *Garrett*, L. R., 5 Ex. 132; 39 L. J., Ex. 69; ante, 272.

APP. B. s. 49.

and conditions in the same indenture of lease reserved and contained, and on the lessee's part to be paid, performed and observed: AND WHEREAS the said I. K. has contracted with the said G. H. for the purchase of the said leasehold tenements and premises for the residue of the said term of

Testatum.

—— years, subject as aforesaid, for the price or sum of £——; NOW THIS

Stamp (*t*).

INDENTURE WITNESSETH, that, in pursuance of the said recited contract, and in consideration of the sum of —— pounds sterling now paid by the said I. K. to the said G. H. (the receipt whereof the said G. H. doth hereby

Operative Words.

acknowledge, and from the same doth release and discharge the said I. K., his executors, administrators and assigns): HE the said G. H., as beneficial owner, DOTH assign unto the said I. K., his executors, administrators and assigns, ALL [that messuage and land], and all and singular other the premises comprised in and expressed to be demised by the said recited indenture of lease, TOGETHER

Fire Policy.

with the appurtenances [except as in the same indenture is excepted]: [AND ALSO all that policy of insurance in the —— office, No. ——, whereby the said buildings, or some part thereof are insured against loss or damage by fire as therein expressed, and the full benefit and advantage thereof, and all moneys insured and to become payable under or in respect thereof; with power to the said I. K., his executors, administrators and assigns, at his or their own expense to sue and give receipts, releases and other discharges for the said moneys or any

Habendum.

part thereof in the name or names of the said G. H., his executors or administrators (*x*): TO HOLD the said [messuage, land and] premises hereinbefore expressed to be assigned (except the said policy) unto the said I. K., his executors, administrators and assigns, henceforth for the residue and remainder

Subject, &c.

now to come and unexpired of the said term of —— years, expressed to be granted by the said recited indenture of lease; SUBJECT nevertheless to the payment of the rent, and the performance and observance of the covenants and conditions in the same indenture reserved and contained, and on the lessee's part

Covenants.

to be paid, performed and observed; [AND TO HOLD the said policy, unto the said I. K., his executors, administrators and assigns, absolutely]. *Add covenants by assignee, corresponding with those ante, p. 975, substituting the words "the said recited indenture of lease," for "the within-written indenture," when necessary.*

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SECT. 50.—*Licence to Assign* (*y*).

WHEREAS by an indenture of lease, dated [*recite lease, as in* SECT. 49, *supra, then go on thus*:] and in the said indenture is contained a covenant on the part of the said C. D. that he the said C. D., his executors, administrators or assigns, should not nor would [*recite covenant not to assign, &c.*], without the consent in writing of the said A. B., his heirs [*or* executors, administrators] or assigns, for that purpose first had and obtained; NOW the said A. B. at the request of the said C. D., DOTH hereby give unto the said C. D. licence and consent to assign and transfer all his estate, term and interest of, in and to the said premises, with the appurtenances comprised in and demised by the said recited indenture of lease, unto I. K., of ——, his executors, administrators and licensed assigns: SUBJECT nevertheless to the payment of the rent and the performance and observance of the covenants and conditions in the said recited indenture reserved and contained, and on the lessee's part to be paid, performed and observed; Provided always, that such licence as is hereby given shall not extend to any further assignment, underletting or dealing with the premises either by the said C. D. or the said I. K., or by their executors, or administrators respectively. AS WITNESS the hand of the said A. B., the —— day of ——, 18—.

Witness,
G. H. of [&c.].

(Signed) A. B.

(*t*) See Stamp Act, 1891.

(*x*) As to the necessity for this, see *Poole* v. *Adams*, 33 L. J., Ch. 639; 12 W. R. 683. Notice of this assignment should be forthwith given to the insurance company.

(*y*) A licence to assign may be written in the margin of the proposed assignment as above; but sometimes there may be reasons for writing it in a separate form.

SECT. 51.— *Surrender of a Lease by Indenture (indorsed).* APP. B. s. 51.

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN the within named C. D. of the one part, and the within-named A. B. of the other part: WITNESSETH that the said C. D., at the request of the said A. B., and in consideration of the sum of £—— sterling (*z*) now paid by the said A. B. to the said C. D. (the receipt whereof is hereby acknowledged), DOTH assign, surrender and yield up unto the said A. B., his [heirs *or* executors, administrators] and assigns, ALL [that messuage or tenement, land] and premises, with the appurtenances comprised in and expressed to be demised by the within-written indenture; TOGETHER with the said indenture: AND all the estate, right, title, interest, property, profit, possession, benefit, claim and demand, legal and equitable, of him the said C. D., of, in and to the said premises respectively: TO HOLD the same unto the said A. B. his [heirs *or* executors, administrators (*a*)] and assigns, for the residue and remainder now to come and unexpired of the term of —— years, granted by the within-written indenture, and for all other the term, estate and interest of the said C. D. of and in the said premises respectively, TO THE INTENT that the said term of —— years may merge and be extinguished in the reversion [freehold and inheritance *or* (*b*) estate and interest] of the said A. B. of and in the said premises: AND the said C. D. doth hereby covenant with the said A. B., that he the said C. D. hath not executed or done, or knowingly suffered, or been party or privy to any deed or thing whereby or by reason or means whereof the premises hereinbefore expressed to be surrendered or otherwise assured, or any of them or any part thereof, or these presents, are, is, or may be charged, incumbered, affected or impeached in title, estate or otherwise howsoever. IN WITNESS, &c.

Date and Parties. Testatum. Stamp (*z*). Parcels. Estate. Habendum. Merger. Covenant against Incumbrances.

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SECT. 52.—*The like by Deed-Poll (indorsed).*

TO ALL TO WHOM THESE PRESENTS SHALL COME, C. D. of —— [grocer] sends greeting: KNOW YE that the said C. D. at the request of the within-named A. B., and in consideration of the sum of £—— sterling now paid by the said A. B. to the said C. D. (the receipt whereof is hereby acknowledged), DOTH assign, surrender and yield up unto the said A. B., his [heirs *or* executors, administrators] and assigns, ALL, &c. [*remainder as ante*, SECT. 51, *including the covenant against incumbrances*]. IN WITNESS whereof the said C. D. hath hereunto set his hand and seal, on the —— day of —— 18—.

Stamp (*c*).

Signed, sealed and delivered by the above-named C. D. in the presence of } C. D. (L.S.)

I accept the above surrender.

(Signed) A. B. (*d*).

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SECT. 53.—*Surrender of a Lease by Indenture (not indorsed).*

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN G. H. of —— [tailor] of the one part and A. B. of —— [esquire] of the other part: WHEREAS by an indenture of lease [dated, &c. *recite lease, and any assignments thereof as ante*, SECT. 51]: NOW THIS INDENTURE WITNESSETH, that the said G. H., at the request of the said A. B. [and in consideration of the sum of £—— sterling now paid by the said A. B. to the said G. H. (the receipt whereof is hereby acknowledged]; DOTH assign, surrender and yield up, unto the said A. B. [his heirs *or* executors, administrators] and assigns, ALL, &c. [*remainder as ante*, SECT. 51, *substituting the words "the said recited indenture of lease," in lieu of "the within-written indenture," whenever necessary*].

(*z*) As to the proper stamp, see ante, p. 940.

(*a*) If A. B. is the freeholder, say "his heirs and assigns;" if he is only a termor, say "his executors, administrators and assigns."

(*b*) According as A. B. has a freehold or only a chattel interest.

(*c*) Ante, 940.

(*d*) This memorandum of acceptance is not essential, but generally advisable.

APP. B. s. 54.

SECT. 54.—*The like by Deed-Poll (not indorsed).*

TO ALL TO WHOM THESE PRESENTS SHALL COME, G. H. of —— [tailor], sends greeting: WHEREAS by an indenture of lease [dated, &c., *recite lease; also any assignments, as ante*, SECT. 49]: NOW KNOW YE that the said G. H., at the request of the said A. B. [and in consideration of the sum of £—— sterling now paid by the said A. B. to the said G. H. (the receipt whereof is hereby acknowledged)]; DOTH assign, surrender and yield up unto the said A. B., his [heirs *or* executors, administrators] and assigns, ALL, &c. [*remainder as ante*, SECT. 51, *substituting the words "the said recited indenture of lease," in lieu of "the within-written indenture," whenever necessary*].

IN WITNESS, &c.

I accept the above surrender.

(Signed) A. B. (*e*).

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SECT. 55.—*Renewal of Lease (indorsed).*

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN the within-named A. B. (hereinafter called the lessor) of the one part, and the within-named C. D. (hereinafter called the lessee) of the other part: WHEREAS the residue of the within-mentioned term of —— years is now vested in the lessee, subject to the payment of the rent reserved by and to the performance of the lessee's covenants contained in the within-written Indenture: AND WHEREAS the reversion in fee expectant on the determination of the said term is now vested in the lessor: AND WHEREAS the lessor has agreed with the lessee to demise to him the within-mentioned messuage and hereditaments for the further term of —— years, to commence on the —— day of ——, at the rent and subject to the covenants and provisions hereinafter reserved and contained or referred to: NOW THIS INDENTURE WITNESSETH that in consideration of the rent hereinafter reserved, and the covenants by the said —— hereinafter contained or referred to, the lessor doth hereby demise unto the lessee, his executors, administrators and assigns ALL the messuage or dwelling-house and premises comprised in and demised by the within-written indenture [except and reserving as is within excepted and reserved (*f*)] TO HOLD the said [messuage and] premises hereinbefore expressed to be hereby demised for the term of —— years, from the said —— day of —— subject nevertheless to the yearly rent of £——, payable at the like times and in like manner as the rent reserved by the within-written indenture, and subject to the performance and observance, covenants and conditions on the part of the lessee, and the like proviso for re-entry in case of non-payment of rent or breach of covenant or the happening of any of the other events in the within-written indenture in that behalf mentioned, and with the benefit of the like covenants and agreements on the part of the lessor, and subject to and with the like provisions and conditions in all respects as are in the within-written indenture contained, in like manner as if all such covenants, agreements, conditions and provisions had been herein repeated, with such modification only as the differences in the names of the parties and in the amount of the rent, and in the term of the lease and other circumstances, may require: AND the lessor doth hereby for himself covenant with the lessee, his executors, administrators and assigns, and the lessee doth hereby for himself and his assigns covenant with the lessor, his heirs and assigns, that they the said respective covenanting parties, their heirs, executors, administrators and assigns respectively, shall and will during the said term of —— years perform and observe all such covenants, agreements and provisions as aforesaid which on his or their respective part are or ought to be performed and observed: PROVIDED ALWAYS, and it is hereby agreed, that if the term of —— years granted by the within-written indenture, shall be determined by virtue of the condition or provision for re-entry therein contained, then these presents shall become absolutely void and determined. IN WITNESS, &c.

(*e*) This memorandum of acceptance is not essential, but generally advisable.

(*f*) Omit these words if there are no exceptions in the original lease.

SECT. 56.—*Memorial of Lease in Middlesex or Yorkshire for more than* 21 *years* (*ante*, 202). APP. B. s. 56.

A MEMORIAL, to be registered pursuant to Act of Parliament, Of
—— } AN INDENTURE, bearing date the —— day of ——, one thousand eight
to } hundred and eighty ——, and made between A. B. of, &c. [*as in the*
—— } *deed*], of the one part, and C. D. of, &c. [*as in the deed*], of the other Stamp (*g*).
part; WHEREBY the said A. B. demised to the said C. D. [his executors, administrators and assigns], ALL [*parcels verbatim as in the deed,*] with the appurtenances (*h*), [except, &c., *as in deed*]: To hold the same unto the said C. D., his executors, administrators and assigns, from the —— day of —— [*as in the deed*], for the term of —— years thence next ensuing, under and subject to the rent, covenants and conditions therein reserved and contained; which said indenture, as to the execution thereof by the said A. B. [and C. D.], is witnessed by [*name, address and addition of the witness or witnesses*] [And as to the execution thereof by the said C. D. is witnessed by (*name, address and addition of the witness or witnesses* (*i*)]: [And is hereby required to be registered by the said A. B. *or* C. D.]. [As WITNESS his hand and seal.]

Signed and sealed (*k*) by the above-named
—— in the presence of } *Signature* (L.S.).
*Two witnesses* (*l*).

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SECT. 57.—*Memorial of an Assignment of a Lease* (*ante*, 202).

A MEMORIAL, to be registered pursuant to Act of Parliament, Of
—— } AN INDENTURE, bearing date the —— day of ——, one thousand eight
to } hundred and eighty ——, and made between A. B. of, &c. [*as in the*
—— } *deed*], of the one part, and C. D. of, &c. [*as in the deed*], of the other
part, WHEREBY after reciting an indenture, dated —— (*n*) purporting to be a Stamp (*m*).
lease of ALL [*here set out the description verbatim from the recitals in the deed*]; FOR THE CONSIDERATIONS in the now memorializing indenture mentioned, the said A. B. did assign to the said C. D., his executors, administrators and assigns, ALL [*describe parcels verbatim, as in the operative part of the deed*]: To hold the same unto the said C. D., his executors, administrators and assigns, for the residue of a term of —— years, from the —— day of ——, one thousand eight hundred and —— created by the said recited indenture of the —— day of ——, 18—, under and subject to the rent, covenants and conditions reserved and contained in the said recited indenture of the —— day of ——, 18—: which said indenture, as to the execution thereof [*remainder as in the last form*].

(*g*) Stamp 2*s.* 6*d.*; Stamp Act, 1891, and sched. tit. "Memorial."

(*h*) These need not be more fully stated.

(*i*) Omit this where the same witness attests the execution by both parties.

(*k*) A memorial need not be *delivered* as a deed.

(*l*) One of whom must be an attesting witness to the lease, and will have to prove before the registrar upon oath that he saw the memorial signed and sealed, and the deed to which it refers duly executed.

(*m*) Stamp 2*s.* 6*d.*; Stamp Act, 1891, and sched. tit. "Memorial."

(*n*) Only the date need be mentioned.

# APPENDIX C.

## FORMS OF NOTICES, ETC.


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*Disclaimer of Lease, &c.*

[See p. 292, ante, as to these forms.]

| | | |
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(1.) *Notice to Quit signed by the Landlord himself* (*a*).

To Mr. C. D.

Sir, I hereby give you notice to quit and deliver up possession of the [house *or* farm, land] and premises, with the appurtenances situate [at *or* in the parish of ] in the county of , which you hold of me, as tenant thereof, on the [twenty-fifth] day of March next [or at the expiration of the year of your tenancy which shall expire next after the end of one half-year from the service of this notice].

Dated the day of , 18 .

Yours, &c.

A. B. of

(*a*) See ante, Chap. VIII., Sect. 7.

(2.) *Notice to Quit, given by an Agent of the Landlord.* APP. C. s. 2.

To Mr. C. D.

Sir, I hereby, as agent for [A. B. esq.] your landlord, and on his behalf give you notice to quit and deliver up possession of the [house *or* farm, land] and premises, with the appurtenances, situate [at *or* in the parish of ] in the county of , which you hold of him as tenant thereof, on the day of next [or at the expiration of the year of your tenancy which shall expire next after the end of one half-year from the service of this notice].

Dated the day of , 18 .

Yours, &c.
E. F. of
Agent for the above-named A. B. esq.

---

(3.) *Notice by Landlord to quit Lodgings.*

Sir, I hereby give you notice to quit and deliver up on the day of instant *or* next, the rooms or apartments with the appurtenances in my house [No. 25, Green Street, Grosvenor Square] which you now hold of me.

Dated this day of , 18 . Yours, &c.

To Mr. C. D. A. B. of

---

(4.) *Notice to Quit signed by the Tenant himself.*

To A. B. esq.

Sir, I hereby give you notice that it is my intention to quit and deliver up possession of the [house *or* farm, land] and premises, with the appurtenances, situate [at *or* in the parish of ] in the county of , now held by me as your tenant thereof, on the [twenty-fifth] day of [March] next (*b*).

Dated the day of , 18 .

Yours, &c.
C. D. of

---

(5.) *Notice to Quit given by an Agent of the Tenant.*

To A. B. esq.

Sir, I hereby, as agent for Mr. C. D. your tenant, and on his behalf, give you notice that it is his intention to quit and deliver up possession of the [house *or* farm, land] and premises, with the appurtenances, situate [at *or* in the parish of ] in the county of , now held by him as your tenant thereof, on the day of next (*b*).

Dated the day of , 18 .

Yours, &c.
G. H. of
Agent for the above-named C. D.

---

(6.) *Notice by Tenant to quit Lodgings.*

Sir, I hereby give you notice that on , the day of instant *or* next I shall quit and deliver up possession of the rooms and apartments with the appurtenances in your house [No. 25, Green Street, Grosvenor Square], which I now hold of you.

Dated the day of , 18 .

Yours, &c.

To Mr. A. B. C. D. of

(*b*) The words, "or at the expiration of the year of [my *or* his] tenancy which shall expire next after the end of one half-year from the service of this notice," are seldom necessary when the notice is given by or on behalf of the tenant, who generally knows at what time of the year his tenancy commenced.

APP. C. s. 7.

(7.) *Notice to Quit given by Tenant in Common* (*ante*, 369).

To Mr. C. D.

Sir, I hereby give you notice of my intention to determine the tenancy under which you now hold of me [one undivided *third* part or share *as the case may be*] of and in the [messuage *or* farm, land] and premises with the appurtenances, situate at in the county of , and require you to quit the same on the day of next [or at the expiration of the year of your tenancy, which shall expire next after the end of one half-year from the service of this notice].

Dated the day of , 18 .

Yours, &c.
A. B. of

---

(8.) *Notice to determine a Lease for Twenty-one Years, at the end of the first Seven or Fourteen Years, pursuant to a Proviso or Power therein contained* (*ante*, 384).

To Mr. C. D.

Sir, In pursuance of the proviso or power (*c*) in this behalf contained in an indenture of lease dated the day of , 18 , made or expressed to be made between [*as the case may be*], I the undersigned [being the assignee of the immediate reversion of and in the tenements with the appurtenances demised by the said lease], do hereby give you notice that it is my intention to avoid the said lease, and to put an end to the term thereby granted at the end of the first (seven *or* fourteen, *or as the case may be*] years of the said term.

Dated the day of , 18 .

Yours, &c.
E. F. of

---

(9.) *Demand of Possession, to determine any express or implied Tenancy at Will* (*ante*, 238).

To Mr. C. D.

Sir, I do hereby [*if given by an agent, say*, "as agent of and for A. B. of esq."] demand and require you forthwith to quit and deliver up possession of [the messuage, land and premises] with the appurtenances situate and being [at *or* in the parish of ] in the county of , now in your possession. [In case of any refusal or neglect on your part to comply with this notice, an action of ejectment will be commenced against you without further notice.] And you are hereby warned not to commit any waste, spoil or damage in or upon the said premises or any part thereof.

Dated this day of , 18 .

Yours, &c.
A. B. of
[*or* E. F. of
Agent for the above-named A. B.]

---

(10.) *Demand of Possession* (*d*) *pursuant to* 15 & 16 *Vict. c.* 76, *s.* 213.

To Mr. C. D.

Sir, I do hereby [*if given by an agent, say*, "as agent of and for A. B. esq., your landlord, and on his behalf"], according to the form of the statute in such case made and provided, demand and require you forthwith to quit and deliver up possession of [the messuage, land and premises *or* the farm and premises, *or*

(*c*) A notice to quit at the end of the first seven or fourteen years is sufficient, although it does not refer to the proviso: *Giddens* v. *Dodd*, 3 Drew. 485; 25 L. J., Ch. 451.

(*d*) This demand may be addressed to the tenant "or any one holding or claiming by or under him," and may be "served personally upon, or left at the dwelling-house or usual place of abode of such tenant or person;" C. L. P. Act, 1852, 15 & 16 Vict. c. 76, s. 213; ante, 839. If possible, an express refusal to deliver possession pursnant to the notice should be obtained.

*as the case may be*], with the appurtenances, situate and being [at *or* in the parish of ] in the county of , and which were held by you under a [lease *or* agreement in writing], bearing date the day of , 18 , for the term of years, which expired on or about the day of last [*or* as tenant from year to year, which tenancy was determined by the said A. B., *or* by you, *as the case may be*, on the day of last, by a regular notice to quit before then duly given].

Dated this day of , 18 .

[*Signature, &c. as in No.* 9.]

---

(11.) *Demand of Possession at the end of a Tenancy, otherwise double Rent or double Value* (*ante*, Chap. XX., Sect. 2).

To Mr. C. D.

Sir, I do hereby [as agent for and on behalf of your landlord, A. B. esq.] demand and require you to quit and deliver up possession of [*describe the premises shortly*] with the appurtenances, situate at *or* in the parish of , in the county of [forthwith: *or if the term have not expired, say*, "on the expiration of your term therein, which will expire on or about the day of next *or* instant"]: and take notice, that if you hold over the said premises after ["the service hereof" *or* "the expiration of the term"] you will be liable to pay [double value *or* double rent (*e*)] for the said premises, pursuant to the statute in such case made and provided.

Dated this day of , 18 .

[*Signature, &c. as in No.* 9.]

---

(12.) *Notice to Tenant to deliver up Possession, pursuant to* 1 & 2 *Vict. c.* 74 (*ante*, Chap. XXII., Sect. 4 (a)) (*f*).

I, [owner, or agent to , the owner, *as the case may be*], do hereby give you notice, that unless peaceable possession of the tenement [*shortly describing it*], situate , which was held of me [*or* "of the said ," *as the case may be*], under a tenancy from year to year [*or as the case may be*], which expired [*or* "was determined"] by notice to quit from the said [*or otherwise as the case may be*] on the day of , and which tenement is now held over and detained from the said be given to [*the owner or agent*], on or before the expiration of seven clear days from the service of this notice, I, , shall on next, the day of , at of the clock of the same day, at (*g*), apply to her Majesty's justices of the peace acting for the district of [*being the district, division or place in which the said tenement, or any part thereof, is situate*], in petty sessions assembled, to issue their warrant directing the constables of the said district to enter and take possession of the said tenement, and to eject any person therefrom.

Dated this .

(Signed)

To Mr. C. D. [*owner or agent*].

(*e*) State correctly which.

(*f*) This form is given, with form of complaint to justices and of warrant of possession (see post, App. E., Sect. 49), in the schedule to the Small Tenements Recovery Act, 1838, 1 & 2 Vict. c. 74 (see p. 877), and should therefore be followed very closely. By direction appended to the form of complaint, a duplicate of this notice is to be annexed thereto.

(*g*) The notice should mention *the place* in a borough, &c., where the application will be made; and if given by an agent, should describe him as agent of the *owner* of the premises: *Delancy* v. *Fox*, 1 C. B., N. S. 166.

APP. C. s. 13.

(13.) *Notice to repair.*

Sir, You are hereby required [forthwith *or* within three calendar months now next] to put in good tenantable repair, order and condition (*h*) the [messuage] and premises, with the appurtenances, situate at in the parish of , in the county of , which you now hold of [me, *or* of A. B. of , esq.]; and particularly to do all and singular the amendments and repairs specified in the schedule hereinunder written.

Dated this day of , 18 .

Yours, &c.

A. B. of

[*or*, E. F. of

To Mr. C. D. Surveyor of the said A. B. esq.].

THE SCHEDULE above referred to.

[*Here specify the amendments and repairs required to be done.*]

---

(14.) *The like—Another form.*

To Mr. C. D.

Sir, Having surveyed the [messuage] and premises, with the appurtenances, situate at in the parish of , in the county of , now held by you under a lease, bearing date the day of , 18 , and expressed to be made between A. B. esq., of the one part, and you the said C. D. of the other part; I find that the amendments and repairs specified in the schedule hereunder written, are now necessary to be done pursuant to the covenants in that behalf contained in the said lease. And I hereby give you notice to do all and singular such amendments and repairs [forthwith *or* within three calendar months next after the service of this notice].

Dated this day of , 18 .

Yours, &c.

E. F. of

Surveyor of the said A. B. esq.

THE SCHEDULE above referred to.

[*Here specify the amendments and repairs required to be done.*]

---

(15.) *Notices under Conveyancing Act before proceeding to enforce right of Re-entry* (*i*).

*Ejectment.*

44 & 45 Vict. c. 41, Sect. 14.

To [*naming a lessee and a sub-lessee*] and all others whom it may concern.

You are hereby required within three calendar months from the date hereof to well and substantially repair, uphold, support, maintain, pave, purge, scour, cleanse, empty, amend, paper, glaze, and keep the messuage, tenement and premises with the appurtenances thereto belonging, situate, and being, No. 111, Pentonville Road, in the parish of St. James, Clerkenwell, in the county of Middlesex, which you now hold of Captain Frederick Thomas Penton of Chalfont Park in the County of Buckingham, and particularly to do all and singular the amendments and repairs specified in the schedule hereto annexed and make compensations by payment to the said Frederick Thomas Penton of the sum of 20*l*.

Dated this 22nd day of September, 1896.

Lee & Pembertons,

44, Lincoln's Inn Fields,

Solicitors for the said Frederick Thomas Penton.

[SCHEDULE.]

(*h*) Follow as closely as possible the language of the lease.

(*i*) The above form was that used in *Penton* v. *Barnett*, [1898] 1 Q. B. 276, and p. 351 ante.

And see note (*j*), infra.

*Another Form (for Non-repair) (j).*

To C. D. and all parties interested.

I hereby give you notice that you have committed breaches of the covenants to repair the house No. 13, Brick Street, which you hold of me under a lease dated the of 18 [*or* 19 ] containing such covenants.

The particulars of the said breaches are specified in the schedule hereto.

And I hereby require you within months from the date of this notice to remedy the said breaches and to pay me £ as compensation for the same.

(Signed)

[SCHEDULE.]

*For another case (Nuisance).*

To C. D.

I hereby give you notice that I complain of your having annoyed my tenants occupying houses on each side of the house No. 13, Brick Street, which you hold of me under a lease dated the day of and containing a covenant that the tenant will not do or suffer anything that will grow to the annoyance of the occupiers of such houses.

The breach of such covenant consists in your having frequently suffered noxious vapours to proceed from your garden.

I hereby require you to desist forthwith from such annoyance, and also to pay me 50*l.* as compensation for such breach of covenant.

(Signed) A. B.

*For another case (Cutting down Trees).*

To C. D.

I hereby give you notice that I complain of your having cut down [apple-trees in the 2 orchards and 6 elm-trees in the field called the Big Field on the Manor Farm], which you hold of me under a lease containing a covenant not to cut down trees, and I require you to pay me 100*l.* as compensation for having cut down the said trees, and also to replace the said trees by planting new apple-trees and new elm-trees.

(Signed) A. B.

*For another case (Permitting Drunkenness).*

To C. D.

I hereby give you notice that I complain of your having been convicted of the offence of permitting drunkenness [*or*, of your having permitted drunkenness] in the Swan Inn, which you hold of me under a lease containing a covenant not to permit drunkenness therein, and I require you to pay me 50*l.* as compensation for such breach of covenant.

(Signed) A. B.

---

(16.) *Notice of Mortgage by the Mortgagee to the Mortgagor's Tenant.*

To Mr. C. D.

Sir, Take notice, that by an indenture dated the day of , 18 , and made or expressed to be made between [*as the case may be*], the [messuage or dwelling-house and land, *or as the case may be*], with the appurtenances situate and being [at *or* in the parish of ], in the county of , now in your possession (together with other hereditaments) were conveyed and assured unto and to the use of me, the said E. F., my heirs and assigns [*or* executors,

(*j*) For other forms, see Key and Elphinstone's Conveyancing Precedents, 5th ed., vol. ii., at p. 258, published in 1897, in which form the direction is given to set out the covenant to repair verbatim, and Chitty's Forms, 12th ed., at p. 600, published in 1883, which form is very full. Both forms contemplate a schedule of dilapidations.

The requirement to pay a sum of money as compensation for the breach need not be inserted. *Lock* v. *Pearce*, [1893] 2 Ch. 271, and p. 351.

The expenses of a solicitor or surveyor cannot be claimed under sub-s. (1) of s. 14 of the Conveyancing Act, 1881, but can be awarded by the Court under sub-s. (2) of that enactment as amended by s. 2 (1) of the Conveyancing Act, 1892.

App. C. s. 16.

administrators and assigns, for a term of years from the day of , 18 ], for securing the sum of £ with interest for the same at the rate of £ per cent. per annum [at a day now past, *or* on the day of next], and you are hereby required to pay to me all rent and arrears of rent due and payable, and hereafter to become due and payable from you in respect of the said premises in your possession: And in case of any default I shall distrain or sue for the said rent, or bring an action of ejectment to recover possession of the said [messuage or dwelling-house and land], with the appurtenances in your possession, or otherwise put the law in force as I may be advised.

Dated this day of , 18 .

Yours, &c.

E. F. of

---

(17.) *The like, by Mortgagee's Solicitor.*

To Mr. C. D.

Sir, Take notice, that by an indenture dated the day of , 18 , and made or expressed to be made between [*as the case may be*], the [farm and lands, *or as the case may be*], with the appurtenances situate [at *or* in the parish of ], in the county of , now in your possession (together with other hereditaments) were conveyed and assured to the said E. F. [*the mortgagee*], his heirs and assigns [*or* his executors, administrators and assigns, for the term of years from the day of , 18 ], for securing the sum of £ with interest for the same at the rate of £ per cent. per annum [at a day now past *or* on the day of next]: Now I do hereby as the solicitor of and for the said E. F. and on his behalf give you notice of the said indenture, and require you to pay to the said E. F. all rent and arrears of rent now due and payable, and hereafter to become due and payable from you in respect of the said premises in your possession: And take notice, that in case of any default the said E. F. will distrain or sue for the said rent, or bring an action of ejectment to recover possession of the said [farm and lands], with the appurtenances in your possession, or otherwise put the law in force, as he may be advised.

Dated this day of , 18 .

Yours, &c.

G. H. of

Solicitor for the said E. F.

---

(18.) *Attornment by several Tenants, to a Purchaser from their Landlord.*

We, E. F. of [*trade*], G. H. of [*trade*], I. K. of [*yeoman*], and L. M. of [*labourer*], DO hereby severally and respectively, with the privity and consent of our landlord A. B. of [*esquire*], testified by his signing his name in the margin hereof, ATTORN and become tenants to C. D. of [*gentleman*], of the premises in our respective occupations mentioned in the schedule hereunder written, with the appurtenances, as the same are now in our respective tenures or occupations: TO HOLD the same respectively at the same rent, and under and subject to the same stipulations, agreements and conditions as those under which we now respectively hold the same. AND each of us has this day paid to the said C. D. the sum of [one shilling *or* one penny] for and on account and in part payment of the said rent, and by way of acknowledgment of the title of the said C. D. AS WITNESS our hands the day of , 18 .

I consent to these attornments. A. B. Stamp (*k*).

THE SCHEDULE above mentioned:

PART THE FIRST. Premises in the tenure or occupation of the above-named E. F. upon a tenancy from year to year, commencing on the day of in each year, at the yearly rent of £ payable quarterly [on the usual days, *or as the case may be*], viz., ALL that [*describe the premises*, ex. gr. messuage and premises known as No. , street, in aforesaid, with the garden, yard and appurtenances], as the same are now in the occupation of the said E. F.

(*k*) No stamp is necessary.

App. C. s. 18.

PART THE SECOND. Premises in the tenure or occupation of the above-named G. H. upon a tenancy from quarter to quarter, commencing from the day of last (*l*), at the yearly rent of £ payable quarterly [on the usual days, *or as the case may be*], viz., ALL that [piece of land with the messuage and outbuildings thereon, situate on the side of street in aforesaid, and known as No. in the said street, with the appurtenances], as the same are now in the occupation of the said G. H.

PART THE THIRD. Premises in the tenure or occupation of the above-named I. K. upon a tenancy from month to month, commencing on the day of each month, at the monthly rent of £ ; viz., ALL that [piece of land with the cottage and outbuildings thereon, situate and being No. , street, in aforesaid, with the appurtenances], as the same are now in the occupation of the said I. K.

PART THE FOURTH. Premises in the tenure or occupation of the above-named L. M., upon a tenancy from week to week, commencing on [*Monday*] in each week, at the weekly rent of [payable in advance on in each week], viz., ALL that [cottage and land] at aforesaid, with the appurtenances as the same are now in the occupation of the said L. M.

Witness to the signatures of the above-named [E. F., G. H., I. K. and L. M.] X. Y. of .

(Signed)
E. F.
G. H.
I. K.
L. M.

---

(19.) *Attornment to a Receiver or to a Purchaser, with the Consent of Landlord [and of his Mortgagee]*.

Stamp (*m*).

We consent to this attornment
A. B.
N. M.

I, C. D., of [*farmer*], DO hereby, with the privity and consent of A. B. [esq.], my landlord [and of his mortgagee N. M. esq. (whose mortgage is become forfeited),] testified by their respectively signing their names in the margin hereof, ATTORN and become tenant to R. R. of [*gentleman*], of ALL that [farm *or* messuage, lands] and premises mentioned in the schedule hereunder written, with the appurtenances, as the same are now in my tenure, or occupation, TO HOLD the same at and under the same rent, and subject to the same [covenants and conditions *or* stipulations, agreements and conditions] as those under which I now hold the same: AND I have this day paid to the said R. R. the sum of [one shilling] for and on account and in part payment of the said rent.

AS WITNESS my hand this day of 18 .

THE SCHEDULE above mentioned.

ALL that [*describe the property*].

(Signed) C. D.

Witness E. F. of

Received of Mr. C. D. the sum of [one shilling] as above mentioned.

Witness E. F. (Signed) R. R.

---

(20.) *Acknowledgment of Title to bar the Statute of Limitations* (*n*).

I. C. D., of , do hereby admit and declare that I am now in possession of [*or* in receipt of the rents and profits of] all that messuage, &c. [*describe the property so as to identify it*], with the appurtenances, situate at , *or* in the parish of , in the county of , by the sufferance and permission of A. B. of [esq.], and subject to the title of the said A. B., under whom I now hold the same.

Dated this day of , 18 .

C. D.

To A. B. esq.

(*l*) Each quarter may be considered as the commencement of a new tenancy.

(*m*) No stamp is necessary.

(*n*) No stamp is necessary; *Barry* v. *Goodman*, 2 M. & W. 768.

APP. C. s. 21

(21.) *Notice by a Landlord to take part of the Land for Building or other Purposes pursuant to a Covenant in the Lease.*

(See ante, Appendix B., p. 972.)

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(22.) *Notice from Tenant to Landlord, or his Bailiff or Receiver, of an Action for Recovery of Land* (*ante*, pp. 849, 868).

[Address and date as in a letter.]

Sir, Herewith I send you as [*or* bailiff, *or* receiver of A. B. esq.] my landlord, copy of a writ of summons [*or* summons and plaint] served upon me in an action for the recovery of the possession of the [messuage, *or* farm, *or* land, &c.] and premises situate at in the county of , held by me as your tenant [*or*, as tenant of the said A. B.].

I am, &c.

---

(23.) *Authority by Occupier to kill Ground Game* (*ante*, 767).

I, A. B. [*or* we, J. A. and J. B.], do authorize C. D. to kill and take ground game on the lands occupied by me [*or* us].

A. B. [*or* J. A. J. B.]

---

(24.) *Authority by Occupier to kill Ground Game with Firearms* (*ante*, 767).

I, A. B. [*or* we, J. A. and J. B.], do authorize C. D. to kill ground game with firearms on the lands occupied by me [*or* us].

A. B. [*or* J. A. J. B.]

---

## *Forms in connection with Disclaimer of Lease, taken from the Bankruptcy Rules.*

No. 119.

*Notice of Intention to Disclaim Lease.*

(*Title.*)

Take notice that I intend to disclaim the lease dated whereby [*here specify property let*] was let to the above-named debtor at a rent of £ .

If you do not, within seven days after service of this notice upon you, require me by notice in writing to bring the matter before the court, I hereby disclaim the said lease as from the expiration of the said seven days.

Dated

G. H. [*Trustee.*]

To Mr. X. Y.

---

No. 119A.

*Notice to Landlord of Intention to Disclaim Leasehold Property not Sublet or Mortgaged.*

(*Title.*)

(*a*) Lease or tenancy *as the case may be.*
(*b*) Here specify property let.

Take notice that I intend to disclaim the (*a*) dated , whereby (*b*) was let to the above-named debtor, at a rent of £ .

If you require the matter to be brought before the court, you must give notice thereof to me in writing within seven days of the receipt by you of this notice.

Dated this day of , 189 .

, Trustee.

To Address.

The landlord of the above-mentioned property.

No. 119B.

*Notice of Intention to Disclaim Leasehold Property Sublet or Mortgaged.*

(*Title.*)

Take notice that I intend to disclaim the lease dated whereby (*a*) was let to (*b*) at a rent of £ .

If you require the matter to be brought before the court, you must give notice thereof to me in writing within fourteen days of the receipt by you of this notice.

Dated this day of , 189 .

, Trustee.

To Mr. Address.

The landlord of the above-mentioned premises *and*

To Mr.

The mortgagee *or* sub-tenant.

(*a*) Here insert particulars of demised property.

(*b*) The above-named bankrupt *or as the case may be.*

---

No. 120.

*Disclaimer without Notice.*

(*Title.*)

I , the trustee of the property of the above-named bankrupt, hereby disclaim the (*a*) of the premises (*b*) which were let to the above-named bankrupt (*c*) at a rent of £ per .

Notice of this disclaimer has been given to (*d*) .

Dated this day of , 189 .

Address. Trustee.

(*a*) Lease dated the *or as the case may be.*

(*b*) Insert description of the property.

(*c*) On a tenancy *or* for a term of years *or as the case may be.*

(*d*) Insert names and addresses of persons to whom notice given.

---

No. 120A.

*Disclaimer of Leasehold Property after Notice to Landlord, Mortgagee, &c.*

(*Title.*)

Pursuant to notice dated the day of addressed to (*a*) I the trustee of the property of the above-named bankrupt, hereby disclaim the lease dated the day of , 18 , whereby (*b*) were let to (*c*) at a rent of £ for a term of .

Dated this day of , 18 .

, Trustee.

Address.

(*a*) Here insert names and addresses of persons to whom notice given.

(*b*) Here insert particulars of demised property.

(*c*) The above-named bankrupt *or* as the case may be.

---

No. 120B.

*Disclaimer of Lease with Leave of Court.*

Pursuant to an order of court dated the day of , 18 , I , the trustee of the property of the above-named bankrupt, hereby disclaim all interest in the lease dated the day of , 18 , whereby the premises (*a*) were demised to at a rent of £ per annum, for a term of

Notice of this disclaimer has been given to

Dated this day of , 18 .

, Trustee.

(*a*) Insert description of the property disclaimed.

APP. C.

No. 120C.

*Notice of Disclaimer without the Leave of the Court.*

(*Title.*)

Take notice that, by writing under my hand, bearing date the day of , 18 , I, , the trustee of the property of the above-named bankrupt, disclaimed (*a*) of the premises known as (*b*) , which were let to (*c*) at a rent of £ per (*d*) .

The above-mentioned disclaimer has been filed in court with the proceedings in the bankruptcy.

Your attention is directed to the provisions of the Bankruptcy Acts printed on the back hereof.

Dated this day of , 18 .

, Trustee.

Address.

NOTE.—On the back of this notice the provisions of sub-sections 2 and 6 of section 55 of the Bankruptcy Act, 1883, and the second paragraph of section 13 of the Bankruptcy Act, 1890, should be printed.

(*a*) The lease dated the day of *or as case may be.*

(*b*) Insert description of property disclaimed.

(*c*) On a tenancy *or* for the term of years, *or as case may be.*

(*d*) *Add* where necessary "pursuant to notice dated the day of 18 ."

---

No. 120D.

*Notice of Disclaimer of Lease, with Leave of Court.*

(*Title.*)

Take notice that pursuant to an order of court dated the day of , 18 , I , the trustee of the property of the above-named bankrupt, by writing under his hand bearing date the day of , disclaimed all interest in the lease, dated the day of , 18 , whereby the premises were demised to at a rent of £ per annum, for a term of .

The above-mentioned disclaimer has been filed in court with the proceedings in the bankruptcy.

Dated this day of , 18 .

, Trustee.

Address.

To

---

No. 120E.

*Form of Notice by Landlord or other Person requiring Trustee to bring matter of intended Disclaimer of Property burdened with onerous Covenants before the Court.*

(*Title.*)

To Mr.

Trustee of the property of the above-named bankrupt.

Sir,—I hereby give you notice that the said bankrupt was, at the date of the receiving order, interested as lessee [*or, as the case may be*] in the property described in the schedule to this notice, and that as such lessee [*or, as the case may be*] the bankrupt was liable in respect of [*set out nature of bankrupt's liability*] which liability has devolved on you as trustee in bankruptcy of his property, and I hereby require you to bring the matter of your intended disclaimer of the bankrupt's interest in the said property before the court.

I am, &c.

(Signed) A. B.

[State how interested in the property.]

SCHEDULE to Notice when given by Lessor.

| Date of Lease. | Names, Addresses, and Descriptions of Parties to Lease. | Full Description of Property Leased. | Term and Rent. | Date of Assignment to Bankrupt (if any). | Names and Addresses of Parties to Assignment (if any). | Particulars of any Notices of Mortgage of Lease by Bankrupt. |
|---|---|---|---|---|---|---|
| | | | | | | |

SCHEDULE to Notice when given by Mortgagee or Assignee.

| Date of Lease. | Names and Addresses of Parties to Lease. | Description of Property Leased. | Term and Rent. | Date of Mortgage. | Names and Addresses of Parties to Mortgage. | Term conveyed by Mortgage. | Amount secured by Mortgage. | Particulars of any Transfer of Mortgage, with Dates and Names and Descriptions of Parties thereto. |
|---|---|---|---|---|---|---|---|---|
| | | | | | | | | |

# APPENDIX D.

## FORMS OF PROCEEDINGS IN DISTRESS.


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### *Proceedings on Distresses.*

(1.) *Warrant to distrain in a House for Rent* (*ante*, 495).

To Mr. R. S. my bailiff.

I hereby authorize and require you to distrain the goods and chattels (*a*) in and upon the [house] and premises of C. D., situate and being [No. , street], in the parish of , in the county of , for £ , being quarters' rent, due to me for the same [at Lady-day, Midsummer-day, Michaelmas-day *or* Christmas-day last, *as the case may be; or* "on the day of last"]; and to proceed thereon for the recovery of the said rent as the law directs. But you are hereby expressly prohibited from taking any property not legally liable to a distress for rent.

Dated this day of 18 .

(Signed) (*b*) A. B. of
[*or* A. B. of
by P. Q., his agent].

(2.) *Warrant to distrain on a Farm for Rent.*

To Mr. R. S. my bailiff.

I hereby authorize and require you to distrain the goods and chattels [and also the cattle and growing crops], in and upon the farm, lands and premises of C. D., situate and being at in the parish, &c. [*as in No.* 1, *to the end*].

(3.) *Inventory of Goods distrained* (*ante*, 521).

AN INVENTORY of the goods and chattels [cattle and growing crops] distrained by [R. S. of as bailiff of and for] A. B. of , esquire on the

(*a*) "Of C. D." may be here introduced, if wished for any special reason; but in ordinary cases the words would do more harm than good.

(*b*) This warrant should be signed by the person entitled to receive the rent; *Buller's case*, 1 Leon. 50; 2 Leon. 215; or by his agent having sufficient express or implied authority; *Trent* v. *Hunt*, 9 Exch. 14; 22 L. J., Ex. 318. It does not require a stamp; *Pyle* v. *Partridge*, 15 M. & W. 20.

The bailiff must be "certificated"; see ante, 493.

day of , 18 , in and upon the [house *or* farm, lands] and premises of C. D., situate and being [No. , street], in the parish of , in the county of , for £ , being quarters' rent due to the said A. B., [at last; *or* "on the day of last"].

1. *In front room on ground floor.*—One dining-table, one side-board, twelve chairs [*describe each article in this room intended to be distrained*].

2. *In back room on ground floor.*—[*Here describe each article in this room intended to be distrained.*]

3, 4, 5, &c.—[*Here describe in like manner each article intended to be distrained in the "front room on first floor"—"back room on first floor"—"front room on second floor"—"back room on second floor," &c.—"front attic"—"back attic"—"front kitchen"—"back kitchen"—"wash-house"—"scullery"—"wine cellar"—"coal cellar"—"yard"—"garden"—"coach-house"—"stables"—"barns," &c. &c.*]

*In the Fields.*

1. *In the field or close called or known as "Greenacre:"* cows, calves, oxen, bulls, sheep, lambs, horses, mares, geldings, colts, fillies, pigs [*as the case may be*].

2. *In the field or close called or known as* [*name*]: haystacks, stacks of [wheat]; about acres (more or less) of growing crops of [wheat *or* barley, oats, potatoes, peas, beans, *as the case may be*].

3. *Describe in like manner each close and the articles therein intended to be distrained. At the end of the list may (if wished) be added, the following words or to the like effect, viz.:*

"And all other goods, chattels and effects on the said premises," *or* "and any other goods that may be found in and about the said premises to pay the said rent and expenses of this distress" (*c*). *But it would be too indefinite and incorrect to say,* "And all other goods, chattels and effects on the said premises *that may be required in order to satisfy* the above rent, together with all necessary expenses" (*d*).

Dated this day of , 18 .

(Signed) R. S., bailiff of the said A. B.
[*or* A. B. of ].

---

(4.) *Notice of Distress for Rent* (*e*) (*ante*, 509).

To Mr. C. D., and all others whom it may concern.

Take notice that I [R. S., as bailiff of and for A. B., esq., your landlord], have this day distrained on the premises in your occupation or possession, named in the inventory [above written *or* hereunto annexed], the [cattle], goods and chattels mentioned in the said inventory for £ being quarter's rent due to [me, *or* the said A. B.], at last [*or* on the day of last], for the said premises: And unless you pay the said rent, with the charges of distraining for the same, within five [or such other number of days not exceeding fifteen as you may name in a request in writing in that behalf] days from the service hereof, the said [cattle] goods and chattels will be sold according to law. [*If cattle or goods removed, mention the place thus,* "And take notice that the said cattle have been removed to and are now in the common pound in and for the parish of , in the county of ."]

Dated this day of , 18 .

(Signed) R. S., of
Bailiff of the above-named A. B.
[*or* A. B. of ].

---

(5.) *Notice of Distress of Growing Crops, &c.* (*ante*, 471).

To Mr. C. D., and all others whom it may concern.

Take notice that I [R. S., as bailiff of and for A. B., esq., your landlord], have this day distrained on the [farm, lands and] premises in your occupation

(*e*) *Wakeman* v. *Lindsey*, 14 Q. B. 625; 19 L. J., Q. B. 166. But these words may perhaps make the distress *excessive*.

(*d*) *Kirby* v. *Harding*, 6 Exch. 234; 20 L. J., Ex. 162.

(*e*) To be written at the foot of a true copy of the inventory, or such true copy to be annexed to this notice.

APP. D. s. 5. or possession, mentioned in the inventory [above written *or* hereunto annexed], the [cattle, goods and chattels, and also the] growing crops mentioned in the said inventory for £ , being quarters' rent due to [me *or* the said A. B.], at last [*or* on the day of last] for the said [farm, lands and] premises: And unless you pay the said rent, with the charges of distraining for the same [within five days from the date hereof, the said cattle, goods and chattels will be appraised and sold according to law, and] I shall [*or* if signed by the bailiff say, "the said A. B. will"] proceed to cut, gather, make, cure, carry and lay up the said crops, when ripe, in the barn or other proper place on the said premises, and in convenient time sell and dispose of the same in or towards satisfaction of the said rent, and of the charges of such distress, appraisement and sale, according to law.

Dated this day of , 18 .

(Signed) A. B. of
[*or* R. S. of
Bailiff of the above-mentioned A. B.]

---

(6.) *Request of a Tenant to his Landlord to withdraw a Distress for Rent, with Liberty to make a second Distress* (*f*) (*ante*, 512).

To A. B., esq.

Sir, I hereby request you, for my accommodation, to withdraw the distress for rent made by you on the [farm, land and] premises, situate at , in the county of , now in my occupation as your tenant: And in consideration of your so doing, I do hereby consent, promise and agree that it shall and may be lawful for you at any time [afterwards, *or* after the day of next] to make a second distress for the said rent, of for so much thereof as shall for the time being remain unpaid, and for the expenses of and incident to such second distress; [And I will also pay you on demand all expenses incurred of and incident to the said first distress to the time of its being withdrawn for my accommodation as aforesaid].

Dated this day of , 18 . Yours, &c.

Witness, E. F., of (*g*). C. D.

---

(7.) *Requirement by Tenant or Owner of Appraisement* (*ante*, 513).

To A. B., esq.

Sir, I hereby require you to cause the [cattle], goods and chattels which you have distrained for rent to be appraised as required by the Act passed in the second year of the reign of their Majesties King William and Mary, chapter five.

Dated this day of , 18 . Yours, &c.

C. D.

---

(8.) *Request by Tenant or Owner of Removal of Distress to Auction Room for Sale* (*ante*, 513).

To. A. B., esq.

Sir, I hereby request you to remove the [cattle], goods and chattels which you have distrained for rent to a public auction room [*or* to the premises of Messrs. , No. , street] for sale.

Dated this day of , 18 . Yours, &c.

C. D.

(*f*) See other similar forms in *Hill* v. *Ramm*, 5 M. & G. 789; *Fishwick* v. *Milnes*, 4 Exch. 825; which cases show that no agreement stamp is necessary.

(*g*) An attesting witness is unnecessary.

(9.) *Request of Extension of Time to Replevy in* (*ante*, 510). APP. D. s. 9.

To A. B., esq.

Sir, I hereby request that the period of five days within which but for this request I am entitled to replevy the [cattle], goods and chattels which you have distrained for rent be extended to [*State number of days not exceeding fifteen*], from the date of your distress.

And I beg to enclose my promissory note for £ [*or* the promissory note of C. D. for £ ] as security for any additional cost.

Dated this day of , 18 . Yours,
E. F.

---

(10.) *Request of Tenant to Sell before the Extended Time* (*ante*, 510).

To A. B., esq.

Sir, I hereby request you to sell the [cattle], goods and chattels which you have distrained for rent at any time before the expiration of the extended time within which I should, but for this request, be entitled to replevy them.

Dated this day of , 18 . Yours,
C. D.

---

(11.) *Consent of Tenant to the Landlord or his Bailiff continuing in Possession under a Distress for more than Five Days.*

To A. B., esq. [*or* to Mr. R. S., bailiff of A. B., esq.]

Sir, I hereby request you not to remove the goods and chattels which you have distrained and impounded for rent on the premises, situate at , in the county of , now in my occupation as [your tenant *or* tenant of the said A. B.]; but to keep the said goods and chattels in the place where they are now impounded, until the day of next inclusive, for my accommodation, and to give me the opportunity of obtaining money to pay the said arrears of rent with expenses of the distress; all extra expenses occasioned by keeping possession as aforesaid to form part of the expenses of and incident to the distress.

Dated this day of , 18 . Yours, &c.
Witness E. F., of (*h*). C. D.

---

(12.) *Appraisement* (*i*) (*ante*, 512).

WE, the above-named L. M. and N. O., having viewed the [cattle], goods and chattels mentioned in [this *or* the within written] inventory, do appraise and value the same at the sum of pounds shillings and pence.

As witness our hands the day of , 18 .

(Signed) L. M. }
N. O. } Appraisers.

---

(13.) *Notice to Sheriff under* 8 *Ann. c.* 14, *s.* 1, *of Rent due to Landlord of Execution Debtor* (*ante*, 531).

To the sheriff of the county of , and his under-sheriff and bailiffs, and all others whom it may concern:

Take notice that the sum of £ is now due and owing to [me *or* to I. K. of esq.] from C. D., of , in the county of , for [one year's

(*h*) An attesting witness is unnecessary.
(*i*) Not necessary unless required by tenant; ante, 513.

APP. D. s. 13.

*or* one half-year's *or* one quarter's] rent, due on the day of last, of the premises in his occupation at aforesaid; upon which premises, as I am informed, you have seized and taken in execution certain goods and chattels; And you are hereby required not to remove any of the said goods and chattels from off the said premises until the said arrears of rent are paid, pursuant to the statute in such case made and provided.

Dated this day of , 18 .

Yours, &c.
I. K. of
[*or* E. F. of
Agent for I. K. of , esq.]

---

(14.) *Notice from Sheriff to Execution Creditor of Rent being due from the Defendant, and requiring Payment thereof by such Creditor, pursuant to* 8 *Ann.* c. 14, *s.* 1 (*ante*, 523).

In the High Court of Justice,
Division.
Between A. B., plaintiff,
and
C. D., defendant.

Take notice, that the sum of £ is due and owing from the above-named defendant to his landlord I. K., of [&c. esq.] for [one year's *or* one half-year's *or* one quarter's] rent, due on the day of last, for and in respect of the [house *or* farm, land and] premises situate at , in the county of , now in the occupation of the said defendant, and upon which certain goods and chattels have been seized by the sheriff of shire under the writ of fieri facias issued in this action [and the said sheriff has had notice of such arrears of rent, (*k*)]: Now I do hereby, as the agent of the said sheriff and on his behalf, give you notice that unless the above-named plaintiff do forthwith pay the arrears of rent due to the said landlord, either to him or his bailiff, pursuant to the statute in such case made and provided, the said sheriff will withdraw from possession of the said goods and chattels under the said writ.

Dated this day of , 18 .

Yours, &c.
L. M. of ,
Agent for the sheriff of shire.

To the above-named plaintiff: and to
Mr. , his solicitor or agent.

---

(15.) *Notice to the Bailiff of a County Court, pursuant to County Courts Act*, 1888, *s.* 160 (*ante*, 534).

To the high bailiff of the County Court of , holden at , and to his bailiff and officers, and all others whom it may concern:

Take notice, that C. D., whose goods you have taken in execution under a warrant from the said County Court, holds the [house *or* apartments] in which the said goods were taken as tenant thereof to [me *or* to I. K. of esq.] under a lease for years [and three quarters of another year wanting five days] from the day of , 18 , *or* under a tenancy from year to year, from the day of last (*l*), or under a tenancy from month to month from the [*first*] day of each month, *or* under a tenancy from week to week from each [*Saturday*] at the yearly rent of £ payable [by equal half-

(*k*) Omit this when inaccurate. Express notice to the sheriff appears to be unnecessary; it is sufficient if he knows of the arrears of rent (ante, 531). He should inspect the lease, and obtain legal proof of the arrears due (ante, 532).

(*l*) A tenancy from year to year recommences annually (ante, 230).

yearly, *or* quarterly, payments, on the day of , &c., *state days of payment*], *or* at the monthly rent of £ payable [in advance (*m*)] on the day of each month, *or* at the weekly rent of £ payable [in advance (*m*)] on each [*Saturday*]: And I now [as the agent of and for the said I. K., and on his behalf,] claim the sum of £ for arrears of the said rent for (*n*) one year [*or* two quarters] ending on the day of last; *or* for two months [*or* four weeks] ending on the day of last, *as the case may be*, which said rent or sum of £ now remains in arrear and unpaid.

Dated this day of , 18 .

(Signed) I. K. of
[*or* C. D. of
Agent for the above-named I. K.]

---

(16.) *Declaration by Lodger* (*o*) (*ante*, 480).

To [*name of superior Landlord, or his Bailiff, as the case may be*].

Sir, I, John Smith, occupying as lodgings 5 rooms in No. 13 Brick Street, do hereby declare that [name of immediate landlord] my landlord has no right of property or beneficial interest in the furniture, goods and chattels, distrained [*or* threatened to be distrained] for rent alleged to be due to [name of superior landlord], and of which an inventory is hereto annexed, but that such furniture, goods and chattels are my property [*or* in my lawful possession].

I owe [name of immediate landlord] £ on account of rent from to [*or* no rent].

The inventory referred to in this declaration is as follows:

*Inventory.*

1 Pianoforte,
4 Sofas,
2 Timepieces, &c., &c. [*state articles with precision*].

To Yours, &c.
J. S.

(*m*) Omit these words if rent not payable in advance.

(*n*) Here say "part of," if necessary, and add (just before the date), "the residue of the said [year's] rent having been paid."

(*o*) This declaration *need not* state that no rent is due if such be the case, nor that the declarant is a lodger (*Ex parte Harris*, 16 Q. B. D. 130; 34 W. R. 132), but it seems best to state the facts as they are, if accurately known.

# APPENDIX E.

## FORMS OF PROCEEDINGS IN ACTIONS.


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## SECT. 1.—FORMS OF PROCEEDINGS ON A REPLEVY (BEFORE ACTION).

(1.) *Notice of Proposed Sureties* (*a*).

[*Form* 120 *in C. C. Rules*, 1889.]

No. of plaint .

In the County Court of , holden at .

Between A. B., plaintiff,

and

C. D., defendant.

Order XXIX., Rule 1.

Take notice, that the sureties whom I propose as my security in the above action [*here state the proceeding which has rendered the sureties necessary*] are [*here*

(*a*) This seems scarcely applicable to an *intended* replevy: especially where the action of replevin is to be brought in the High Court. It does not mention where the action is to be brought, but assumes it to be already begun in the County Court. (See next form.)

*state the full names and additions of the sureties, whether housekeepers or freeholders, and their residences for the last six months, therein mentioning the county or city, places, streets, and numbers, if any*].

Dated this day of , 18 .

To the

[*Signature of person sending notice.*]

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(2.) *Notice of Sureties* (*another suggested form*).

[*Title of court and cause as in previous forms.*]

Take notice, that the sureties whom I propose as my security for the due prosecution of an action of replevin against the above-named C. D. in her Majesty's High Court of Justice are [*see directions* as in last form].

Dated this day of , 18 .

To the above-named C. D. and to the Registrar of the said County Court. } [*Signature of person sending notice.*]

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(3.) *Affidavit of Justification.*

[*Form* 121 *in C. C. Rules*, 1889.]

[*Title of court and action as ante*, No. 1.]

I, , of , one of the sureties for the defendant (*b*), make oath and say, that I am a housekeeper [*or* freeholder, *as the case may be*], residing [*describing particularly the county or city, the street or place, and the number of the house, if any*], that I am worth property to the amount of £ [*the amount required by the practice of the Court*] over and above what will pay my just debts [*if security in any other action or for any other purpose, add*, and every other sum for which I am now security], that I am not bail or security in any other action or proceeding or for any other person [*or if security in any other action or actions, add*, except for C. D., at the suit of E. F., in the Court of in the sum of £ , for G. H., at the suit of I. K., in the Court of in the sum of £ , *specifying the several actions with the Courts in which they are brought and the sums in which he has become bound*]; that this my property, to the amount of the said sum of £ [*and if security in any other action, &c.*, over and above all other sums for which I am now security as aforesaid], consists of [*here specify the nature and value of the property in respect of which the deponent proposes to become bondsman as follows*, stock in trade in my business of carried on by me at of the value of £ , of good book debts owing to me to the amount of £ , of furniture in my house at of the value of £ of a freehold [*or* leasehold] farm of the value of £ situate at occupied by *or* of a dwelling-house of the value of £ situate at occupied by *or of other property, particularizing each description of property, with the value thereof*], and that I have for the last six months resided at [*describing the place of such residence, or if he has had more than one residence during that period, state in the same manner as above directed*].

Order XXIX., Rule 2.

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(4.) *Notice to Distrainer of Goods* (*or Cattle*) *intended to be replevied.*

[*Form No.* 243 *in C. C. Rules*, 1889.]

In the County Court of , holden at .

Take notice, that A. B. of, &c., whose goods [*or* cattle] you have distrained, intends to replevy the same, and has proposed as his sureties for the due

(*b*) The prescribed form says "for the defendant," but in replevin it would seem more proper to say "for the plaintiff in this action of replevin."

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prosecution of an action of replevin against you in the [*here mention the Court in which the action is to be brought*], E. F. of, &c., and G. H. of, &c., and that if you have any valid objection to make to the proposed sureties, or either of them, you must attend at [*here insert place of office of Registrar*], on the day of , 18 , at the hour of , when the bond will be submitted to me for approval.

J. K.,
Registrar of the Court.

Hours of attendance at the office of the Registrar [*place of office*] from ten till four o'clock except on [*here insert the day on which the office will be closed*] *when the office will be closed at one o'clock.*

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(5.) *Bond in Replevin where Action to be commenced in High Court of Justice.*

[*Form No.* 244 *in C. C. Rules*, 1889.]

Know all men by these presents, that we, A. B. of, &c., C. D. of, &c., and E. F. of, &c., are held and firmly bound unto G. H. (*) of, &c., in £ to be paid to the said G. H. or his certain attorney, executors, administrators, or assigns, for which payment to be made we bind ourselves and each and every of us, in the whole, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

* The distrainer.

Sealed with our seals, and dated this day of, , one thousand hundred and .

Whereas the above-named C. D. and E. F., at the request of the said A. B., have agreed to enter into the above-written obligation, and his security has been approved of by , the Registrar of the County Court of holden at , as appears by his allowance in the margin hereof;

I approve of this bond.
I. K.,
(L.S.) Registrar.
*This bond does not require a stamp* (*c*).

Now the condition of this obligation is such, that if the above-bounden A. B. do and shall within one week from the date of the said obligation commence an action of replevin against the above-named G. H. in the High Court of Justice, for taking and unjustly detaining of certain goods and chattels of the said , to wit, [*here insert the description of the goods and chattels*], and prosecute such action with effect and without delay, and unless judgment be obtained thereon by default, do and shall prove before the said Court of that he the said had good ground for believing that the title to the hereditament in respect of which the distress was made was in question [*or*, that the title to a toll was in question], [*or*, that the title to a market was in question], [*or*, that the title to a fair was in question], [*or*, that the title to a franchise was in question], [*or*, that the alleged rent or damage in respect of which the distress was made exceeded twenty pounds], and do and shall also make return of the said goods and chattels, if return thereof shall be awarded, then this obligation shall be void and of no effect, otherwise shall be and remain in full force.

A. B. (L.S.)
C. D. (L.S.)
E. F. (L.S.)

Signed, sealed, and delivered by the above bounden in the presence of .

51 & 52 Vict. c. 43, s. 109.

NOTE.—*If a deposit of money be made, the memorandum thereof should follow the terms of the conditions of the bond, and will not require a stamp.*

---

(6.) *Bond in Replevin where Action to be commenced in County Court.*

[*Form No.* 245 *in C. C. Rules*, 1889.]

Know all men by these presents, that we, A. B. of, &c., C. D. of, &c., and E. F. of, &c., are held and firmly bound unto G. H. (*) of, &c., in £ to

* The distrainer.

(*c*) As to requirement of stamp, see note (*d*), post, to Form (6).

be paid to the said G. H., or his certain attorney, executors, administrators, or assigns, for which payment to be made we bind ourselves and each and every of us, in the whole, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this day of , one thousand eight hundred and .

Whereas the above-named C. C. and E. F., at the request of the said A. B., have agreed to enter into the above-written obligation, and this security has been approved of by , the Registrar of the County Court of holden at , as appears by his allowance in the margin hereof:

I approve of this bond.
I. K.,
(L.S.) Registrar.
*This bond does not require a stamp (d).*

Now the condition of this obligation is such, that if the above-bounden A. B. do and shall within one month from the date of the said obligation commence an action of replevin against the above-named G. H. in the County Court of holden at for taking and unjustly detaining of certain goods and chattels of the said , to wit, [*here insert the description of the goods and chattels*], and prosecute such action with effect and without delay, and do and shall also make return of the said goods and chattels, if return thereof shall be awarded, then this obligation shall be void and of no effect, otherwise shall be and remain in full force.

A. B. (L.S.)
C. D. (L.S.)
E. F. (L.S.)

Signed, sealed, and delivered by the above bounden in the presence of .

NOTE.—*If a deposit of money be made, the memorandum thereof should follow the terms of the conditions of the bond, and will not require a stamp.*

---

(7.) *Warrant to High Bailiff to Replevy.*

[*Form No.* 246 *in C. C. Rules*, 1889.]

In the County Court of holden at .

Whereas hath given security as well to commence his action of replevin against for the taking and unjustly detaining of certain goods and chattels [*or* cattle] of the said that is to say; and prosecute such action with effect and without delay, as also to return the said goods and chattels if return thereof shall be adjudged by law: Now, as Registrar of the said County Court, and by virtue of the provisions of the County Courts Act, 1888, I hereby authorise and direct you without delay to replevy and deliver the said goods and chattels [*or* cattle] to the said and forthwith to return to me this warrant and what you shall have done under the same.

Dated the day of , 18 .

Registrar of the Court.

To the High Bailiff of the Court.

In obedience to this warrant, I have replevied and caused to be delivered to the within-named the within-mentioned goods and chattels [*or* cattle].

Dated this day of , 18 .

High Bailiff.

(*For Judgment for Plaintiff in Replevin, see Form* 34.]

(*d*) Note by Editor.—The marginal note "This bond does not require a stamp," has, in Heywood's Annual County Court Practice for 1898, Vol. I., at p. 846 (as in many previous editions), been replaced by the marginal note, "[This bond, under the Stamp Act, 1891, requires a stamp—Ed.]," and see note (*k*) at p. 438. The "General Exemptions from all Stamp Duties" at the end of Schedule I. to the Stamp Act, 1891, exempts replevin bonds given to "sheriffs and other persons *in Ireland*," while the corresponding exemptions of the repealed Stamp Act, 1870, exempted replevin bonds given "to sheriffs and other persons" generally. The general imposition of duties under which replevin bonds, if not exempted, come (see Sched. I., tit. *Bond*), is subject, under s. 4, to exemptions under any other *Act*, but it is submitted that Form 245 under the County Court Rules, 1889, is not an *Act* within the meaning of such 4th section.

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## SECT. 2.—PROCEEDINGS IN HIGH COURT OF JUSTICE.

### (a) *Indorsement of Claims on Writ of Summons.*

R. S. C., App. A., Part III., Sects. II., III., IV.

(1.) *Rent.*

The plaintiff's claim is for £ for arrears of rent.

---

(2.) *Use and Occupation.*

The plaintiff's claim is for £ for the use and occupation of a house.

---

(3.) *Replevin.*

The plaintiff's claim is in replevin for goods wrongfully distrained.

---

(4.) *Distress.*

The plaintiff's claim is for damages for improperly distraining (*e*).

---

(5.) *Ejectment.*

The plaintiff's claim is to recover possession of a house, No. in Street, [*or of a farm called Blackacre,*] situate in the parish of , in the county of .

---

(6.) *To establish Title and recover Rents.*

The plaintiff's claim is to establish his title to [*here describe property*] and to recover the rents thereof.

---

(7.) *Fire Insurance.*

The plaintiff's claim is for damages for breach of a covenant to insure a house.

---

(8.) *Repair.*

The plaintiff's claim is for damages for breach of contract to keep a house in repair.

---

(9.) *Farming.*

The plaintiff's claim is for damages for breaches of covenants contained in a lease of a farm.

(*e*) To this Form there is the following note :—

"This form shall be sufficient whether the distress complained of be wrongful or excessive or irregular, and whether the claim be for damages only, or for double value."

(10.) *Breach of Contract to Let or Take.*

The plaintiff's claim is for damages for breach of contract to let [*or take*] a house.

---

(11.) *Mesne Profits, &c.*

[*Add to Indorsement where Claim is to Land or to establish Title or both.*]
And for mesne profits.
And for an account of rents or arrears of rent.
And for breach of covenant for [*repairs*].

---

## (b) *Pleadings.*

(1.) *Breach of Covenant for Repair* (*R. S. C., App. C., Sect. V., No.* 9).

In the High Court of Justice,
Division. 18 . B. No. .
Writ issued 18 .
Between A. B., plaintiff,
and
C. D., defendant.

*Statement of Claim.*

1. By a repairing covenant contained in a lease under seal from the plaintiff to the defendant, dated the 1st of January, 1876, of a house No. 401, Piccadilly, for seven years from the 25th day of December, 1878, the defendant covenanted to keep the premises in such repair and condition as therein mentioned.
2. The premises were during the term out of such repair as was required by the covenant.
3. They were yielded up out of such repair at the expiration of the term.
4. Particulars of dilapidations were delivered to the defendant's solicitor on the day of , 18 , and exceed three folios.
The plaintiff claims £
Place of trial,
(Signed)
Delivered

---

(2.) *Recovery of Land and Mesne Profits* (*R. S. C., App. C., Sect.* 7).

The plaintiff is entitled to the possession of a farm and premises called Church Farm, in the parish of St. James, in the county of Surrey, which was let by the plaintiff to the defendant for the term of three years from the 29th of September, 1883, which term has expired [*or* as tenant from year to year from the 29th September, 1883, which said tenancy was duly determined by notice to quit expiring on the 29th September, 18 ].
The plaintiff claims possession and 50*l.* for mesne profits.
Place of trial, Surrey.
(Signed)
Delivered

---

(3.) *Unlawful, Excessive, and Irregular Distress.*

1. The plaintiff was tenant to the defendant of a farm and premises called Church Farm at the rent of 100*l.* a year payable quarterly.
2. On the day of , 18 , the defendant wrongfully distrained and

APP. E. s. 2.

sold goods of the plaintiff to the value of 300*l.* for pretended arrears of the said rent, whereas no rent was due to the defendant.

3. The said pretended arrears, if due, amounted to 75*l.* only.

4. The said goods were not removed to a public auction-room for sale, nor were they sold for the best price which could have been realized for the same.

The plaintiff claims:

Double the value of the goods so sold,

or, in the alternative,

200*l.* for excessive distress and 100*l.* for irregular distress.

Place of trial, Shrewsbury.

---

(4.) *Recovery of Land and Mesne Profits, with Counter-claim.*

In the High Court of Justice,
Division. 18 . B. No. .
Writ issued of 18 .
Between A. B., plaintiff,
and
C. D., defendant.

*Statement of Claim.*

1. On the day of 18 , the plaintiff let to the defendant a house No. , street, in , as tenant for fourteen years at the yearly rent of £ , payable quarterly, by a lease containing a covenant not to convert the said house into a shop, with a proviso for re-entry on breach thereof, the tenancy to commence on the day of .

2. The defendant has converted the said house into a butcher's shop, and the said house is now so used.

The plaintiff claims:

1. Possession of the house.

2. £ for mesne profits from the day of .

The plaintiff proposes that this action should be tried in .

In the High Court of Justice,
Division. 18 . B. No. .
Between A. B., plaintiff,
and
C. D., defendant.

*The Defence and Counter-claim of the above named C. D.*

1. The plaintiff, A. B., by writing dated the day of and signed by him, granted to the defendant C. D. leave to convert the said house into a butcher's shop.

2. By the said writing the plaintiff further agreed to repay to the plaintiff one-half the cost of the said conversion, and also to extend the defendant's lease for a further period of seven years.

3. By way of counter-claim the defendant claims to have the sum of 12*l.* 4*s.* 6*d.*, being one-half the said cost, repaid to him, and to have an extended lease granted to him accordingly.

*For Another Case.*

The plaintiff has given no notice to the defendant, in pursuance of the 14th section of the Conveyancing and Law of Property Act, 1881, specifying the breach of covenant complained of.

*The Reply of the Plaintiff A. B.*

The plaintiff joins issue upon the defendant's defence and counter-claim.

(c) *Other Forms.*

1.) *Judgment in Default of Appearance in Action for Recovery of Land.*

(*R. S. C., App. F., No.* 3.)

In the High Court of Justice,
Division. 18 . B. No. .
Between A. B., plaintiff,
and
C. D. and E. F., defendants.
of 18 .

No appearance having been entered to the writ of summons herein, it is this day adjudged that the plaintiff recover possession of the land in the said writ mentioned.

---

(2.) *Præcipe for Writ of Possession.*

(*R. S. C., App. G., No.* 7.)

In the High Court of Justice,
Division. 18 . B. No. .
Between A. B., plaintiff,
and
C. D. and others, defendants.

Seal a writ of possession directed to the sheriff of to deliver possession to A. B. of
Judgment dated day of .

---

(3.) *Writ of Possession.*

(*R. S. C., App. H., No.* 8.)

In the High Court of Justice,
Division. 18 . B. No. .
Between A. B., plaintiff,
and
C. D. and others, defendants.

VICTORIA, to the sheriff of , greeting: Whereas lately in our High Court of Justice, by a judgment of the division of the same court, A. B. recovered [*or* E. F. was ordered to deliver to A. B.] possession of all that with the appurtenances in your bailiwick: Therefore we command you that you omit not by reason of any liberty of your county, but that you enter the same and without delay you cause the said A. B. to have possession of the said land and premises with the appurtenances; and in what manner you have executed this our writ make appear to the judges of the division of our High Court of Justice immediately after the execution thereof, and have you there then this writ. Witness, &c.

---

(4.) *Writ of Second Deliverance* (*f*).

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, To the Sheriff of greeting: If A. B. shall make you secure of prosecuting his claim, and also of returning the [cattle, goods, and chattels, &c.] which were lately adjudged to C. D. in our High Court of Justice on account of the default of the said A. B., if a return thereof shall be adjudged: We command you that if by virtue of our writ of

(*f*) This and the two following forms are not in the Rules of the Supreme Court.

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retorno habendo to you thereupon before directed, you have caused the said [cattle, &c.] to be returned to the said C. D., then that you cause them to be re-delivered to the said A. B., and put by gages and safe pledges the said C. D., that he be before our said High Court of Justice, at Westminster, on [*the return day of the writ*], to answer the said A. B. in an action of replevin for the taking and unjustly detaining the [cattle, goods and chattels] aforesaid, and have you there the names of the pledges and this writ: Witness ourself at Westminster, the day of , in the year of our reign.

---

(5.) *Return to Writ of Second Deliverance.*

By virtue of this writ to me directed, I have caused to be delivered to the within-named A. B. his [cattle, goods and chattels] within mentioned, as I am within commanded. The pledges within mentioned are , and

The answer of , esq., sheriff.

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(6.) *The like, where only part of the Goods, &c. could be delivered.*

By virtue of this writ to me directed, I have caused to be delivered to the within-named A. B. [*describe the goods re-delivered*], part of the [cattle, goods and chattels] within mentioned, being all of the said [cattle, goods and chattels] which are to be found in my bailiwick. The pledges within mentioned are and

The answer of , esq., sheriff.

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## SECT. 3.—PROCEEDINGS IN THE COUNTY COURT.

### (a) *Proceedings in Replevin.*

(1.) *Particulars of the Goods distrained, required on entering a Plaint or Replevin.*

No. of plaint (*when known*).

In the county court of holden at .

Between A. B., plaintiff,

and

C. D. and R. S., defendants.

The following are the particulars of the [cattle, *or* goods and chattels, &c.] taken under a distress for alleged arrears of rent by C. D. [and R. S., as his bailiff] at in county of , and within the district and jurisdiction of this court, and with respect to which I [*or* the said A. B. doth] now enter my plaint in replevin in the said court and claim the sum of pounds shillings damages for their detention against sureties and pledges, until, &c.

[*Here enumerate the cattle, &c., intended to be replevied.*]

Dated this day of 18 .

[*Signature of plaintiff or his solicitor.*]

*The plaint notes are prepared and kept printed in the registrar's office.*

---

(2.) *Judgment for Plaintiff in Replevin for Rent.*

[*Title of court and cause as ante, No.* 1.]

Upon hearing this action at a court holden this day, it is this day adjudged that the plaintiff do recover against the defendant the sum of £ for

damages for the taking of the plaintiff's goods and chattels [*or* cattle, *stating the particulars thereof*] and £ for costs amounting together to the sum of £ .

And it is ordered that the defendant do pay the same to the registrar of the court on the day of 18 .

Given under the seal of the court this day of 18 .

By the court,

I. K.,

Registrar of the Court.

Hours of attendance, [&c. *see ante*, 1,000].

---

(3.) *Judgment for Defendant in Replevin for Rent* (*g*).

Upon hearing this action at a court holden this day, it is adjudged that the plaintiff do return to the defendant the goods and chattels [*or* cattle, *stating the particulars thereof*], and pay to the registrar of the court forthwith [*or* on the day of ] the sum of £ for costs of suit. [*Or*, it is adjudged that the amount due for rent in arrear from the plaintiff to the defendant is £ , and that the goods and chattels [*or* cattle] were of the value of £ ; and that the plaintiff do forthwith [*or* on the day of ] pay to the registrar of the court, at his office, the said sum of £ , and also the sum of £ for costs of suit].

---

## (b) *Forms in Action of Replevin removed from the County Court into the High Court.*

(1.) *Affidavit for Certiorari.*

In the High Court of Justice (*h*).

I, C. D., of , in the county of [*trade or addition*], make oath and say as follows:—

1. On the day of [instant *or* last] I was served with a summons issued out of the County Court of , holden at , with particulars of demand thereto annexed: and the paper writing hereto annexed, marked A, is a true copy of the said particulars of demand (*i*).

2. I am the defendant named in the said summons and particulars.

3. I have good ground for believing, and do verily believe, that the rent [*or* "damage"] in respect of which the distress mentioned in the said summons and particulars was made exceeded twenty pounds.

4. [*Here state the facts, showing the ground of belief above mentioned, ex. gr.:*] The plaintiff A. B., in the said summons and particulars named, for quarters of a year next before and ending on the day of last, held a certain [dwelling-house *or* farm, lands] and premises, situate at , in the parish of in the county of , wherein the said distress was taken, as my tenant at the annual rent of pounds, payable [quarterly on the usual quarter days, *or as the case may be*], of which rent the sum of pounds, for [two] quarters ending on the day of last, became and was due to me from the said A. B., and [the sum of £ , parcel thereof (the residue having been paid)] continued in arrear and unpaid at the time of the making of the said distress [*or state facts showing that the "damage done" exceeded twenty pounds*].

5. I am desirous of having the said action removed by certiorari from the County Court of holden at , into Her Majesty's High Court of

(*g*) This form is No. 247 in schedule to C. C. C. Rules, 1889.

(*h*) Not to be entitled in any cause.

(*i*) Let A. and B. be marked as exhibits.

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Justice: And I am ready and willing to give such security as is required by the statute in such case made and provided.

C. D.

Sworn, &c.

---

(2.) *The like, when some Title is in Question.*

[*Commence as ante*, No. 1, *to the end of the second paragraph.*]

3. [*Here state the facts specially, showing that the title of some particular hereditament, toll, market, fair or franchise is in question.*]

4. I have good ground for believing, and do verily believe, that the title to the said was and is in question.

I am desirous [&c. *as in last form*].

C. D.

Sworn, &c.

---

(3.) *Judge's Order for a Certiorari to remove an Action of Replevin* (*k*).

Upon reading the affidavit of , I do order that a writ of certiorari do issue to remove an action of replevin between A. B. and C. D., with all things touching the same, from the County Court of , holden at , into her Majesty's High Court of Justice, on the said C. D. giving security as provided for by the 19 & 20 Vict. c. 108, s. 67.

Dated the day of , 18 .

[*Judge's signature.*]

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(4.) *Bond on Removal.*

[*Form of bond by the defendant and two sureties in a penalty not exceeding* 150*l.* (*l*), *as ante*, Sect. 1, No. 6, p. 1,000, *to the date inclusive:* WHEREAS an action of replevin was on the day of , 18 , commenced in the County Court of , holden at , wherein A. B. was plaintiff and the above-bounden C. D. was defendant: AND WHEREAS the Honourable Sir , Knight, one of the judges of Her Majesty's High Court of Justice [*or*, "And whereas her Majesty's High Court of Justice"], on the application of the said C. D., did, on the day of , 18 , order that [*recite order for certiorari in the past tense, ex. gr.*] "a writ of certiorari should issue to remove the said action of replevin between the said A. B. and C. D., with all things touching the same, from the said County Court of , holden at , into Her Majesty's High Court of Justice, on the said C. D. giving security as provided for by the 19 & 20 Vict. c. 108, s. 67;" AND WHEREAS the above-named E. F. and G. H., at the request of the said C. D., have agreed to enter into the above-written obligation as his sureties: NOW THE CONDITION of this obligation is such, that if the above-bounden C. D. do defend the said action in her Majesty's High Court of Justice, with effect (*m*); And unless the said A. B. shall discontinue or shall not prosecute such action or become nonsuit therein if the said C. D. do prove before the said High Court that the said C. D. had good ground for believing either that the title to some corporeal or incorporeal hereditament, or to some toll, market, fair or franchise was in question, or that the rent or damage in respect of which the distress in this behalf was taken, exceeded twenty pounds, then this obligation shall be void and of no effect, otherwise shall be and remain in full force.

I approve of this bond.
W. B.,
Master.

Signed, sealed and delivered by the above-bounden in the presence of

C. D. (*Seal.*)
E. F. (*Seal.*)
G. H. (*Seal.*)

(*k*) The order need not be entitled in any division or cause. The application is usually made to a Judge at Chambers; *Bowen* v. *Evans*, 3 Exch. 111; 6 D. & L. 193. But sometimes it may be made to the court. The form of a rule of court agrees in substance with the above order.

(*l*) The amount of the penalty not exceeding 150*l.* must be fixed by one of the masters, pursuant to s. 137 of the County Courts Act, 1888.

(*m*) I.e., with success; *Tummons* v. *Ogle*, 6 E. & B. 571.

(5.) *Memorandum of Deposit in lieu of a Bond on Removal.* APP. E. s. 3.

MEMORANDUM made on the day of , 18 : WHEREAS an action of replevin was on the day of , 18 , commenced in the County Court of , holden at , wherein A. B. was plaintiff and C. D. was defendant, AND WHEREAS the Honourable Sir , Knight, one of the judges of her Majesty's High Court of Justice, [*or*, "And whereas her Majesty's High Court of Justice"], on the application of the said C. D., did on the day of , order that [*recite order for certiorari in past tense, ex. gr.*] "a writ of certiorari should issue to remove the said action of replevin between the said A. B. and C. D., with all things touching the same, from the said County Court of , holden at , into her Majesty's High Court of Justice, on the said C. D. giving security as provided for by the County Courts Act, 1888, s. 137:" AND WHEREAS the said C. D. has this day deposited with , esq., one of the masters of the Division of the said High Court of Justice, the sum of £ sterling (being the amount fixed by the said master pursuant to the said act): NOW THE CONDITION of the said deposit is such, that if the said C. D. do defend the said action in her Majesty's High Court of Justice with effect; and unless the said A. B. shall discontinue or shall not prosecute such action, or become nonsuit therein, if the said C. D. do prove before the Division of the said High Court of Justice that the said C. D. had good ground for believing either that the title to some corporeal or incorporeal hereditament, or to some toll, market, fair or franchise, was in question, or that the rent or damage in respect of which the distress in this behalf was taken exceeded twenty pounds, then the said deposit shall be void, and returned to the said C. D.; otherwise the same shall be applied and disposed of according to law.

I approve of this memorandum.
W. B.,
Master.

(Signed) C. D.,
[*or*
C. D., by G. H., his attorney.]

(6.) *Writ of Certiorari to remove Action of Replevin.*

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, To the judge of the county court , holden at , greeting: We being willing for certain causes to be certified of a plaint levied in our court before you against C. D. at the suit of A. B. in an action of replevin, command you that you send to our High Court of Justice at Westminster, on , the plaint aforesaid with all things touching the same, as fully and entirely as it remains in our court before you, by whatsoever names the parties may be called therein, together with this writ, that we may further cause to be done thereupon what of right we shall see fit to be done. Witness [*name of Lord Chancellor*] (*n*) at Westminster, the day of , in the year of our Lord, 18 .

(*Indorsement.*)

"By order of Mr. [Justice *or* Baron] dated the day of , 18 ;" *or* "By rule of court, dated the day of , 18 ."
*Add solicitor's name and address.*

(*n*) See R. S. C., Ord. II., r. 8.

APP. E. s. 3.

(7.) *Return of County Court Judge to Certiorari.*

(*Indorsement on the Writ.*)

The execution of this writ appears in the schedule hereunto annexed.
The answer of , esq., judge of the county court within mentioned.

[*Annex a Schedule written on Parchment as follows:*]

I , esq., the judge of the county court of , holden at , in the said county, do most humbly certify to our sovereign lady the queen, that at the date and suing forth of the writ of our said lady the queen to me directed and to this schedule annexed (to wit) on [*teste of writ of certiorari*] A. B. in the said writ named, entered in the office of the registrar of the said county court at , aforesaid, a plaint in writing against C. D. in the said writ also named, for taking and unjustly detaining certain goods [and cattle] of the said A. B.: And that afterwards, on , a summons on the said plaint was issued under the seal of the said court, according to the form of the statutes in that behalf, whereby the said C. D. was summoned to appear at the said court to be holden at , in aforesaid, on , to answer the said A. B. to a claim, the particulars of which were thereunto annexed, and are as follows:— "In the county court of [&c. *copy of particulars.*]" And this is the tenor and record of the process of the said plaint, with all things touching the same, as it remains before me.

(8.) *Notice of filing Certiorari, and Demand of Statement of Claim.*

In the High Court of Justice.

Between A. B., plaintiff.
and
C. D., defendant.

The defendant having sued out of this honourable court a writ of certiorari directed to the judge of the county court of , holden at , for removing the above cause out of the said county court into this court, returnable on the day of last past, I do hereby give you notice, that the defendant has filed the said writ, and the return thereto, with the proper officer of this court, and has entered his appearance in the said action in this court: And the plaintiff is hereby required to declare in the said action in four days, otherwise a judgment of non pros. will be signed against him.

Dated this day of , 18 .

Yours, &c.
G. H. of
Defendant's [solicitor *or* agent].

To Mr. E. F., the plaintiff's [solicitor *or* agent].

## (c) *Forms in Actions for the Recovery of Small Tenements in the County Courts.*

APP. E. s. 3.

(1.) *Summons for Recovery of Possession against a Tenant or other Person holding over* (*o*).

In the county court of holden at . No. of Plaint.
(*Seal.*)

Between A. B., plaintiff,
[*Address, Description*],
and
C. D., defendant,
[*Address, Description*],

* [Issued "by leave of the court" *or*, "by leave of the registrar."] * Insert this when necessary.

You are hereby summoned to appear at a county court to be holden at on the day of , 18 , at the hour of in the noon, to answer the plaintiff, wherefore you neglect or refuse to deliver up to him possession of a certain [*messuage, with appurtenances*, or *part of a house*, &c., or, *as the case may be*.] situate at . Order V., Rule 3.

And take notice, that the plaintiff claims of you for rent [*or* mesne profits] [*or* for rent and mesne profits] the sum of for a period from the day of , 18 , to the day of , 18 .

And further take notice, if you do not appear at the said court, and show cause why you do not deliver up possession as aforesaid, the court may order that possession of the said premises be given by you to the plaintiff forthwith, or on or before such day as it shall name, and that if such order be made and be not obeyed a warrant may issue to give possession to the plaintiff.

Dated the day of , 18 .

Registrar of the court.

To the defendant.

| | £ | *s.* | *d.* |
|---|---|---|---|
| Costs of this summons . . . . . | | | |
| Claim for . . . . . | | | |

*At bottom of Summons.*

TAKE NOTICE.—If the plaintiff in this action be not your immediate landlord, YOU MUST upon your being served with this summons, or if this summons sha l come to your KNOWLEDGE, forthwith GIVE NOTICE thereof to your IMMEDIATE LANDLORD, and if you do NOT give such NOTICE you will be liable. under section 140 of the County Courts Act, 1888, to forfeit to your immediate landlord THREE YEARS' RACK-RENT of the premises held by you of him, in respect of which the summons shall have issued. 51 & 52 Vict. c. 43, s. 140.

(2.) *Summons for Recovery of Possession of a Tenement for Nonpayment of Rent* (*p*).

[*Title of court and action, as above*, No. 1.]

You are hereby summoned to appear at a court to be holden at on the day of , 18 , at the hour of in the noon, to answer the plaintiff why possession of a certain , situate at , should not be given up to the plaintiff, by reason of the rent payable in respect thereof by you being Order V., Rule 3.

(*o*) This is Form No. 210 in schedule to C. C. C. Rules, 1889.

(*p*) This is Form No. 211 in schedule to County Court Rules, 1889.

APP. E. s. 3. half a year in arrear, and the plaintiff having right by law to re-enter for the nonpayment thereof.

If you shall pay to the Registrar the rent in arrear, and the costs of this action, as stated at the foot of the summons, five clear days before the day you are required to appear to this summons, this action will cease.

And take notice, that if you do not pay such rent in arrear and costs, or appear at the said Court, and show cause why possession of the said should not be recovered against you, you may be ordered by the Court to give possession of such premises to the plaintiff, and that if such order be not obeyed a warrant may issue to give possession to the plaintiff.

Dated this day of , 18 .

Registrar of this Court.

£ s. d.

Costs of this summons . . . . . .

*At bottom of Summons.*

51 & 52 Vict. c. 43, s. 140. TAKE NOTICE [as in No. 1, *ante*].

---

(3.) *Order for Recovery of Possession of Tenement for Nonpayment of Rent* (*q*).

Order V., Rule 3. Upon the hearing of this action at a Court holden this day, it is ordered that the defendant do give to the plaintiff possession of a certain situate at on or before the day of , 18 , unless the rent in arrear for the said premises, amounting to £ , and the costs of this action be paid into Court before such day of , 18 .

And it is adjudged that the plaintiff do recover against the defendant the sum of £ for costs of this action.

And it is ordered that the defendant do pay the same to the Registrar of this Court on or before the day of , 18 .

To the defendant.

TAKE NOTICE.—That if you do not pay the said rent and costs, or give such possession, a warrant may issue requiring the bailiff of the Court to give possession of the said to the plaintiff, and to levy the sum of £ above mentioned, together with further costs.

Hours of attendance, &c.

---

(4.) *Order for Recovery of Possession of Tenement against Person holding over* (*r*).

Order V., Rule 3. Upon the hearing of this action at a Court holden this day, it is ordered that the defendant do give to the plaintiff possession of a certain house [or *messuages with appurtenances*, or *part of certain house*, or, *as the case may be*], situate at forthwith [*or* on the day of ], and it is adjudged that the plaintiff do recover against the defendant the sum of £ for rent [*or* mesne profits] [*or* for rent and mesne profits] and £ costs.

And it is ordered, that the defendant do pay to the Registrar of the Court the sum [*or* sums] above mentioned on or before the day of , 18 .

To the defendant.

TAKE NOTICE.—That if you do not give such possession a warrant may issue requiring the bailiff of the Court to give possession of the said to the plaintiff, and to levy the sum of £ above mentioned, together with further costs.

(*q*) This is Form No. 212 in schedule to County Court Rules, 1889.

(*r*) This is Form No. 213 in schedule to County Court Rules, 1889.

(5.) *Warrant for Recovery of Possession of Tenement* (*s*). APP. E. s. 3.

Order V., Rule 3.

Whereas at a Court holden at on the day of , 18 , it was ordered by the Court, that the defendant should give the plaintiff possession of a certain [*as in summons*] situate at [*and that the Plaintiff should recover against the Defendant*] the sum of £ for rent [*or* mesne profits] [*or* rent and mesne profits] and costs:

And whereas the defendant has not obeyed the said order:

These are therefore to authorise and require you to forthwith give possession of the said hereinbefore mentioned premises to the plaintiff:

And these are therefore further to require and order you forthwith to make and levy by distress and sale of the goods and chattels of the defendant, wheresoever they may be found within the district of this Court (excepting the wearing apparel and bedding of the defendant or his family, and the tools and implements of his trade, if any, to the value of five pounds), the said sum, and the costs of this warrant and execution; and also to seize and take any money or bank-notes (whether of the Bank of England or any other bank), and any cheques, bills of exchange, promissory notes, bonds, specialties, or securities for money, of the defendant which may be there found, or such part or so much thereof as may be sufficient to satisfy this execution and the costs of making and executing the same and to pay the amount so levied to the Registrar of this Court, and make return of what you have done under this warrant immediately upon the execution thereof.

Given under the seal of the Court, this day of , 18 .

By the court
Registrar of the Court.

To the high bailiff of the said court.

| | £ | *s.* | *d.* |
|---|---|---|---|
| Rent [*or* mesne profits], [*or* rent and mesne profits] . . . | | | |
| Costs . . . . . | | | |
| Poundage for issuing this warrant | | | |
| Total amount to be levied. | | | |

NOTICE.—The goods and chattels are not to be sold until after the end of five days next following the day on which they were seized, unless they be of a perishable nature, or at the request of the said defendant.

Application was made to the registrar for this warrant at minutes past the hour of , in the noon of the day of , 18 .

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## (d) *Form of Summons in Ejectment.*

*Summons in Action for Recovery of Land (Ejectment)* (*t*).

[*Title of Court as above*, p. 1011.]

Order V., Rule 3.

You the above-named defendants, and all persons entitled to defend the possession of the property described in the statement hereunto annexed, situated in the parish within the district of this court, to the possession whereof the above-named plaintiffs, some or one of them, claim to be [*or* to have been on and since the day of 18 ] entitled, and to eject all other persons therefrom, are hereby summoned to appear at a county court to be holden at on the day of , 18 , at the hour of in the forenoon to defend the said property, or such part thereof as you may be advised.

(*s*) This is Form No. 214 in schedule to County Court Rules, 1889.

(*t*) This is Form No. 215 in schedule to County Court Rules, 1889.

App. E. s. 3.

And take notice that unless you appear judgment may be given, and you turned out of possession.

Dated the day of 18 .

Registrar of the court.

To the defendants.

| | £ | s. | d. |
|---|---|---|---|
| Costs of this summons . . . | | | |
| Solicitor's costs . . . . | | | |
| Total . . . | | | |

*At bottom of Summons.*

TAKE NOTICE.—If you, the defendants, or any of you, be only tenants of the property or some part thereof, YOU MUST, upon being served with this summons, or if this summons shall come to your KNOWLEDGE, forthwith GIVE NOTICE thereof to your IMMEDIATE landlord or his bailiff or receiver, and if you do not give such notice you will be liable, under section 209 of 15 & 16 Vict. c. 76, to FORFEIT to your landlord THREE YEARS' RACK-RENT of the premises demised to you or holden in your possession of him, in respect of which this summons has issued.

15 & 16 Vict. c. 76, s. 209.

## SECT. 4.—FORMS UNDER THE SMALL TENEMENTS RECOVERY ACT, 1838, 1 & 2 VICT. C. 74 (*ante*, 877).

### (1.) *Complaint before Two Justices* (*a*).

The complaint of [owner *or* agent, &c., *as the case may be*], made before us, two of her Majesty's Justices of the Peace acting for the district of , in petty sessions assembled, who saith that the said did let to a tenement, consisting of , for under the rent of , and that the said tenancy expired [*or* was determined by notice to quit, given by the said , *as the case may be*], on the day of and that on the day of the said did serve on [*the tenant overholding*] a notice in writing of his intention to apply to recover possession of the said tenement (a duplicate of which notice is hereto annexed), by giving, &c. [*describing the mode in which the service was effected*]; and that notwithstanding the said notice the said refused [*or* neglected] to deliver up possession of the said tenement, and still detains the same.

(Signed) .

Taken the day of before us

(Signed) .

*A duplicate of the notice of intention to apply is to be annexed to this complaint.*

### (2.) *Warrant to Peace Officers to take and give Possession.*

Whereas [*set forth the complaint*], we two of her Majesty's Justices of the Peace, in petty sessions assembled, acting for the of , do authorize and command you, on any day within days from the date hereof [except on Sunday, Christmas Day, and Good Friday, *to be added if necessary*], between

(*a*) For notice to tenant to deliver up possession, see ante, App. C.

the hours of nine in the forenoon and four in the afternoon, to enter (by force if needful), and with or without the aid of the owner or agent, *as the case may be*, or any other person or persons whom you may think requisite to call to your assistance, into and upon the said tenement, and to eject thereout any person, and of the said tenement full and peaceable possession to deliver to the said the owner *or* agent]. APP. E. s. 4.

Given under our hands and seals this day of .

To and all other constables
and peace officers acting for the
district of .

# APPENDIX F.

## FORMS UNDER THE AGRICULTURAL HOLDINGS ACT (*a*).


| SECT. | PAGE |
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### SECT. 1.—NOTICE OF IMPROVEMENTS, CLAIMS, ETC.

(1.) *Authority of Agent to act under the Act.*

I, A. B., of [*name and address of landlord or tenant as the case may be*] hereby appoint C. D., of , to act for me under the Agricultural Holdings Act, 1883, generally [*or*] for the special purpose of [*e.g.*] consenting on my behalf to the execution by my tenants of improvements mentioned in the first part of the first schedule of the said act [*or*], to the execution of the improvement denominated [*e.g.*] "laying down of permanent pasture."

Address A. B.
Date

(2.) *Application for Landlord's Consent to Improvement in Pt. I. of Sched. I.* (*b*).

I beg to inform you that I propose to execute upon [*describe holding*], in the parish of , the following improvement, that is to say:—

"Laying down of permanent pasture" [*or other improvement in Pt. I. of Sched. I., as the case may be*] to the extent of acres:

and I hereby request your consent in writing to such improvement.

Address A. B.
Date

To C. D. [*name and address of landlord*].

(*a*) See the act discussed, ante, Chap. XXI., p. 812; and set out at length, ante, p. 915. For County Courts Orders and Forms, see Appendix A., Sect. 10, pp. 928, 929.

(*b*) This should, but need not, be in writing.

(3.) *Consent of Landlord to Improvement in Part I. of Sched. I.* APP. F. s. 1.

In reply to your application of the instant, I hereby [*or* I hereby on behalf of , of ] consent to the execution by you of the improvement therein specified, that is to say:—

"Laying down of permanent pasture" [*or other improvement in Pt. I. of Sched. I., as the case may be*].

Address A. B.
Date
To C. D. [*name and address of tenant*].

---

(4.) *Notice of Intention to claim Compensation* (sect. 7) (*c*).

I hereby give you [*or* you as and being the agent of C. D. of ] notice of my intention to claim compensation, under the Agricultural Holdings Act, 1883, for certain improvements within the meaning of that act executed by me upon my holding called [*describe holding*].

The following are the particulars of my intended claim:—

[*State the site, class, date, and extent in acreage of each improvement, and the amount of the whole claim*].

Address A. B.
Date
To C. D. [*name and address of landlord or his agent, as the case may be*].

---

(5.) *Notice of Intention to claim Compensation for Breach of Covenant by Landlord* (sect. 6).

*Proceed as in* No. 4, *supra, and add,*

And I also hereby give you notice of my intention to claim compensation under the above act for the breach of an agreement on your part [*or* on the part of the said C. D.] to [*here follow the words of the agreement if in writing, and add,* such agreement being dated the day of ].

&c., &c.

---

(6.) *Counter-notice by Landlord of Claim for Compensation* (sect. 7) (*d*).

With reference to your claim for compensation under the Agricultural Holdings Act dated the instant, I [*or* I on behalf of C. D. of ] hereby give you notice of my intention to make a claim upon you for compensation under that act.

The following are the particulars of my intended claim:—

[*Refer to Sect.* 19, *and describe act of waste or breach of agreement, as the case may be, with dates and references to writings, if any.*]

Address A. B. [*or* A. B. for the said C. D.]
Date
To E. F. [*name and address of tenant*].

(*c*) By sect. 7 of the act this notice must be given two months before the determination of the tenancy.

(*d*) By sect. 7 this counter-notice must be given before the determination of the tenancy, or within 14 days thereafter.

APP. F. s. 1.

(7.) *Notice to Quit part of Holding in consequence of intended resumption for Improvements* (sect. 41).

I [*or* I on behalf of C. D. of ] hereby give you notice to quit and deliver up on the day of , 18 , the possession of [*describe accurately, with measurements, that part of the holding to which the notice is intended to apply*] the said [*repeat description of the part sufficiently for identification*] being part of the holding known as [*describe entire holding*], situate in the parish of , in the county of , which said holding you now hold of me as tenant from year to year.

And I hereby state, in pursuance of the Agricultural Holdings Act, 1883, that the said [*repeat description of part holding*] is required to be resumed with a view to [*state any of the purposes enumerated in section* 41, *e.g.* the planting of trees].

Address A. B.

Date

To E. F. [*name and address of tenant*].

---

(8.) *Notice by Tenant that he accepts the above Notice to Quit as a Notice to Quit the entire Holding* (sect. 41) (*e*).

With reference to your notice to quit of the instant, I hereby beg to inform you that I accept the same as a notice to quit my entire holding, as I am entitled to do by virtue of the Agricultural Holdings Act, 1883, to take effect at the expiration of the current year of my tenancy, that is to say, on the day of , 18 .

Address A. B.

Date

To C. D. [*name and address of landlord or his agent*].

---

(9.) *Notice of Intention to remove Fixtures* (sect. 34, sub-sect. 4) (*f*).

In pursuance of the Agricultural Holdings Act, 1883, I hereby give you [or you as and being the agent of C. D. of ] notice of my intention to remove from my holding known as [*describe holding*], the following fixtures, that is to say:

[*Enumerate and describe fixtures.*]

Address A. B.

Date

To C. D. [*name and address of landlord or his agent*].

---

(10.) *Notice of Landlord's Election to purchase Fixtures* (sect. 34, sub-sect. 5) (*g*).

With reference to your notice of the instant and by virtue of the Agricultural Holdings Act, 1883, I [*or* I as and being the agent of C. D. of

(*e*) By sect. 41 this notice must be given within 28 days after service of the notice to quit.

(*f*) By sect. 34, sub-sect. 4, this notice must be given one [calendar, 13 & 14 Vict. c. 21, s. 4] month before the removal.

(*g*) By sect. 35, sub-sect. 5, this notice must be given before the expiration of the notice of removal.

] hereby give you notice that I elect to purchase the following of the fixtures comprised in such notice, that is to say: App. F. s. 1.

[*Enumerate and describe fixtures.*]

[*or* all the fixtures comprised in such notice].

Address of A. B. A. B.

Date

To E. F. [*name and address of tenant*].

---

## SECT. 2.—REFERENCES, ETC.

(1.) *Appointment of Referee by Landlord and Tenant jointly* (sect. 9, sub-sect. 1).

In pursuance of the Agricultural Holdings Act, 1883, we hereby appoint of , to settle the amount, mode and time of payment of compensation payable by virtue of that Act in respect of [*describe premises*].

A. B.
C. D.

Dated this day , 18 .

---

(2.) *Notice to Single Referee to act* (sect. 9, sub-sect. 2).

In pursuance of the provisions of the Agricultural Holdings Act, 1883, we [*or* I] hereby require you to act, within seven days after the receipt of this letter, in the reference under that act which you undertook by our [*or* my appointment].

Dated this day of , 18 . A. B.
C. D.
[*or* A. B. for C. D.]

---

(3.) *Appointment of Referee by either Party* (sect. 9, sub-sect. 3).

In pursuance of the Agricultural Holdings Act, 1883, I hereby appoint E. F. of , to act as one of the referees in determining the mode, time and amount of compensation payable by or to me by virtue of that act in respect of [*describe premises*]; [And I hereby require that the umpire (*h*) be appointed by the county court *or* the Inclosure Commissioners.]

Dated this day of , 18 . A. B.

---

(4.) *Appointment of Substituted Referee* (sect. 9, sub-sect. 4).

In pursuance of the Agricultural Holdings Act, 1883, I hereby appoint C. D. of , to act in the reference under that statute, which E. F., deceased [*or* who has become incapable of acting] undertook on our appointment.

Dated this day of . 18 . A. B.

(*h*) This is quite optional. See sect. 9, sub-sects. 1 and 2. If the appointment of the umpire by the court be dissented from notice in writing of the dissent must be given. The notice of dissent may run, "I hereby dissent from the umpire in this reference being appointed by the county court."

APP. F. s. 2.

(5.) *Notice of Appointment of Referee.*

In pursuance of the Agricultural Holdings Act, 1883, I beg to inform you that I have appointed C. D. of to act as one of the referees in the reference of differences between us under that statute.

Dated this day of , 18 .

To C. D. A. B.

(6.) *Notice to appoint Referee in Fourteen Days.*

[*Describe reference.*]

In pursuance of the Agricultural Holdings Act, 1883, I have to ask you to be kind enough to appoint a referee in this matter forthwith, and I hereby give you notice that if you do not appoint a referee within fifteen days after the receipt of this letter I shall apply to the county court to make the appointment.

Dated this day of , 18 .

To C. D. of A. B.

(7.) *Appointment of Umpire.*

[*Describe reference.*]

In pursuance of the Agricultural Holdings Act, 1883, we hereby appoint E. F. to act as umpire in case of difference between in this reference.

Dated this day of , 18 .

A. B.
C. D. } Referees.

(8.) *Request to Referees to appoint Umpire in Seven Days.*

[*Describe reference.*]

I have to ask you to be kind enough to appoint an umpire in this reference, and I hereby give you notice that unless you appoint an umpire within eight days after the receipt of this letter I shall apply to the county court to make the appointment.

Dated this day of , 18 .

To [*names and addresses of referees*] (*i*). A. B.

(9.) *Form of Award* (sects. 28, 31, 32, 33).

To all to whom these presents shall come. We [*names of referees*] *or* I [*name of umpire*] having considered the matters referred to us by virtue of the Agricultural Holdings Act, 1883, touching the amount and time and mode of compensation payable by or to A. B. and C. D., now hereby award and determine as follows, that is to say:

As to improvements mentioned in the First part of the First Schedule of the said act, we find that £ is due from A. B. to C. D. in respect of [the erection of buildings], and that £ is due from A. B. to C. D. in respect

(*i*) Serve each referee with a copy.

of [making of garden]. Such buildings, being [*describe buildings*] were authorized by A. B. in the year 18 , and executed by C. D. in the year 18 , at the cost of £ . Such making of gardens was authorized by A. B. in the year 18 , and executed by C. D. in the year 18 , at the cost of £ . The gardens made are situate [*describe situation*] and cover acres roods and perches. App. F. s. 2.

As to improvements mentioned in the third part of the First Schedule of the said act, we [*or* I] find that £ is due from A. B. to C. D. in respect of [liming of land]. This improvement was executed by C. D. in the year 18 , at the cost of £ . Such improvement extends over the lands called [*describe lands*], consisting of acres or thereabouts.

We [*or* I] further find that £ is due from A. B. to C. D. in respect of purchased manure, being guano, applied to land. This improvement was executed by C. D. in the year 18 , at the cost £ . Such improvement extends over the lands called [*describe lands*], consisting of acres or thereabouts.

And with respect to breaches of covenant, we find that the said C. D. committed two breaches of covenant in this, that he underlet the farmhouse called to in the years 18 , and 18 , without having first obtained the leave of the said A. B., whereby the said farmhouse became and is in a bad state of repair. And we [*or* I] award and determine that the sum of £ is due from C. D. to A. B. in respect of such breaches of covenants.

Wherefore we award, adjudge and determine that there is due from A. B. to C. D. the sum of £ , and that the said sum of £ be paid by A. B. to C. D. on or before the day of 18 .

And we award that all costs of and incident to this reference be borne [by the said A. B., *or* by the said C. D., *or* by the said A. B. and C. D. between them] *or* in the following proportions, that is to say [three-fourths] by the said and [one-fourth] by the said

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